

Creditor Causes of Action: Pleadings and Proof

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POP QUIZ

- 1) (True or False) Debtor's summary judgment response includes an affidavit affirming that all offsets and credits have not been allowed. The affidavit raises a fact issue.
- 2) Probably the most difficult defense to plead. Defendant must "file with his plea an account." What is the defense? _____
- 3) Plaintiff serves affidavit as to the amount and necessity of attorney services, and attaches detailed invoices. What must Defendant do to contest fees? _____
- 4) (True or False) A creditor threatened with a usury claim should consider curing the alleged usury violation.

Answers:

- 1) FALSE. Vague affidavit as to unspecified offsets is conclusory and insufficient. *See Life Ins. Co. of Virginia v. Gar-Dal, Inc.* 570 S.W.2d 378 (Tex. 1978), discussed at page 14.
- 2) Payment, Rule 95. See pages 11, 12.
- 3) Promptly file and serve counter-affidavit. Otherwise, plaintiff's affidavit is incontrovertible. Texas Civil Practice & Remedies Code, § 18.001, Affidavit Concerning Cost & Necessity of Services. See page 10.
- 4) TRUE. See Tex. Fin. Code §305.006(c)(pre-suit cure, correct the violation), §305.006(d)(post-suit cure, correct violation and pay obligor's reasonable attorney's fees as determined by court). See also creditor's waiver of cure opportunity in *Walker & Assocs. Surveying v. Roberts*, 306 S.W.3d 839, 853(Tex. App–Texarkana 2010, n.p.h.).

INTRODUCTION

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

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

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

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

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

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PART ONE:

SWORN ACCOUNTS

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

I. RULE 185

A. Broad Rule

Rule 185, Suit On Account states:

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

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

B. Allows Judgment on the Pleadings

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

Sworn Account

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

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

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

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

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

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

Sworn Account

2. Sale of Personal Property is Not Required; Cases

a. Generally

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

b. Texas Supreme Court Cases

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

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

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

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

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

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

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

c. Insurance Premiums

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

d. Electrical Utility Service

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

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e. Freight Services

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

f. Telephone Services

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

g. Mailing Services

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

h. Staffing Services

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

i. Advertising

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

j. Attorney's Fees

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

k. Equipment Repairs

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

l. Personal Property Lease - - Conflicting Cases

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

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

m. Credit Cards - - Conflicting Cases

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

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

3. Fallacy Two: Sworn Account Requires Specific Account Description

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

4. 1984 Amendment to Rule 185 Negating Specificity

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

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

5. Troublesome Cases Ignoring “No Particularization” Amendment

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

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

II. PLEADINGS

A. Petition

1. Form of Pleading

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

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

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

B. The Affidavit

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

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

C. Attachments to Petition (Caution)

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

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

D. The Answer

1. Requirements of Sworn Denial

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

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

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

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

2. Affirmative Defenses - - Allowed Without Sworn Denial

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

III. ELEMENTS

A. Generally

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

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

B. Order as Additional Element

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

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

C. Price

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

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

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D. Amount Due

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

IV. PROOF

A. Business Records Affidavit

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

B. Services Affidavit

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

C. Discovery With Petition

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

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

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

V. DEFENSES

A. Negating Elements

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

B. Stranger to the Transaction

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

C. Payment

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

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

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

VI. MOTIONS FOR SUMMARY JUDGMENT

A. Generally

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

B. Specificity of Motion

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

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

C. Obtain Ruling on Objections

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

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D. Affidavits As Summary Judgment Evidence

1. Personal Knowledge Requirement

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

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

2. Readily Controverted Requirement

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

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

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

3. Avoid Conclusory Statements

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

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Production Credit Assoc., 372 S.W.2d 956 (Tex. Civ. App.–Houston 1963, writ ref'd n. r. e.). In rejecting a vague debtor's affidavit the Houston court stated:

“However, we are of the view that the plea in appellant Smiths' affidavit, there being nothing more, stating that all offsets and credits have not been allowed, is but a conclusion. It should have gone further and specified what such credits and offsets were. If this had been a trial on the merits and the only thing stated by appellant was that all offsets and payments had not been credited, the court would have been required to instruct a verdict against appellant. His testimony in such a trial, that all payments and offsets had not been allowed, without more, would be a pure conclusion. See *Franklin Life Ins. Co. v. Rogers*, 316 S.W.2d 116 (CCA), ref., n.r.e.”

