Because of the Way Debt Collectors operate their business, most of them share three main weaknesses that will allow you to win your case. This report shows you what they are, how to find them, and how to use them to win. Includes many case references as authority judges will listen to.

3 Weaknesses Almost All Debt Collectors Have

This Is How You Beat Them

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Three Weaknesses Most Debt Collectors Have

– This Is How You Beat the Debt Collector

As we have often pointed out, debt buyers (who are debt collectors under the Fair Debt Collection Practices Act – FDCPA) purchase debts in very large quantities. They buy them for very small amounts of money. And they bring lawsuits in bulk.

These practices create weaknesses that ordinary people can use to beat the debt collectors, and in this report we discuss the three most common weaknesses most debt collectors have. These are:

(1) inability to show valid ownership of the debt;
(2) violation of the rule against hearsay; and
(3) inability to show a valid contract.

In attacking the other side's weaknesses, there are three steps: (1) knowing what to look for; (2) exposing the weakness; and (3) showing the court why you should win (winning at court). That will be the format of this report in general. Then we'll explain the underlying law so you get the bigger picture and are more prepared to deal with issues that may come up.

Remember that the weaknesses we are discussing here mostly apply to debt collectors – people who are attempting to collect money originally (allegedly) owed to someone else.

Keep in mind, also, that we cannot give you legal advice, and so you should look at the actual cases cited in this report so that you understand and can apply the concepts and principles of them on your own.

1. What to Look for: Ineffective Bill of Sale/Chain of Title

Click here for video.

When a debt buyer owns your debt and sues you, you should always deny that it owns the debt. It seems that most junk debt buyers *cannot show true ownership of a debt,* especially if the debt has been sold more than once. (This problem will never apply to original creditors, as the debt will be in their name.)

Let's start with some basic law: when a debt is legitimately "assigned" (usually this means "sold"), the debt buyer "steps into the seller's shoes." That means a company *can* sue you if they can show that they really did buy the debt from a person who had the right to sue you. It's just that, for some reason probably associated with the fact that they do everything in bulk, most debt collectors cannot do this. So deny that they own the debt in your Answer and look out for the inability to show true ownership of the debt.

Debt collectors are not eager to show you they have this problem, of course, and they try to cover it up. They do this by attaching a "bill of sale" that looks a little bit like it is selling your debt. **Look for a bill of sale that says something like this**:

> "Bank sells $42 million of accounts to Debt Buyer, including all the accounts listed in Exhibit A, attached."

And then they do not attach Exhibit A. If they do attach Exhibit A for themselves, but they purchased the debt from another debt buyer, look to see if they attach all the necessary information regarding the prior purchase. They almost never do. *See Cach, LLC v. Askew, 358 S.W.3d 58, 62 (Mo. 2012) (citing Midwestern Health Mgmt., Inc. v. Walker, 208 S.W.3d 295, 298 (Mo. App. 2006)*) (requiring "every link in the chain between the party to which the debt was originally owed and the party trying to collect the debt must be proven by competent evidence in order to demonstrate standing.")

Finding and Exposing the Weakness

You cannot simply ***say*** *they have this problem – you must find out if they do and (eventually) demonstrate and prove it* to the court.

You can find out they have this problem in several ways, but the most common ways would be: (1) by your asking them for verification before suit is filed, (2) by their giving you these documents in response to your own discovery questions, or (3) by their putting forth this statement in a motion for summary judgment they bring against you, or (4) at trial. We will discuss each of these separately. Sometimes they attach the incomplete bill of sale to their initial petition (the lawsuit) against you; we address this situation briefly in a note about Motions to Dismiss.

Verification

You probably know how to seek verification: you ask for it when the debt collectors first contact you. You should be told that right in their first written communication to you. For more on this, check out "Requiring Verification" (a video on Youtube).

Doing this may result in the debt collector sending you all sorts of things, including the bill of sale of the debt. We suggest, in Control your Debt, Control your Life (a product that includes two sample verification letters), that you actually ask for all the documents the debt collector has in your letter requesting verification even though they are probably not required to give them to you. They often will – if they respond at all.

If they send you the bill of sale in response to your request for verification, you can only take this as an *indication* of what they have, however, and not evidence that you could use. You will still need to ask for the information in discovery to get admissible evidence, which is what you must have.

Note

The main reason you would ask for verification is to cause the debt collector to go away (as it sometimes does when you request verification), not to discover the bill of sale problem. It's nice when they give you that, but discovery – the process of asking questions and asking for documents – is much more important.

Discovery

You should always conduct discovery, including (among many other things) a request for "all documents showing, reflecting, relating to, or transferring ownership of the debt plaintiff claims is owed by defendant." The debt collector will probably object to everything, but they may well give you the documents they say show ownership. If they don't, you must keep pressing the discovery through a motion to compel production (and you may want to do a motion to compel anyway for other stuff) which would force them to give you the documents. Their answers to discovery can be used as evidence.

By "documents showing ownership," I mean the bill of sale and any attachments or supporting affidavits.

Motion for Summary Judgment

Even if you do not do discovery, you will often find out what the debt collector has for proof of ownership when (and if) it files for summary judgment. In that case, it will create what it calls a "Statement of Facts" (or something like that – it might be called a "Statement of Undisputed Facts") that will include, among other things, the bill of sale.

If you have disputed ownership of the debt in your Answer ***and they do not include*** the bill of sale in their facts and evidence, you should file a cross-motion for summary judgment and ask for dismissal of the case since they can't prove they own the debt. At least you must respond that their motion for summary judgment should be denied on the basis of that failure to include proof of ownership of the debt.

If they do attach these things, you will attack as we show you below. In addition, their filing a motion for summary judgment relying on an affidavit of this type may constitute a violation of the FDCPA, see, *Rini v. Javitz, Block & Rathbone, LLC (N.D. Ohio, 2013)*(the FDCPA may be violated if the law firm attached an affidavit to a summary judgment motion which the law firm knew or should have known was executed by an "account specialist" who attested to the amount and character of the debt, but who in reality lacked personal knowledge of the matters to which she was attesting in that affidavit), *citing, Williams v. Javitch, Block &Rathbone, 480 F. Supp. 2d 1016, 1022 (S.D. Ohio 2007); Delawder v. Platinum Financial Services Corp., No. C-1-04-680, 2005 U.S. Dist. LEXIS 40139 (S.D.Ohio March 1, 2005)*.

