

# Secret Weapon in Credit Card Defense

## – Demand for Bill of Particulars

If you are being sued for debt, you may have a powerful weapon at your disposal that is rarely used: submitting a demand for a Bill of Particulars. This is a statement that the plaintiff is required to provide supplying details about every part of the bill upon which they are collecting. When the plaintiff is a debt collector or a large creditor like Cap One or discover, chances are good they will be unable to provide these details. You might get the case dismissed on that basis.

### **What is a Bill of Particulars?**

A Bill of Particulars is a written statement providing a detailed, formal, written statement of the charges or claims upon which the plaintiff is suing you. It functions as a part of the pleadings by giving you the details of the lawsuit (rather than discovery, which is primarily a search for evidence). To take a step back, the pleadings (the Petition and Answer and counterclaim and any response to that) together establish what the lawsuit is “about” – who wants what and why. Together they create the limits of the case, you might say, and anything not related to the pleadings is not permitted into the trial because it isn’t “relevant.”

What all this means is that *if you make a demand for a bill of particulars and follow the correct procedures you can prevent the debt collector from entering evidence about anything not listed in the bill of particulars*. Since the debt collectors rarely have evidence of the specific charges underlying the debt they are pursuing, and since that evidence is a part of their case against you, you might be able to get the case dropped by demanding a bill of particulars.

### **Who Can Demand a Bill of Particulars?**

The right to demand a bill of particulars is defensive. That is, the defendant can make the demand about the Petition, and if you make a counterclaim, the plaintiff can make the demand about your counterclaim. However, only six jurisdictions of which I am aware provide for bills of particulars: California, New York City, Delaware, Illinois, Virginia, and Georgia.

### **The Rights Regarding a Bill of Particulars Can be Waived or Lost**

The remedy for the plaintiff’s failing to provide an adequate bill of particulars is that no evidence not related to the bill of particulars can be excluded (prevented from being allowed at trial). However, there is a required procedure, **and not following this procedure will result in your losing the right** to prevent the evidence from being allowed. It is obviously very important,

therefore, to follow the required steps. They are not hard, but they do require a certain amount of persistence. Just remember that your trouble will be amply rewarded if you follow the steps.

## The Required Steps

In California the rule regarding pleading – and the Bill of Particulars – is in Section 454 of the California Code of Civil Procedure. Section 454 states:

It is not necessary for a party to set forth in a pleading the items of an account therein alleged, but he must deliver to the adverse party, within ten days after a demand thereof in writing, a copy of the account, or be precluded from giving evidence thereof. The court or judge thereof may order a further account when the one delivered is too general, or is defective in any particular. If the pleading is verified the account must be verified by the affidavit of the party to the effect that he believes it to be true...

From this language the courts have devised the following procedure that must be followed.

### Step One: the filing of a demand for a bill of particulars

In California, the plaintiff then has ten days from the time the demand is made (if it is delivered in person, or 15 days if it is made by mail), to provide a response. If there is **no** response, or if the response is so inadequate as to amount to no response and a “total and unqualified noncompliance with the demand” (*see, e.g., Burton v. Santa Barbara Nat. Bank, 247 Cal. App. 2d 427, 434 (Dist. 2, 1966)*), the next step will be filing a motion to exclude any evidence regarding the items that should have been provided. Details of this step will be provided below at step Four.

As the Burton court held, “upon failure of compliance, for complete refusal or gross neglect, the statute would seem to call for the imposition of the **mandatory** penalty of exclusion of evidence.” *Burton at 247 Cal App. 2d 433, citing, Elmore v. Tingley, 78 Cal. App. 460, 467, 470, 208 P. 706 (emphasis added)*. Where the bill of particulars is provided, even if it is “wholly

defective in form and useless for the purpose sought,” defendant is not entitled to exclude evidence but must file a noticed motion for a further account and bill of particulars. *Id.*

## **Step Two: “Meet and Confer”**

Anything short of absolute non-compliance, however lame, triggers the second step – the requirement that you try to work out the problems informally, without intervention of the court, before filing a noticed motion for a further account and bill of particulars. A letter stating that the response is inadequate (a Sample Letter is included as part of this product) and requesting an adequate response within five or ten days should do the trick on this part.

Debt collectors essentially never have the materials you request, so their response is likely to be grossly inadequate. After the plaintiff’s response, assuming no real progress is made in negotiations, you will go to **Step Three**. If the negotiations do not look futile (i.e., if the plaintiff asks for more time or concedes something but reasonably disputes other things), you may need to exhaust the negotiations phase. Neither the statute nor the cases are totally clear about the extent of negotiations required, but remember that this attack looks like a “technicality,” and the law favors disposition “on the merits” of the case rather than technicalities.