“ . . . [I]t is axiomatic that legal conclusions are insufficient to raise issues of fact . . . ” *CGM Valve & Gauge Co., Inc. v. Energy Valve, Inc.* 698 S.W.2d 253, 254 (Tex. App.–Houston [14th Dist.] 1985, no writ). See also *Schultz v. General Motors Acceptance Corp.*, 704 S.W.2d 797, 798 (Tex. App.–Dallas 1985, no writ)(conclusory statement regarding disposition of collateral was insufficient to support summary judgment).

E. Other Summary Judgment Cases

Liberty Mut. Ins. Co. v. Garrison Contrs. 966 S.W.2d 482 (Tex.1998)(debtor raised fact issue through affidavits asserting that creditor's agreement misrepresented amount of retrospective premiums); *Boodhwani v. Bartosh*, No. 03-02-0432-CV(Tex. App.–Austin, March 6, 2003, no pet.)(2003 Tex. App. Lexis 1907)(mem. op.)(debtor filed no sworn answer; sworn response to creditor's motion for summary judgment therefore ineffectual); *Rush v. Montgomery Ward*, 757 S.W.2d 521, 523, (Tex. App.–Houston [14th Dist.] 1988 writ denied (same); *Grant-Brooks v. Transamerica Bank, N.A.*, No. 05-02-00754-CV (Tex. App.–Dallas, January 31, 2003, no pet.)(2003 Tex. App. Lexis 990)(mem. op.)(summary judgment affidavit from creditor's legal account specialist was sufficient though sale was apparently by a third party; debtor waived objections by failing to obtain ruling).

A summary judgment motion based on sworn account should include an alternate request for judgment based on breach of contract. If the court rejects the sworn account, creditor may yet prevail. See *Cavazos v. Citibank*, No. 01-04-00422-CV (Tex. App.–Houston [1st Dist.] June 9, 2005, no pet.)(unpublished, 2005 Tex. App. Lexis 4484)(court rendered judgment on contract claim after rejecting sworn account).

Account Stated

PART TWO:

ACCOUNT STATED

I. DEFINITION 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.).

II. 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. *Dulong v. Citibank (S.D.), N.A.*, 261 S.W.3d 890, 893 (Tex. App.–Dallas 2008, no pet.); *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).

III. 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 1975, writ ref'd n.r.e.), *citing Reed v. Harris* 37 Tex. 167, 169)(Tex. 1872).

A creditor can recover attorney's fees under Chapter 38 based upon an account stated claim. *See Busch v. Hudson & Keyse, LLC*, No. 14-09-00009-CV (Tex. App.–Houston [14th Dist.], May 11, 2010, n.p.h.)(2010 Tex. App. Lexis 3477)(mem. op.); Tex. Civ. Prac. & Rem. Code § 38.001(8)(oral or written contract).

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IV. PROOF

Because the agreement on which an account stated claim is based can be express or implied, creditor need not produce a written contract, as long as it produces other evidence of the agreement between the parties. *Dulong v. Citibank (S.D.), N.A.*, 261 S.W.3d 890, 894 (Tex. App.–Dallas 2008, no pet.). “Based on the series of transactions reflected on the account statements, it is reasonable to infer that [debtor] agreed to the full amount shown on the statements and impliedly promised to pay the indebtedness.” *Id.* Other evidence of account stated may include letters and e-mails, stopped payment checks, and credit card statements.

A. Confirming Letters

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).

1. 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 December 1, 2011. 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.

Account Stated

2. Specificity Required

An account stated requires an absolute acknowledgment or admission of a sum certain by the debtor to the creditor. *Paine v. Moore*, 464 S.W.2d 477, 480 (Tex. Civ. App.–Tyler 1971), citing *Dodson v. Watson*, 220 S.W. 771 (Tex. 1920). 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).