At Trial

Even if you have not conducted discovery and there has been no motion for summary judgment, you must still attack the ownership of the debt at trial. If they present the bill of sale and it does not connect your account to the sale, you will attack that as we show below. If they fail to present the bill of sale you will move for judgment on that basis after they finish presenting their evidence (and both before, and after if necessary, you present any evidence you may have).

A Side Note

Saving this question for trial is not a good idea, in my opinion, although it ***is*** a matter of strategy rather than legal dictates. If you have to because you don't have time to conduct discovery, then it's what you have to do, but it is far better to conduct the discovery and try to get the case knocked out before trial. Trial is too unpredictable, and preparing for and attending trial is also very time-consuming. Judges are both distracted at trial and not overly-inclined at that point to listen to something that would be a knock-out point of law. They don't expect that from you, and you should get them ready for it by making the argument in advance – in a pretrial brief, for example.

Winning in Court: the Argument

As we have said, proof of ownership is an essential part of the right to sue. Failure to prove ownership of the debt means that the debt collector "lacks standing" to file suit and also has failed to prove an essential element of its case (damages to it). At any time you show that the bill of sale does not connect the sale to the plaintiff, you should win.

You can quote these cases to the court so it knows you should win on this point, and there are several others cited throughout this report as well:

Ineffective Bill of Sale

Unifund CCR Partners v. Cavender, No. 2007-CC-3040, 14 Fla.L. Weekly Supp. 975b (Orange Cty. July 20, 2007), the court held that a debt buyer "assignment" that does not refer to specific accounts does not establish ownership by the plaintiff.

Colorado Capital Investments, Inc. v. Villar, 5894/2005 (1'J.Y. Civ. Ct., June 4, 2009), "("None of these assignments, however, contain a list of the accounts which were included in the transfer. Thus on their face, these assignments and bills of sale do not specify that defendant's account was included in any transfer, and cannot support movant's contention that defendant's account was so transferred"), and

Wirth v. CACH, LLC, 300 Ga. App. 488, 490-491, 685 S.E.2d 433, 435-436 (2009), "Moreover, there is no contract or Appendix A appended to the Bill of Sale which identifies Wirth's account number as one of the accounts Washington Mutual assigned to CACH. The record is also devoid of any evidence which reflects that Washington Mutual purchased Providian to support the chain of assignment to CACH. See *Ponder v. CACV of Colorado, LLC, 289 Ga. App. 858, 859 (658 SE2d 469) (2008)* (record was devoid of evidence supporting CACV's allegation that it was the successor in interest to Fleet Bank's right to recover any outstanding debt from Ponder). Given the foregoing, we conclude that "[t]his evidence, even together with the reasonable inferences from it, was insufficient to establish all essential elements of its case."

Reason You Should Win

Your argument is that, once you raise the issue of standing, **you have attacked the court's constitutional authority to hear the case**, and it must resolve the issue before reaching any substantive issues in the case.

In *Citibank (South Dakota), N.A. v. Martin, 11 Misc. 3d 219; 807 N.Y.S.2d 284 (Civ.Ct. 2005)*, for example, the court held that, "as to assigned claims, it is essential that an assignee show its standing, which "doctrine embraces several judicially self-imposed limits on the exercise of ... jurisdiction, such as the general prohibition on a litigant's raising another person's legal rights."

And see, *MBNA America Bank, NA. v. Nelson, 13777/06,2007 NY Slip Op 51200U; 2007 N.Y. Misc. LEXIS 4317 (N.Y.Civ. Ct. May 24, 2007)*, "It is imperative that an assignee establish its standing before a court, since "lack of standing renders the litigation a nullity." It is the "assignee's burden to prove the assignment." *Id*.

And see, *Unifund CCR Partners v. Cavender, No. 2007-CC-3040, 14 Fla.L. Weekly Supp. 975b (Orange Cty. July 20, 2007)(*a debt buyer "assignment" that does not refer to specific accounts does not establish ownership by the plaintiff).

Burden of Proof as to Damages

In addition to raising the constitutional issue of standing, you are also attacking the debt collector's claim to damages. The debt collector, as plaintiff, has the burden of proof on every element of its case. It if has not established its ownership of the debt, it cannot prove that it was damaged, as only the owner of a debt can be damaged by the failure to repay it.

Counterargument

There is really no question that failure to prove ownership of the debt should result in dismissal of the case. If you demonstrate that the bill of sale does not connect the debt to the purchase, the debt collector may attempt to do it in another way – an exceptionally bogus way. They will have testimony by one of their "records custodians" that the debt was transferred to them. Or they will attempt to say that their records show the debt was transferred to them. We will discuss this possible issue at length below in the section on hearsay and business records.

Remember that a records custodian can only testify as to things he or she really should know about and can show knowledge of "affirmatively." "Affirmatively" means that the person testifying must testify as to facts that show why he or she is qualified and has direct knowledge of what she's testifying about. Testifying that a debt was bought and sold based on the mere fact that the debt collector has records, in the absence of a bill of sale actually transferring the debt, is very thin. Why would the record keeper know about this sort of record? And remember, it's the records that come into evidence, not testimony about them. These records are often transferred and often mixed up. It seems very little to ask that actual proof of ownership, rather than some bogus claim based on just having some information, be required. Again, this is not much litigated, so here are a few cases that might help you with that.

Palisades Collection, LLC a/p/o AT&T Wireless v. Gonzalez, 10 Misc. 3d 1058A; 809 N.Y.S.2d 482 (N.Y.County Civ. Ct. 2005): Todd v. Weltman, Weinberg & Reis Co., L.P.A., 434 F.3d 432 (6th Cir. 2006)("Finally, Ms. Bergmann claims that plaintiff is entitled to sue because of an assignment to it from AT&T. However, she does not attach a copy of the alleged assignment. In the absence of the document on which her statement is based, her statement is of no probative value ... Consequently, Ms. Bergmann has failed to establish that plaintiff has the right to collect this debt").

Unifund CCR Partners v. Cavender, No. 2007-CC-3040, 14 Fla.L. Weekly Supp. 975b (Orange Cty. July 20, 2007), (debt buyer "assignment" that does not refer to specific

accounts does not establish ownership by the plaintiff, nor is testimony based on a computer screen sufficient).