Most judges will be looking at every step you take, and in general they do not like to take the step you will ultimately be asking them (in the last step) to take, so you cannot take short cuts here.

## **Step Three: Filing of a Noticed Motion for a “Further Bill of Particulars”**

After exhausting the negotiations for the first bill of particulars, you must then file a Motion Requesting a Further Bill of Particulars. This motion must be noticed (you have to set the matter for argument at court and tell the other side, giving it a proper amount of time to prepare as required by the Rules of Civil Procedure) and argued, and the court must then order the other side to provide a further bill of particulars.

As the statute states, although it is “not necessary for a party to set forth in a pleading the items of an account therein alleged ... he must deliver to the adverse party, within ten days after a demand thereof in writing, a copy of the account, or be precluded from giving evidence thereof.” The stated purpose of a bill of particulars is to “protect the adverse party from embarrassment” by giving him reasonable notice of the items constituting plaintiff’s claim so that he may prepare for trial. *Id.*, citing *McCarthy v. Mt. Tecarte Land & Water Co.*, 110 Cal. 687, 692, 43 P. 391).

Your argument for a further bill of particulars is that the statement provided did not give you reasonable notice of the items constituting plaintiff’s claims and was not a “copy of the account.” That works because, in attempting to prove a suit for money lent, the plaintiff must show each item of money lent, when it was paid, and whether or not it was paid back. To satisfy a bill of particulars, they should have to provide you with a complete, itemized statement of account dating all the way back to the beginning. In addition, they should show any terms of the agreement. Really – everything. Since debt collectors never start with this information and essentially never can get it, you will probably never get an adequate bill of particulars.

### **Step Three and a Half: How Many “Further” Bills of Particulars Must You Seek?**

What if, following the granting of a further bill of particulars, the plaintiff provides you another inadequate response? Again, like the negotiations in Step Two, this looks like a gray area to me. You *may* have to repeat steps two and three. I have not seen cases which explicitly state that you must – but most of the cases involving bills of particulars where evidence was excluded actually did involve repeated requests.

The courts do not like to deprive plaintiffs (at least large ones with lots of money) of their rights on the basis of a technicality, and so any effort to comply by the debt collector is likely to be looked on favorably by the court. Nevertheless, the statute is ultimately clear about what must be provided, and failure to do so will eventually result in exclusion (after **Step Four**), but you may have to keep hammering away at the court and plaintiff. I would suggest, as most parties have done in the cases I’ve found, that after the first inadequate response, your motions should

be “in the alternative,” meaning you ask the court either for an order excluding the evidence or a further bill of particulars.

## **Step Four: Filing a Noticed Motion to Exclude**

If the plaintiff never provides you an adequate bill of particulars, you should be able to get the evidence of the account “excluded,” meaning you should get an order preventing the plaintiff from showing that you owe the money. This is not a dismissal of the case, but almost. **You must file a noticed motion to exclude or you will lose the right** to prevent the evidence from coming in at trial. In other words, if you do not file the motion to exclude, you will lose the right to exclude the evidence. *See, id., citing Union Lumber Co. v. Morgan, 162 Cal. 722, 725, 124 P. 228, Glogau v. Hagan, 107 Cal. App. 2d 313, 321, 237 P.2d 329* (some cases omitted).

A sample motion to exclude is provided in the materials that are a part of this product. Remember, writing and filing the motion are *necessary*, but they are *not enough*. You must also **set it for a hearing and present it to the judge and get it heard and ruled upon**. Anything short of this will lose your rights.

## **Step Five: Motion for Summary Judgment**

The Court should issue an order denying the plaintiff the right to enter any evidence within the scope of the required bill of particulars. In *Burton v. Santa Barbara Nat. Bank*, the court of appeals ruled that this was the equivalent of a dismissal and accepted an appeal of the ruling. I do not believe you can count on an automatic dismissal of the case, and therefore I suggest one final step: the filing of a motion for summary judgment.

In this motion you point out that since the plaintiff cannot present any evidence of its claim, the court should award you judgment and dismiss the case against you. You do this to end the case and get it dismissed “with prejudice.” Remember that unless you cause the court to dismiss the case with prejudice, the plaintiff will normally have the right to dismiss at any time without prejudice, and thus I suggest that you **combine** your motion to exclude with a motion for summary judgment. Allowing the plaintiff to dismiss without prejudice would leave you vulnerable to further collection efforts and hamper your ability to clear your credit report.

A sample combined motion to exclude and for summary judgment is included to this package.