B. Stopped Payment/ NSF Checks

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, was 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.).

C. Credit Card Statements

Credit card statements may be used as evidence to establish account stated. See *Dulong v. Citibank (S.D.), N.A.*, 261 S.W.3d 890, 893 (Tex. App.–Dallas 2008, no pet.)(summary judgment affirmed against debtor on account stated - monthly credit card statements reflecting charges and payments over a seven-year period established implied agreement fixing the amount due and implied promise to pay); *McFarland v. Citibank, N.A.*, 293 S.W.3d 759, 764 (Tex. App.–Waco 2009, no pet.)(same); *Eaves v. Unifund CCR Partners*, 301 S.W.3d 402, 408 (Tex. App.–El Paso 2009, no pet.)(assignee of credit card debt sued on account stated); *Jamarillo v. Portfolio Acquisitions, LLC*, No. 14-08-00939-CV (Tex. App.–Houston [14th Dist.], March 30, 2010, n.p.h.)(2010 Tex. App. Lexis 2219)(mem. op.)(same). But see *Morrison v. Citibank (S.D.) N.A.*, No. 2-07-130-CV (Tex. App.–Fort Worth February 28, 2008, no pet.)(2008 Tex. App. Lexis 1692)(mem. op.)(monthly credit card statements, coupled with debtor’s payment history involving a pattern of minimum monthly payments, held factually insufficient to support the second element of account stated, an agreement, express or implied, fixing an amount due). See also *Montoya v. Bluebonnet Fin. Assets*, No. 02-09-00301-CV (Tex. App.–Fort Worth, October 28, 2010, n.p.h.)(2010 Tex. App. Lexis 8691)(mem. op.)(summary judgment for assignee of a credit card account reversed because of balance variance between the final credit card statement and the bill of sale to assignee).

Account Stated

V. DEFENSES

A. Attack Elements

Of course, if debtor persuades the fact finder that plaintiff has not met his burden of proof as to all elements, such is an effective defense. As indicated in the preceding section, often the “weak link” is the element of agreed amount due. *See Neil v. Agris*, 693 S.W.2d 604, 605 (Tex. Civ. App.–Houston [14th Dist.] 1985 no writ)(proof that creditor mailed debtor a bill that was never paid, without more, was insufficient to establish account stated).

B. The “Forgotten Offset”

After an account stated is established, may debtor allege an offset omitted by mistake, a forgotten offset? Such seems to negate the concept of account stated. Recent cases provide no authority for such attacks. However, a forgotten offset was allowed with troublesome language in *Dodson v. Watson*, 220 S.W. 771 (Tex. 1920). Debtor, at trial, sought to prove credits against an account stated. The issue was whether debtor had to prove mutual mistake in order to obtain the credits. Mutual mistake was not required and the supreme court stated that an account stated simply establishes a prima facie case, shifting the burden to the debtor to disprove its correctness. The court stated:

Mere presumptive evidence cannot create an estoppel. A stated account does not, therefore, amount to an estoppel. It is open to impeachment, just as other presumptions are subject to be overcome by competent proof. It does not of itself amount to an obligatory agreement - - a contract upon a new consideration, having all the sanctity of a written agreement. Its purpose is but to reach an agreed balance between the parties whereby the particular items may be eliminated. When that is done, its office is performed and the character of prima facie correctness in the balance is attained.

The case may be brought within the principles of an estoppel, or of an obligatory agreement between the parties, as when upon a settlement mutual compromises are made; but the mere stating of an account in its very nature and purpose precludes giving to the account when stated the character of a binding written contract. In the ordinary affairs of men it is not intended to have that character. In modern business transactions, such, for instance, as between banks and their customers, it would be perilous to state accounts if the statement of the balance is to be held in all cases as creating a contract binding upon both parties and subject to no correction for errors unless they be due to the fault of both. 220 S.W. at 775.

Practice Tip: Argue that agreement as to the balance due disposes of all issues to that date; that debtor should be able to assert only post-agreement offsets and credits. But beware of *Dodson* when offsets or credits are asserted, as it could negate an account stated. Debtor should plead offsets and credits as affirmative defenses under Rule 94. Payment must be specially pleaded per Rule 95.