*Brown v. Brown, 145 S.W.3d 745 at 752 (Tex. App. 2004)(*When an affidavit in a summary judgment proceeding refers to other papers, sworn or certified copies of those papers must be attached to the affidavit).

A Look at the Underlying Law

Let's take a step back here and fill you in on some of the law and facts behind all this.

For some reason, a lot of pro se defendants are under the mistaken impression that debt collectors cannot legally sue them, but most of the time they can. Things that might make a debt collector's suing you illegal would be a provision in the original contract that explicitly denies the right to assign the debt (rare) or some public policy that would make assigning the debt illegal (even rarer).

In fact, public policy is generally strongly in favor of the ability to assign contracts, and there are good reasons for this. Assigning contracts allows for a more efficient way to spread risks and costs and allows more things to get done. It's a good thing. And necessary to the effective assignment of contracts is the ability of the person or company taking ownership to take the legal rights of the company selling the contract.

After all, if you can't force the other party to pay up, what is the value of owning the debt? The law is generally practical.

Essential to the right to sue on the contract, however, is that it be a *legitimate* purchase from someone with a legitimate right to sell the debt. That is shown by the chain of title, and for some reason many debt collectors either cannot, or are unwilling to, show a clear chain of title. Our guess is that this is simply a matter of carelessness based on the sheer numbers of accounts being processed. Because so many cases have involved debt collectors suing on debts that were never owed or that were never purchased, or sold to someone else before the debt collector brought suit, it is extremely important that debt collectors show actual, present, proof of ownership.

And many if not most debt collectors cannot do it.

We will discuss the process of "authentication" which is another critical part of showing the bill of sale in evidence. Remember for now that you cannot just give a court a document and expect it to believe that the document is legitimate. If the debt collector wants to put a bill of sale into evidence, someone must swear that it is what it says it is. And that person has to be someone in a position to know who actually does know.

Another Note: FDCPA Violation?

We have always taken the position that attaching a "false" affidavit – an affidavit that was created by the debt collector to make it look like they were legally capable of testifying as to damages – to the petition violated the FDCPA. That's because they create the false and deceptive impression that the debt collector has more evidence and ability to win the suit than it does. And this causes people receiving the petitions to give up more often – because they don't think they can win.

Attaching an incomplete bill of sale or any other records that the debt collector is unable to, or systematically does not, authenticate is equivalent to a false affidavit and is, in my opinion, a violation of the FDCPA. Therefore, if you get one of these attached to your petition filed against you, I would suggest you consider a counterclaim for deceptive means of collection. See, Henggeler v. Brumbaugh & Quandahl, PC, LLO, 894 F. Supp. 2d 1180 (D. Neb. 2012), citing *Williams v. Javitch, Block & Rathbone, LLP,* 480 F.Supp.2d 1016, 1022-24 (S.D.Ohio 2007) (finding allegations that a debt collector's law firm filed debt collection actions based on affidavits that it "knew or should have known" were not based on personal knowledge stated a claim under the FDCPA).

> *And see, Richey v. Citimortgage, Inc. (slip op., ND Ohio 2013)*("Sixth Circuit courts have generally found entities cannot say they owned debts, "all the while knowing they did not have means of proving the debt," and that such an FDCPA complaint will survive a motion to dismiss for failure to state a claim.").

Motion to Dismiss?

Motions to dismiss are motions you file to ask the court to kick out the case against you based on the pleadings (only). Where the other side includes an incomplete bill of sale as part of its petition, you could probably move to dismiss the case on that basis. Implied in your motion would be that they had attached *all* the proof of ownership they had, and you would argue that it shows they cannot actually prove ownership. *Pension Ben. Guar. Corp. v. White Consol. Ind., 998 F. 2d 1192, 1196-7 (3rd Cir. 1993)* **(**a court may consider an undisputedly authentic document that a defendant attaches as an exhibit to a motion to dismiss if the plaintiff's claims are based on the document.)

The advantage of a motion to dismiss would be that it would immediately attack the lawsuit without your even needing (in most, if not all jurisdictions) to respond with an Answer. That would increase the cost and frustration of the other side and show them you planned to fight. Plus, as we have shown, you would stand a good chance of winning if they did not have all the proof necessary. The downside would be that, if you won, the proper solution would be a dismissal "without prejudice," which would leave you open to being sued again (unlikely) and vulnerable to credit report damage and further harassment (much more likely).

2. What to Look for: Violation of the Rule against Hearsay

Click here for video.

The second weakness almost all debt collectors have is that they cannot show the amount of any debt allegedly owed with *valid* evidence. The problem they have is that the records of the debt – from its beginning, through any payments, to charge-off and sale – were made by the original creditor. The debt collector is not entitled to use those records unless they follow some specific rules – which they almost never can or do follow. And they aren't allowed to testify about them without following those rules, either.

This is an area where debt collectors have run roughshod over the law – and the courts have let them. We will discuss why this is so in the Legal Background section below.

This issue is going to come up for the debt collector in the "proving" stage of the case, either at trial or in its motion for summary judgment (rather than the "pleading" stage, where they file suit). You will see that it is *possible* for an original creditor to have this problem if they get careless or have lost some documents, but again, this is *mostly* an issue for debt collectors.

What is Hearsay?

Statements that are made outside of sworn testimony in court are considered hearsay as to the truth of their content. Umm,… what?

In other words, if Bob says "Sue told me she really owns that debt," Bob's testimony would be hearsay as to whether Sue really owned the debt. (It might still be used to prove other things than the truth of what was said: for example, that Sue was able to talk, maybe, or could speak English.) *Business records and financial statements are "statements" made outside of court and are hearsay regarding their contents.*

Hearsay is usually not allowed into evidence.

Business Records Exception

There's an exception to the rule against hearsay for business records under certain circumstances. Someone who knows how the records were kept, and if they were made and kept in particular ways, can testify to the legitimacy of the records.

This "authenticates" them as reliable evidence. Every jurisdiction has a "business records exception" for records made under specific, enumerated conditions, and the rules vary to some extent by state. Therefore, you must find the rule for your state. Google:

"business records exception" and your state's name

and look for a case which lists the several rules that must be followed.

The hearsay rule and the business records exception are the reason most debt collectors, at some point in almost every case, use an affidavit by (one of their employees) that says, "I am the custodian of the records at Debt Collector. I know how the records were generated, etcetera, etcetera" (saying what is required to establish the business records exception).

Then they try to claim that records they got *from someone else* are *their* business records. Debt collectors always have a real problem with the hearsay rule. This is not something they *couldn't* overcome, though. In most "normal" (non-debt collection) cases it is no problem at all to obtain a witness who can authenticate documents of any type. The reason debt collectors have so much trouble with it, however, is the way they do business – on enormous scale, in bulk. Since most people don't fight back, the debt collectors don't even prepare to fight.

Original creditors can have a problem with business records if they get careless and forget to introduce it properly, or if they lose evidence. So you should watch them carefully to make sure they follow the rules.

The Debt Collector's Problem

The debt collector's record keeper does not know, and cannot legitimately testify to, the business records of the original creditor. They cannot show affirmative knowledge about how or when the records were made, how or how safely they were maintained, whether they were disputed, denied, or even proven false by the consumer. In short, **they know absolutely**

nothing about the records they receive. They cannot testify within the rules of the business records exception, and thus they cannot authenticate the documents. See the cases shown below.

In our opinion, any time such an affidavit is used, it is a violation of the Fair Debt Collection Practices Act because it is an attempt to deceive the debtor and the court into overlooking the absence of evidence. More than that, because no lawyer could legitimately be confused about that, the use of such an affidavit should be considered unethical. It is flatly, plainly, and indisputably, dishonest.

It is an outright fraud. But we am not aware of a single instance in which a lawyer playing that trick has been punished. Still, most courts will not accept such affidavits as evidence if you know how to object and make the argument. So here is how you do it.

Finding and Exposing the Weakness

You discover that the other side has the problem by asking, *in your request for documents*, for:

> "every document referring, related to, reflecting, or showing, any amounts due from defendant to any person purportedly for the debt at issue in this case."

And in your interrogatories, ask the debt collector to:

> "identify any person known to it who knows or could testify to either records concerning the amount allegedly due or the amount due itself."

You want to flush out all the documents that they claim, or will or might claim, are records of the debt, and ***you want to make sure that the only person they have who will testify to these records is one of their own (the debt collector's) employees***. If the other side is the original creditor, you want to see what the records show, whether or not they are complete (see the discussion about contracts, below), and how they were made.

In the debt collector's case, the only person they have testifying either in person or by affidavit is one of their own employees in 99.

Winning in Court: the Argument against Hearsay

Here are some cases that make the argument regarding business records exceptions and the importance of following the rules. We include several cases from different angles and different courts. You must consider the questions carefully to choose which case, if any, you would use to defend your own case. We cannot foresee specifically how the issue will arrive in court in your case.

Look at:

Before a document may be received in evidence, it must meet a number of foundational requirements including relevancy, authentication, the best evidence rule, and hearsay. *Estate of West v. Moffatt,* 32 S.W.3d 648, 653 (Mo.App. W.D. 2000). The authenticity of a document cannot be assumed, and what it purports to be must be established by proof. *Id.* Thus, before a document can be admitted into evidence and considered by the trial court, its proponent must show that it is, in fact, what it is purported to be. *Id. – cited by* Asset Acceptance v. Lodge, 325 SW 3d 525 - Mo: Court of Appeals, Eastern Dist., 4th Div. 2010

The qualification of records within the business records exception to the hearsay rule requires testimony as to the mode of preparation of the record and that it was made at or near the time of the act, condition or event it purports to show. *Estate of West,* 32 S.W.3d at 653. A witness is qualified to testify regarding a business record [for purposes of authenticating it] if he or she has sufficient knowledge of the business operation and methods of keeping records of the business to give the records probity. *Id.*

In *Zundel v. Bommarito,* 778 S.W.2d 954, 958 (Mo.App. E.D.1989), the court held "[t]he business records exception to the hearsay rule applies only to documents generated by the [party] itself." (This holding has been overruled in Missouri ***if*** the person testifying has been trained as to the method of generating and keeping records of the company that created them)

Luke v. Unifund CCR, 2-06-444-CV, 2007 Tex. App. LEXIS 7096, "Affidavits in support of summary judgment must set forth such facts as would be admissible in evidence at trial." *Tex.R. Civ. P . 166a(f); United Blood Servs. v. Longoria, 938 S.W.2d 29, 30 (Tex.1997); Abe's Colony Club, Inc. v. C & W Underwriters, Inc., 852 S.W.2d 86, 88 (Tex.App.-Fort Worth 1993, writ denied).*

"Affidavits are competent summary judgment evidence if they are made on personal knowledge and show affirmatively that the affiant is competent to testify to the matters stated therein." *Brownlee v. Brownlee, 665 S.W.2d 111, 112 (Tex.1984); Abe's Colony Club, Inc., 852 S.W.2d at 88*.

On summary judgment, a witness testifying by affidavit must provide a foundation for personal knowledge and affirmatively demonstrate that the affiant is competent to testify. Chess v. Pima County, 126 Ariz. 233, 235, 613 P.2d 1289, 1291 (App. 1980).

Where the party is seeking to authenticate documents, the affiant must affirmatively show (1) familiarity with the person who prepared the document and (2) the manner in which it was prepared. Villas at Hidden Lakes Condos Ass'n v. Geupel Constr. Co., 174 Ariz 71, 82, 847 P.2d 117, 127 (App. 1992).

"A proper foundation for the admission of a business record must be provided by someone with personal knowledge of the maker's business practices and procedures. *West Valley Fire District No. 1 v. Village of Springville,* 294 AD2d 949 (4th Dept. 2002). An agent of an assigned creditor who does not have personal knowledge of the original creditor's business practices cannot establish a proper foundation for the account agreement and account statements. *CACH LLC v. Sliss,* 2010 NY Slip Op 51557(U), 28 Misc 3d 1230(A) (City Ct., Auburn, 2010).

Contrary to plaintiff's arguments, the purported account statements from Chase and bills of Sale do not fall with in the business records exception to the hearsay, as the "mere filing of papers received from other entities, even if they are retained in the regular course of business, is insufficient to qualify the documents as business records." *CACH LLC v. Sliss,* 2010 NY Slip Op 51557(U), 28 Misc 3d 1230(A) (City Ct., Auburn, 2010).