Quantum Meruit

PART THREE: UNJUST ENRICHMENT CLAIMS

Unjust enrichment is not an independent cause of action but rather characterizes the result of a failure to make restitution of benefits either wrongfully or passively received under circumstances which give rise to an implied or quasi-contractual obligation to repay. *R.M. Dudley Constr. Co. v. Dawson*, 258 S.W.3d 694, 703 (Tex. App.–Waco 2008, pet. filed); *Walker v. Cotter Props.*, 181 S.W.3d 895, 900 (Tex. App.–Dallas 2006, no pet.); *Oxford Fin. Co., Inc. v. Velez*, 807 S.W.2d 460, 465 (Tex. App.–Austin 1991, writ denied). The unjust enrichment doctrine applies principles of restitution to disputes where there is no actual contract and is based on the equitable principle that one who receives benefits which would be unjust for him to retain ought to make restitution. *In re Guardianship of Fortenberry*, 261 S.W.3d 904, 915 (Tex. App.–Dallas 2008, no pet.). However, overpayments under a valid contract may give rise to a claim for restitution or unjust enrichment. *Southwestern Elec. Power Co. v. Burlington N. R.R.*, 966 S.W.2d 467, 469 (Tex. 1998), citing *Staats v. Miller*, 243 S.W.2d 686, 687-88 (Tex. 1951). See also *Heldenfels Bros., Inc. v. Corpus Christi*, 832 S.W.2d 39, 41 (Tex. 1992)(A party may recover under the unjust enrichment theory when one person has obtained a benefit from another by fraud, duress, or the taking of an undue advantage).

I. QUANTUM MERUIT

A. Definition and Elements

The Texas Supreme Court explains quantum meruit and its elements in *Vortt Exploration Co., Inc. v. Chevron U.S.A., Inc.*, 787 S.W.2d 942, 944 (Tex. 1990):

Quantum meruit is an equitable remedy which does not arise out of a contract, but is independent of it. *Colbert v. Dallas Joint Stock Land Bank*, 129 Tex. 235, 102 S.W.2d 1031, 1034 (1937). Generally, a party may recover under quantum meruit only when there is no express contract covering the services or materials furnished. *Truly v. Austin*, 744 S.W. 2d 934, 936 (Tex. 1988). This remedy “is based upon the promise implied by law to pay for beneficial services rendered and knowingly accepted.” *Id.* See *Campbell v. Northwestern Nat’l Life Ins. Co.*, 573 S.W.2d 496, 498 (Tex. 1978). Recovery in quantum meruit will be had when non-payment for the services rendered could “result in an unjust enrichment to the party benefitted by the work.” *City of Ingleside v. Stewart*, 554 S.W.2d 939, 943 (Tex. Civ. App.–Corpus Christi 1977, writ ref’d n.r.e.) Recognizing that quantum meruit is founded on unjust enrichment, this court set out the elements of a quantum meruit claim in *Bashara v. Baptist Memorial Hospital System*, 685 S.W.2d 307, 310 (Tex. 1985). To recover under quantum meruit a claimant must plead and prove that:

- 1) valuable services were rendered or materials furnished;
- 2) for the person sought to be charged;
- 3) which services and materials were accepted by the person sought to be charged, used and enjoyed by him;

Quantum Meruit

4) under such circumstances as reasonably notified the person sought to be charged that the plaintiff in performing such services was expecting to be paid by the person sought to be charged. *Vortt* 787 S.W.2d at 944.

1. Damages

The proper measure of damages for a claim in quantum meruit is the reasonable value of work performed and the materials furnished. *M.J. Sheridan & Son Co. v. Seminole Pipeline Co.*, 731 S.W.2d 620, 625 (Tex. App.–Houston [1st Dist.] 1987, no writ). What constitutes a reasonable compensation for benefits furnished does not depend on any single factor, but takes into account all the evidence and circumstances. *Walker & Assocs. Surveying v. Roberts*, 306 S.W.3d 839, 859 (Tex. App.–Texarkana 2010, n.p.h.).