The testimony of one "who merely obtained the records from another entity that actually generated them, was an insufficient foundation for their introduction into evidence." *Rushmore Recoveries X, LLC v Skolnick,* 2007 NY Slip Op. 51041(U), 15 Misc 3d 1139A (Dist. Ct. Nass 2007) *citing* *Ins. Co. Of North America v. Gottlieb,* 186 AD2d 470 (1st Dept. 1991).

The hearsay rule is designed to ensure the trustworthiness of documents. *Healthcare Services of the Ozarks, Inc. v. Copeland, 198 S.W.3d 604, 616 (Mo. 2006)*. The business records exception to the hearsay rule should apply only if all of the demands of § 490.680 are satisfied. *Estate of White, Matter of, 665 S.W.2d 67, 69 (Mo.App.S.D. 1984)*. When treated as mere technicalities that can be relaxed or glossed over, the rationale for the exception is undermined and the documents cannot be considered reliable. *See Discover Bank v. Smith, 326 S.W.3d 120 (Mo. App. S.D. 2010)* ("While the seriatim recitals of the prerequisites encompassed in section 490.680 may appear at first blush to be but talismanic formulas whose mere recitations at trial bring about a magical acceptance of a document into evidence, each statutory requirement, nevertheless, is grounded upon reason, verity and efficiency."); *See also Kitchen v. Wilson, 335 S.W.2d 38, 44 (Mo. 1960)*.

Debt Collector-Made and Kept Records Not *Business* Records

Some courts have held that records made and kept by debt collectors are not business records because they are not made for the purpose of conducting any sort of normal business. If the records were created or testified about by anyone calling himself or herself a "legal" something or other, or even in general, you will find *LVNV Funding* (cited immediately below) an important case to attack the "business" nature of the records. They were clearly created for

purpose of litigation, and this is beyond the scope of the business records exception. *See, Palmer v. Hoffman, 318 U.S. 109; 63 S. Ct. 477 (1943)* (involving railroad records created for purposes of addressing injuries caused by the railroad).

> *LVNV Funding, LLC, v. Mastaw, No. M2011-00990-COA-R3-CV (Tenn. App. Filed April 30, 2012)* In the case at bar, the affidavits executed by Griffin were clearly prepared specifically for the instant litigation, to trace the assignments of Mastaw's debt, establish LVNV's ownership of the debt and the amount due from Mastaw. They do not incorporate by reference or otherwise summarize or interpret documents that are prepared in the normal course of regularly conducted business activity. We must conclude that Exhibits 4 and 5 do not properly fit within Rule 803(6), the business records exception to the hearsay rule, and that the trial court erred in admitting them into evidence pursuant to this exception.

Trying to Get Testimony *about* the Records into Evidence

Sometimes, in an attempt to avoid the hearsay problem, the debt collector will have an affidavit from the original creditor – and they usually do this with their own records, too – where they have their record-keeper testify, after all the stuff about knowing how the records were kept, that, "the records show that defendant owes $10,000." **This statement is not legitimate evidence.**

We have often taken the position that a debt collector that litigates *cannot* keep any business records "in the ordinary course of business." That's because a debt collector's business is to prepare for litigation, and thus there's no business need to keep the records accurately. Here is a Supreme Court case that makes that point in general (although you would still have a factual dispute about the nature of the debt collector's business):

> *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305 [129 S.Ct. 2527, 174 L.Ed.2d 314], ("[d]ocuments kept in the regular course of business may ordinarily be admitted at trial despite their hearsay status . . . that is not the case if the regularly conducted business activity is the production of evidence for use at trial." (*Id.* at p. 321.)).
>
> And see, *Kelly v. HCI Heinz Construction Co.,* 282 Ill.App.3d36, 41, 218 Ill.Dec. 112, 668 N.E.2d 596 (1996)(Respondent, nonetheless, urges us to find that the client service plans were inadmissible because they were prepared in anticipation of litigation. Records prepared in anticipation of litigation are not records made in the regular course of business and thus are not admissible into evidence unless they fall within another exception to the hearsay rule.. A record is prepared in anticipation of litigation if it is prepared with an eye toward pending or anticipated litigation of any kind. See *In **re** N.W.,* 293 **Ill.App.3d** at 798, 228 Ill.Dec. 157, 688 **N.E.2d** 855).
>
> But that isn't even the main point here.

The Business Records Exception Is to Let Business Records in, not Testimony *about* the Records

The business records exception is a rule that allows a business's records to come into evidence. Thus, after proper authentication, the ***records*** are allowed to be seen by the judge or jury. In other words, the judge or jury gets to look at the records and decide what they say and how much to believe them.

The records themselves are allowed to "testify" in court, you might say.

Any statement by the debt collector about what the records supposedly show is still hearsay – and should be kept out of evidence if you know how to make the argument.

Here are some cases that make the argument regarding the records, and not the custodian, testifying in court.

> In *re A.B., 308 Ill.App. 3d 227, 236, 719 N.E.2d 348 (2nd Dist. 1999)* ("Under the business records exception … "it is the business record itself, not the testimony of a witness who makes reference to the record, which is admissible" (*Cole Taylor Bank v. Corrigan,* 230 Ill.App.3d 122, 130, 172 Ill.Dec. 114, 595 N.E.2d 177 (1992)). In other words, "[a] witness is * * * not permitted to testify as to the contents of the document or provide a summary thereof; the document `speaks for itself.' [Citations.]" M. Graham, Cleary & Graham's Handbook of Illinois Evidence § 803.10, at 825 (7th ed.1999)).

How you Use the Rule against Hearsay

You must object to any attempt by the other side to ask for testimony that is hearsay. What you say is "Objection! Hearsay."

How do you know when to object? Well, you want to prevent any statement or testimony that would be hearsay – a statement made outside of court, but your objection must first be made to the question that is asked by the lawyer. That question might be any variation of: "What did __ say about that?" or "What do the records say…?" or "What do the records show…?" or "What was the amount shown due…?"

You see, the question can come up in many different disguises, but what you are looking for is a request for testimony about something other than what the person under oath knows specifically and directly for himself or herself.

Sometimes a witness will add hearsay even when the question wasn't asked. This could happen in many, many different ways. For example, the lawyer might ask a telephone harassment specialist, "why were you calling defendant?" and the answer might be, "because our records showed that she owed $2,500.00." You can and should object to that testimony as hearsay, requesting that the court not allow the statement to be considered as evidence of what was, in fact, owed.

It is very important for you to remember that you need to object as quickly as possible and, if the hearsay testimony is made, to object and ask for the evidence to be stricken or at least not allowed to be considered as evidence of the truth of what was said.

This is an absolutely critical battle at the trial level. In all likelihood, the debt collector will not have any admissible evidence at all of the important facts of your alleged debt. They won't be able to show that you got the credit card or made any charges on it, that you didn't pay money when due, or that you ever owed anything on it at all, if you stay on top of the hearsay objections. In other words, in almost all debt collection cases, **if you can win the hearsay battle, as you should, you will win the case at trial.**

Why Have Debt Collectors Gotten Away with Violating the Rule against Hearsay So Much?

The reason the debt collectors have gotten away with using hearsay for so long, and the courts have let them, is that we have an adversarial system. You cannot win every legal battle, and you can also set traps for the other side with the rules of evidence (I would suggest various books by Michael Connelly to see that portrayed dramatically). The courts let the parties do what they want and do not see themselves as having a responsibility to even out the legal fight.

The problem is that pro se debt defendants do not know how to object or what the rules are. This has set up a situation where the courts' "leave-em-alone" attitude has resulted in systematic oppression of the debt defendants and a sort of corruption of the process. Make sure that doesn't happen to you by reading and preparing. It helps to watch trials in progress. (We have some videos on our site for members that show you how things are done in court at trial.)

A Reminder not to "Sandbag"

It's probably a good idea, in light of the above, to remind you that we do not recommend that you "sandbag" the plaintiff. In other words, we suggest that you *not* ignore the issues before trial and then try to spring them on the debt collector at trial when, you might think, it would be too late for the debt collector to respond.

The flaw in the strategy, in our opinion, is not so much theoretical as practical. Theoretically, you could spring the hearsay objections suddenly at trial and prevent the debt collector from introducing any evidence of debt at all. Without time to prepare, it is unlikely that the debt collector could find and present the evidence, and that would leave you in a position to move for judgment at the completion of the debt collector's case. If the trial court didn't see it your way, you should win on appeal. Seems perfect, right?

The problem is in the practicalities. In the first place, if you spring the argument on the plaintiff, you are also springing it on the court. Unless you know that your judge is familiar with this issue and has held favorably to debt defendants on these issues, you take a big risk that the court will not understand, or will ignore, the points you make. If you do everything right, you should still win on appeal, but… it's hard to do everything right. Most trials are littered with missed opportunities and mistakes because, although they seem very slow on the outside, they seem extremely fast when you're in them trying to make decisions. A couple of mistakes could cost you your right to appeal.

If you lose and then appeal, you may have to put up a bond for the amount of the judgment. That means, to put it into plain English, if the debt collector gets a judgment against you for seven thousand dollars, you may have to give the court seven thousand dollars in order to keep the debt collector from collecting on you during the appeals process. And appeals courts do not like to overrule trial courts.

Once you put up a bond, you will find it almost impossible to *settle* the case even if you want to – because you have eliminated the risk that they might win and not be able to collect the money. That's called the "collection risk," and leaving as much collection risk in the equation as possible is a very good idea. Removing any amount of collection risk (or any type of risk) significantly increases the value of the case for the debt collector.

So take your best shot at trial and only plan to appeal if you have to. We believe that your best shot at trial means warning the judge of the arguments you are going to make at trial.

You might think that keeping as much as possible hidden before trial would make it harder for the debt collector to prepare for trial, and to an extent that is true. In the vast majority of cases, however, the debt collectors do not have, and either cannot, or will not try, to get the records no matter how much time you give them. And this is because of the way the debt collection business is organized and run. It is very, very unlikely, in other words, that any amount of warning you may give will actually result in the debt collectors taking action to change anything.

It's like this: if they go to trial, it will take at most an hour for the trial (usually no more!). In most cases, the lawyers will have spent under 20 minutes (I know these numbers seem extreme, but the debt collection lawyers have testified to this) on the case before that. They will have spent a few cents on buying the debt they're suing you for, and lawyers' time is valued at over $200 per hour in most cases.

Almost any amount of time doing something particular on your case is going to be seen as a waste of time and money. Finding records and taking the time to understand them? That would be more lawyer time than several other cases would take from start to finish. Thus it's very unlikely to happen even if, in the unlikely case, it is actually possible to find the records. Often they can't get them at any price.

Background Law to Hearsay and Exceptions

The rule against hearsay is based on the simple fact that if the person making a statement to the court is not in court and testifying under oath, there is less reason to believe the person is being truthful. The oath is considered to be an important factor causing people to be truthful, and the judge or jury's being able to look at the person speaking and evaluate that person's truthfulness is very important to the truth-finding process.

A statement made out of court obviously cannot be questioned by the court or other side, and the person making it cannot be observed or evaluated for truth or falsity. Thus it is impossible to determine whether the statement is true or not based on the believability of the witness. Therefore, most of these statements are not allowed to influence the decision. The statement should be objected to and excluded from evidence.

There is an exception for business records because the company making them, if it is doing so in the ordinary course of business and not in preparation for trial, is making records that it will use and rely on – to its own detriment if they are inaccurate. Thus the business has an incentive to make the records good. That obviously doesn't apply the more the records were created in anticipation of trial – in the case of debt collectors, they have many incentives to cheat and few to tell the truth, because most of their cases go to litigation or get sold, and there is little reason not to cheat on them. Thus we have taken the position that the business records exception should never apply to debt collector records. Not many courts have seen it the same way (yet), but that is no reason not to make the argument.

Remember that the main argument you will make in the debt collector's case, anyway, is that the records *were not made* by the debt collector, they were made through a process which the debt collector cannot authenticate. You can back this up with the argument against debt collectors having records "in the ordinary course of business" because the debt collectors like to pretend that records made by other people become the debt collector's records when the account is purchased. Which is absurd.

Finally, bringing the records into evidence does not necessarily mean they are believed or accepted as true – merely that they can be considered like any other testimony. As a practical matter, though, they are generally accepted as true if they are accepted at all. Far better to keep them out if possible.

3. What to Look for: No Contract

[Click here for video.]