B. Services Rendered and Accepted

To prevail on a quantum meruit claim, the plaintiff must establish that the services were valuable from the perspective of the defendant. *Carr v. Austin Forty*, 744 S.W.2d 267, 273 (Tex. App.–Austin 1987, writ denied). See also *Rickett v. Lesikar*, No. 02-10-00026-CV (Tex. App.–Fort Worth, October 14, 2010, n.p.h.)(2010 Tex. App. Lexis 8307)(mem. op.)(no quantum meruit recovery for plaintiff, who provided contour maps and seismic lines, with no explanatory report to defendant, a non-expert).

C. Reasonable Notification To The Person Sought To Be Charged

Quantum meruit requires reasonable notification to the person sought to be charged. In a suit by a subcontractor against a homeowner, even though the homeowner was present at meetings to review additional work, because subcontractor invoiced the general contractor and because the homeowner informed the subcontractor that it should expect payment only from the general contractor, the court concluded that there was no evidence to establish that subcontractor reasonably notified the homeowners that it expected payment directly from them. *Sanders v. Total Heat & Air, Inc.*, 248 S.W.3d 907 (Tex. App.–Dallas 2008, no pet.). Compare *Sanders* with *Copps v. Gardern Appraisal Group, Inc.*, No. 04-07-00070-CV (Tex. App.–San Antonio, October 31, 2007, no pet.)(2007 Tex. App. Lexis 8636)(mem. op.)(judgment on quantum meruit affirmed where appraiser, after being contacted by a third party, sought payment directly from the homeowner).

D. Expectation of Payment or Deal As Element

Expectation of payment of money is not required; expectation of a deal may suffice. In *Vortt*, *supra*, claimant provided seismic information with an expectation of concluding an agreement for production of a well. In *Campbell*, *supra*, claimant provided remodeling services with an expectation of an option to purchase an apartment complex. These satisfied the “expectation of payment” element.

Quantum Meruit

E. Other Restrictions

1. Absence of Express Contract

Generally, quantum meruit recovery is allowed only in the absence of express contract. *Stewart v. Sanmina Tex. L.P.*, 156 S.W.3d 198 (Tex. App.–Dallas 2005, no pet.); *Truly v. Austin et. al.*, 744 S.W.2d 934, 936 (Tex. 1988). That is because the parties should be bound by their express agreements. *Fortune Prod. Co. v. Conoco, Inc.*, 52 S.W.3d 671, 684 (Tex. 2000). *But see Southwestern Elec. Power Co. v. Burlington N. R.R.*, 966 S.W.2d 467, 469 (Tex. 1998), *citing Staats v. Miller*, 243 S.W.2d 686, 687-88 (Tex. 1951)(overpayments under a valid contract).

2. Partial Performance on Contract

Recovery in quantum meruit is sometimes permitted when a plaintiff partially performs an express contract that is unilateral in nature. *Truly v. Austin et. al.*, 744 S.W.2d 934, 937 (Tex. 1988). Examples include partial performance by broker to sell real estate and partial performance by an attorney. As to partial performance by attorney, *see Hoover Slovacek LLP v. Walton*, 206 S.W.3d 557 (Tex. 2006)(intricate discussion of unconscionable termination provision in fee agreement); *Hudson v. Cooper*, 162 S.W.3d 685 (Tex. App.–Houston [14th Dist.] 2005, no pet.)(partial performance by attorney allows quantum meruit claim, even though a contingent fee contract existed); *French v. Law Offices of Windle Turley, P.C.*, No. 2-08-273-CV (Tex. App.–Fort Worth, Mar. 4, 2010, n.p.h.)(2010 Tex. App. Lexis 1586)(mem. op.)(same).

A contractor may recover the reasonable value of the services rendered and accepted or the materials supplied under the theory of quantum meruit if: (1) the services rendered and accepted are not covered by the contract; (2) the contractor partially performed under the terms of an express contract, but was prohibited from completing the contract because of the owner's breach; or (3) the contractor breached but the owner accepted and retained the benefits of the contractor's partial performance. *Gentry v. Squires Constr., Inc.*, 188 S.W.3d 396, 403 (Tex. App.–Dallas 2006, no pet.)(reversed on other grounds)(labor and material costs awarded to plaintiff-contractor because defendants accepted and retained the benefits of partial performance). *See also Bluelinx Corp. v. Tex. Constr. Sys.*, No. 14-09-00237-CV (Tex. App.–Houston [14th Dist.] Jan. 27, 2011, n.p.h.)(2011 Tex. App. Lexis 605)(mem. op.)(change to more expensive materials recoverable but time and expense obtaining permit not compensable as permit was within the scope of contract).

3. Clean Hands Required

A party seeking an equitable remedy, such as quantum meruit, must come to court with "clean hands." *Jones v. Whatley*, No. 13-09-00355-CV (Tex. App.–Corpus Christi, June 9, 2011, n.p.h.)(2011 Tex. App. Lexis 4380)(mem. op.)(attorney falsely testified to a contingent fee contract), *citing In re Gamble*, 71 S.W.3d 313, 325 (Tex. 2002). The complaining party must show that he has been injured by such conduct. *Id.*, *citing Afri-Carib Enters., Inc. v. Mabon Ltd.*, 287 S.W.3d 217, 222 (Tex. App.–Houston [14th Dist.] 2009, no pet.). In *Jones*, the court did not apply the clean hands doctrine because the jury awarded less attorney's fees than the attorney would have recovered using an hourly rate calculation.

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4. Arbitration agreements

A party may plead alternatively for relief under both contract and quasi-contract theories. But such pleading does not defeat the effect of an arbitration clause that broadly covers all disputes that arise out of the underlying agreement. *In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 740 (Tex. 2005).

F. Limitations

Unjust enrichment claims are governed by the two-year statute of limitations in CPRC § 16.003. *Elledge v. Friberg-Cooper Water Supply Corp.*, 240 S.W.3d 869, 871 (Tex. 2007). “The most logical reading of sections 16.003 and 16.004 is to treat “debt” actions under section 16.004 as breach-of-contract actions that fall under the four-year statute of limitations for such claims, . . . while construing the two-year statute’s reference to actions for ‘taking or detaining the personal property of another’ as applicable to extra-contractual actions for unjust enrichment.” *Id.* at 870. Of questionable authority, *see Quigley v. Bennett*, 256 S.W.3d 356 (Tex. App.–San Antonio 2008, no pet.)(court applied four-year statute of limitations to quantum meruit claim).

Avoid limitations issues. Sue and serve defendants promptly. The reader is referred to O’CONNOR’S CPRC Plus (2010-2011) and other authorities as to this important defense. See pages 81-83 where sixteen debt collection limitations periods are summarized.

G. Attorney’s Fees

A party may recover attorney's fees for claims arising out of quantum meruit. *Weitzul Constr., Inc. v. Outdoor Environs*, 849 S.W.2d 359, 366 (Tex. App.–Dallas 1993, writ denied), *citing* Tex. Civ. Prac. & Rem. Code §38.001.

II. 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).

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“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). When a valid, express contract covers the subject matter of the parties' dispute, there can be no recovery under a quasi-contract theory, such as money had and received. *UL, Inc. v. Pruneda*, No. 01-09-00169-CV (Tex. App.–Houston [1st Dist.], Dec. 9, 2010, n.p.h.) (2010 Tex. App. Lexis 9806) (mem. op.), citing *Fortune Prod. Co. v. Conoco, Inc.*, 52 S.W.3d 671, 684 (Tex. 2000).

C. Cases

Money had and received is a broad and flexible cause of action. A money had and received claim reaches property purchased with the money. *Tri-State Chemicals, Inc. v. Western Organics, Inc.*, 83 S.W.3d 189 (Tex. App.–Amarillo 2002, pet. denied). A variety of claims are asserted as money had and received:

1) **Improper Fees:** Claim of illegal student fees paid under implied duress was proper money had and received claim. *Dallas v. Bolton*, 89 S.W.3d 707 (Tex. App.–Dallas 2002, pet. granted).