The third weakness that most debt collectors have is that they do not have initial contracts, offers, applications, or other documents showing the intent of the parties to form a contract or the terms of any contract. In an action to collect a debt, the plaintiff creditor bears the burden of proving the existence of the debt and that the debtor is indebted to the creditor in a certain amount. *Bellsouth Adver. & Publ. Corp. v. Wilson, No. M2006-00930-COA-R3-CV, 2007 WL 2200170, at *5; 2007 Tenn. App. LEXIS 496, at *12 (Tenn. Ct. App. July 30, 2007)*.

Debt defendants like to argue that debt collectors "don't have the original contract." And debt collectors love to say that they don't have to. They say all they have to show is use of the card.

But all this is really missing the point. Or, rather, skimming over the most important parts of it.

Here's the basic law. When a credit card company issues a card, it is extending a "line of credit" to the consumer. When the consumer uses the card, he is agreeing to pay the money back at that time. So proving use of the card is proving the existence of the contract. Check. That's what the debt collectors say.

However, if each transaction is a separate contract, then proving a breach of contract requires proving the underlying transaction that created that contract. Debt collectors can essentially never do that because they have, in most cases, only a few credit card statements – often statements that do not show a single transaction. Remember, it is the transaction that creates the contract, and without showing the transaction, an essential element of the breach of contract case (i.e. the contract itself) is missing.

In addition, even with proof of the transactions showing an agreement to pay money back, The transactions and statements do not show the *terms* of the contract, so without those terms, any interest or fee would be unsupported by the evidence.

Seeking interest or fee without a contract is a violation of the FDCPA.

A statement claiming that you owe money is not necessarily proof that you used the card, either. A statement is often just a sort of balance sheet of what the bank says you they think you owe. Without more, its mere existence is not proof that you used the card. It is proof only (if at all) of the bank thinking you owe them money. In these days of identity theft, such statements should not be accepted as proof.

How to Find and Expose the Weakness

The way to discover that the debt collector does not have a copy of a contract is to ask them for it in discovery. In your requests for documents you will ask for:

> "all documents signifying, defining, or relating in any way to any agreement to borrow from or pay plaintiff or any predecessor in interest, or extend a line of credit or lend to defendant, including all terms or conditions of payment and repayment."

In your interrogatories you will ask the debt collector to:

> "identify all documents or agreements of any type governing the relationship, including lines of credit and terms of repayment, between defendant and plaintiff and any predecessor in interest on the money claimed in this lawsuit."

You should also ask them to:

> "identify all amounts sought as principal and, separately, as interest or fees."

You can and should ask for these things at the verification stage, too. Remember, however, that the debt collector is probably not required by law to give them to you at the verification stage. You ask for them as a way to put pressure on them in hopes they'll go away, and you hope that they will send you whatever they have for your own future purposes.

The discovery process, which begins after a lawsuit has been filed, is the way to force them to provide it, and you must be prepared to push and fight for the documents and information you requested. The debt collectors do not have any of these things in most cases, and they do not want to reveal this fact. Therefore, you should expect evasive and incomplete answers or large numbers of objections. They will do what they can to discourage you at this point, and to get what you need you may need to follow through with a motion to compel.

Winning at Trial: the Argument

When you "discover" (through discovery) that the debt collector is suing you for amounts that include interest or fees without a contract to support them, or that it cannot differentiate what amount of the debt is principal and what is interest or fees, then you can counterclaim under the FDCPA for seeking money unsupported by contract.

The debt collector will claim that all the money it seeks, the "nominal debt" that it supposedly purchased from the original creditor or another debt collector, is "principal." But this is not so. Principal is the amount of money you supposedly borrowed from the original creditor when you used the card. Anything else was interest or fees, and it does not lose its character when purchased by a debt collector. Remember the debt collector's mantra: they "step into the shoes of the original creditor."

The debt collector will also claim that it does not need the contract to establish the debt. As we pointed out above, seeking money unsupported by a contract is illegal under the FDCPA.

And then there is also the question, as we pointed out above, of proving the debt at all. If their argument is that they don't need a credit card application, but that the contract is formed when you used the card, then they must prove use of the card, and they cannot do that. Even original creditors are unlikely to be able to do this in terms of tracking the account from zero all the way to the current balance they seek – they probably won't have the records.

Debt collectors certainly won't have the records, but if they did, they would be hard pressed to authenticate them under the business records exception because, remember, they didn't create the records and cannot testify about them or authenticate them.

Account Stated

Aware of the problem created by suing for breach of contract, many debt collectors and original creditors sue you under another basis, called "Account Stated." This is actually a different kind of claim for, essentially, the same money. They will say – in their petition – that they sent you statements, you didn't object, and that therefore you "agreed" to the amount stated in the statements.

See, JP Morgan Chase Bank, NA, v. Rabel, City of New York, Kings County February 16, 2010) ("An account stated is an agreement, independent of the underlying agreement, regarding the amount due on past transactions" (*G.W. White & Son, Inc. v. Gosier, 219 A.D.2d 866, 632 N.Y.S.2d 910 [4th Dept. 1995] [citations omitted]; see also W.R. Haughton Training Stables, Inc. v. Miriam Farms, Inc., 118 A.D.2d 639, 499 N.Y.S.2d 792 [2d Dept. 1986]; see also Discover Bank v. Anderson, 20 Misc.3d 136(A), 2008 N.Y. Slip Op. 51526(U), 2008 WL 2814812 [App. Term, 2d & 11th Jud. Dists.]*).

The underlying law on account stated varies significantly from state to state. In many jurisdictions, most notably Pennsylvania (but many others, as well), they require some proof of negotiation or other, independent, indication of actual agreement about the amount sought. If the original creditor is suing you under a theory of account stated, you will need to research the issue separately for your jurisdiction. If you ever disputed the amount sought, then this claim goes right out the window, too, because it is based upon an implied promise to pay after agreeing on the amount owed.

Debt Collector

If you are being sued by a debt collector under a theory of account stated, they have the same problems with that (if any) that the original creditor has, but in addition, they have the *giant* problem of proving that the statements were sent to you.

How would they do that? By introducing into evidence some statement supposedly sent to you by the original creditor.

But *they cannot authenticate the records of the original creditor* as we has shown above. Thus they are unable to prove an essential – you might say *the* essential – element of the account stated claim: *that you received statements* and somehow impliedly agreed to them by not disputing them.