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2) **Transferred Assets:** After transfer of assets by debtor to third party, creditor properly asserted money had and received against third party; third party's summary judgment reversed and remanded. Money had and received claim reached money and property held by third party. Debtor improperly converted consigned goods to cash, then purchased and sold goods to third party. *Tri-State Chemicals, Inc. v. Western Organics, Inc.*, 83 S.W.3d 189(Tex. App.–Amarillo 2002, pet. denied).

3) **Retained Money, Realty:** Creditor paid \$40,000 based on oral agreement to convey land; debtor's failure to convey resulted in a proper money had and received claim, summary judgment affirmed. *Quintanilla v. Almaguer*, No. 13-96-455-CV (Tex. App.–Corpus Christi, May 21, 1998, no pet.)(unpublished, 1998 Tex. App. Lexis 3095).

4) **Retained Money, Goods:** Money had and received is a viable cause of action in dispute between buyer and seller of horse, when horse died prior to delivery and seller kept purchase price. *Leier v. Purnell*, No. 2-04-039-CV (Tex. App.–Fort Worth, December 9, 2004, pet. denied)(unpublished, 2004 Tex. App. Lexis 11127).

5) **Escrowed Funds:** Funds escrowed with city for specified improvements, which were never made, was proper money had and received claim. *Harker Heights v. Sun Meadows Land, Ltd.*, 830 S.W.2d 313 (Tex. App.–Austin 1992, no writ).

6) **Expert's Services:** Seismic information provided with expectation of agreement for production of well is proper money had and received claim. *Vortt Exploration Co., Inc. v. Chevron U.S.A. Inc.*, 787 S.W.2d 942, 944 (Tex.1990).

7) **Remodeling Services:** Remodeling services made with expectation of an option to purchase apartment complex proper money had and received claim. *Campbell v. Northwestern Nat'l Life Ins. Co.*, 573 S.W.2d 496, 498 (Tex.1978).

8) **Legal Services:** Law firm properly paid itself for services from trust account; such did not constitute money had and received claim because there was no unjust enrichment to law firm. *Finish Line P'shp. v. Kashmir & Krage*, No. 05-97-01931-CV (Tex. App.–Dallas November 15, 2000, no pet.)(unpublished, 2000 Tex. App. Lexis 7744).

9) **Unearned Retainer:** Plaintiff-inmate's claim that attorney refused to return unearned retainer was sufficient money had and received claim. *Burnett v. Sharp*, 328 S.W.3d 594 (Tex. App.–Houston [14th Dist.] 2010, n.p.h.).

10) **Wrongful Credit Card Charges:** Class action litigation based on wrongful credit card premium charges by department store and insurers was apparently viable money had and received claim; reversed and remanded as to class certification. *J.C.Penney Co. v. Pitts*, 139 S.W.3d 455 (Tex. App.–Corpus Christi 2004, pet. denied).

11) **Child Support Overpayment:** Overpayment of child support is sufficient to assert a claim for money had and received. *London v. London*, 192 S.W.3d 6, 11-12 (Tex. App.–Houston [14th Dist.] 2005, pet. denied); *In the Interest of L.R.S.*, No. 02-09-00244-CV, (Tex. App.–Fort Worth, March 3, 2011, n.p.h.)(2011 Tex. App. Lexis 1589)(mem. op.)(same).

12) **Misapplication of Mortgage Payment:** Lender's misapplication of a payment was a proper money had and received claim. *Doss v. Homecomings Fin. Network, Inc.*, 210 S.W.3d 706 (Tex. App.–Corpus Christi 2006, pet. denied).

13) **Not Bank Account; Failure to Prove Control:** Court properly entered judgment notwithstanding verdict for debtor because there was no evidence debtor received money in question. Money was deposited into bank account during sale of business, but third party

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controlled account. *Akturk v. Leech*, No. 05-98-02095-CV, (Tex. App.–Dallas, June 7, 2001, no pet.)(unpublished, 2001 Tex. App. Lexis 3803).

14) **Not Improper Payment of Check:** Money had and received claim against bank, based on improper payment of check, failed as there was no evidence bank held funds in question. *Miller-Rogaska, Inc. v. Bank One, N.A.*, 931 S.W.2d 655 (Tex. App.–Dallas 1996, no pet.).