If they say that *they* sent you a statement claiming you owed money, then you point out that account stated is designed for two parties with a contract existing between them, which implies familiarity with each other. You obviously never had a contract or account with the debt collector and had never heard of them before they began asking you for money. You never saw any items supposedly owed (just a statement claiming you owed a lump sum), and thus cannot be presumed to have agreed to any item that was a part of the total claimed.

Finally, allowing the failure to respond to a collection letter to form the basis of an account stated would frustrate congress's clear intention not to allow that, since it specifically provides in the FDCPA that failure to dispute and require verification cannot be used as evidence of agreement with the amount due. Account stated clearly and obviously does not apply to a debt collector's dunning letter.

Debt Collector or Original Creditor

Whether it is a debt collector or original creditor that's after you, if they cannot make their claim for breach of contract but are seeking money for interest or fees under the terms of the contract, then they have violated the FDCPA. In the case of the original creditor, the company itself is not liable under the FDCPA (because it isn't a debt collector, and the FDCPA only applies to debt collectors), but the company's *lawyers* ***are*** debt collectors and may be liable. If it is a debt collector seeking money under a breach of contract claim that includes interest or fees but no contract to support them, then the company violated the FDCPA.

Note

Account stated is a claim for a specific amount, but no other terms of the implied "promise" are included. If anybody has added fees or interest (other than what state law provides) to the amount, then it has sought an amount not supported by contract and is in violation of the FDCPA. This could easily happen, for example, if the debt collector brings an

action for breach of contract and account stated (two counts asking for the same money is permitted) and asks for attorney's fees in either or both claims – and does not have a contract – then this would violate the FDCPA each time. Attorney's fees are not implied in an account stated, in other words, unless state law allows that (as it does in Arizona, for example). Whether a state that allows attorney's fees on debt collection actions (as Missouri does, subject to limits) is doubtful. You would want to research the particular law and come to a conclusion about that.

Underlying Law

The law underlying the need of a contract is really quite simple: if you are suing for breach of contract, you must, as part of your case, show the existence of a contract. Defendants usually thinks this means the application they signed to get the credit card account, and to some extent that is so – because that would be the agreement that provides for your using the card according to the terms and conditions existing at the time of use. The courts have largely overlooked that logic! Instead, they have held that the contract is formed upon use of the card, and there has rarely been a dispute over the terms and conditions applying.

The problem plaintiffs have (and it gets glossed over a lot) is that they cannot prove the use of the card, either. Instead, they seek to use account statements as proof of usage. If they can prove that they sent, and you received, account statements itemizing charges, this might make sense, because you would have had an opportunity to review each charge. In reality, people rarely do that, but the courts generally hold you to that standard. If they cannot prove that they sent account statements showing every charge (starting with a zero balance), then they cannot really show a breach of contract case.

Original creditors usually do not have this problem because they do, in fact, have records of all your account activity.

Debt collectors, on the other hand, essentially never have more than a few statements. These statements, generated by computer and not properly authenticated, should be laughed out of court, but they will not be. You will have to make the arguments that we showed above, explaining to the court that without the application, the debt collector is bringing what amounts to a long series of breach of contract cases where each contract is established by use of the card. Thus use of the card must be shown. Further, all the records of the debt collectors will be hearsay anyway.

> See, *Velocity Investments, LLC, v. Alston, 922 N.W.2d 538 (Ill. App. 2010)* (Plaintiff's failure to attach a copy of the credit card contract to the complaint, recite the terms of the contract within the complaint, or attach an affidavit showing that the document is inaccessible is grounds for dismissal). *Sherman, 392 Ill. App.3d at 733, 331 Ill.Dec. 557, 911 N.E.2d 378; see also Plocar v. Dunkin' Donuts of America, Inc.,103 Ill.App.3d 740,*

749, 59 Ill.Dec. 418, 431 N.E.2d 1175 (1981) (holding that dismissal of a breach of contract claim was proper in light of the plaintiffs' failure to recite or attach a copy of the contract). Thus, defendant's motion to dismiss should have been granted without prejudice. *See* *Portfolio, 391 Ill.App.3d at 645, 330 Ill.Dec. 854, 909 N.E.2d 876* (where the plaintiff failed to attach a copy of the written instrument to its complaint, trial court dismissed the complaint with leave to amend).

And see, *Velocity Investments, LLC, v. Alston (922 N.W.2d 538)(Ill. App. 2010)* Household Bank's standard "Cardmember Agreement and Disclosure Statement" is not the written contract, as it offers no evidence that defendant agreed to be bound by these terms or that these terms even applied to this particular account. *See* *Portfolio Acquisitions, L.L.C. v. Feltman, 391 Ill.App.3d 642, 651, 652, 330 Ill.Dec. 854, 909 N.E.2d 876 (2009)* (plaintiff attached, *inter alia,* copies of cardholder agreements to its second amended complaint; defendant prevailed in arguing that the documents did not constitute a written contract for statute of limitations purposes because, *inter alia,* there was no evidence that the agreement applied to her account or that she agreed to its terms).

The law of account stated was designed for people with running accounts (like bar tabs or hardware store running tabs), where the total is figured up and payment asked for at the end. Then the parties figure it out and agree on how much is owed. This is obviously not appropriate for debt collectors, who never have any relationship with the people they eventually sue, and it isn't really appropriate for credit card users in general. The account stated theory rests on the belief that people will know and remember their charges, will look at them in relation to the statement sent, and will haggle over any disagreements. The statistics show very clearly that this isn't the way people with credit card balances act, and therefore many states require some indication that there was a separate form of agreement to the amount stated. And many do not have that requirement yet.

For an excellent discussion of the law on this point, including great case references, see: http://nclc.ogosense.net/old/images/pdf/unreported/Target_Decision.pdf

Conclusion

The weaknesses we have pointed out leave holes in the debt collector's argument large enough to drive a truck through – if you know how to make the arguments and stand up in court and do it. Along the way, we have pointed out various steps you would take to discover and expose the weaknesses.

You could figure out how to do all that on your own, but it would be hit-or-miss and time consuming. The purpose of our Debt Defense System is to give you what you need to do what it takes to win without having to resort to hit or miss efforts. We offer a system manual which gives you an overall understanding of the debt law substance and process, member-only materials that will save you a lot of time on routine matters and that go into certain areas of problems or opportunity more in depth than any manual could ever do, and teleconferences where you can get questions answered in real time.

If you’re being sued by a debt collector, our materials could help you.