15) **Not Defective Product Claim:** Money had and received claim properly dismissed for lack of standing when based on prospective damages in class action. *Everett v. TK-Taito, L.L.C.*, 178 S.W.3d 844, 860 (Tex. App.–Fort Worth 2005, no pet.).

16) **Not Freight Overcharges Where Contract Controlled:** Claim of freight overcharges was not money had and received or unjust enrichment as contractual provisions controlled. *Southwestern Elec. Power Co. v. Burlington N. R.R.*, 966 S.W.2d 467 (Tex. 1998).

D. Attorney's Fees

Attorney's fees are not recoverable under CPRC 38.001 for a money had and received claim. See *Doss v. Homecomings Fin. Network, Inc.*, 210 S.W.3d 706, 713-14 (Tex. App.–Corpus Christi 2006, pet. denied)(summary judgment based solely on money had and received). Often, money had and received should be plead alternatively as a sworn account, account stated, or breach of contract claim, which allow fee recovery under CPRC 38.001, et. seq.

E. Limitations

A two-year statute of limitations generally applies to money had and received claims. *Pollard v. Hanschen*, No. 05-09-00704-CV (Tex. App.–Dallas, June 8, 2010, n.p.h.)(2010 Tex. App. Lexis 4281)(mem. op.), citing *Elledge v. Friberg-Cooper Water Supply Corp.*, 240 S.W.3d 869, 871 (Tex. 2007)(unjust enrichment claims are governed by two-year limitations period). But see, as to negotiable instruments, Tex. Bus. & Com. Code § 3.118(g), (three-year limitations applies to money had and received claim based on conversion of an instrument).

Promissory Note

PART FOUR: PROMISSORY NOTE

I. DEFINITIONS AND TERMS

A. Promissory Note

A promissory note is a contract between the maker and the payee. *Strickland v. Coleman*, 824 S.W.2d 188, 191 (Tex. App.–Houston [1st Dist.] 1991, no writ), citing *Mauricio v. Mendez*, 723 S.W.2d 296, 298 (Tex. App.–San Antonio 1987, no writ). Courts employ the same rules for interpreting a note that they use to interpret a contract. *EMC Mortg. Corp. v. Davis*, 167 S.W.3d 406 (Tex. App.–Austin, 2005, pet. denied), citing *Affiliated Capital Corp. v. Commercial Fed. Bank*, 834 S.W.2d 521, 526 (Tex. App.–Austin 1992, no writ). Note: This broad topic, promissory note, merits additional research; this is intended as a starting point only.

B. Maker

A maker means a person who signs or is identified in a note as a person undertaking to pay. Tex. Bus. & Com. Code §3.103(a)(5).

C. Holder

A holder means the person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession. Tex. Bus. & Com. Code §1.201(b)(21).

D. Bearer

Bearer means a person in possession of a negotiable instrument that is payable to bearer or indorsed in blank. Tex. Bus. & Com. Code §1.201(b)(5).

II. ELEMENTS OF SUIT ON NOTE

To collect on a promissory note, the holder or payee must establish: (1) there is a note; (2) it is the legal owner and holder of the note; (3) the defendant is the maker of the note; and (4) a certain balance is due and owing on the note. *Levitin v. Michael Group, L.L.C.*, 277 S.W.3d 121, 123 (Tex. App.–Dallas 2009, no pet.); *UMLIC VP LLC v. T&M Sales & Envtl. Sys.*, 176 S.W.3d 595, 611 (Tex. App.–Corpus Christi 2005, pet. denied); *Diversified Fin. Sys. v. Hill, O'Neal, Gilstrap & Goetz, P.C.*, 99 S.W.3d 349, 354 (Tex. App.–Fort Worth 2003, no pet.); *Cadle Co. v. Regency Homes*, 21 S.W.3d 670, 674 (Tex. App.–Austin 2000, pet. denied); *Clark v. Dedina*, 658 S.W.2d 293, 295 (Tex. App.–Houston [1st Dist.] 1983, writ dism'd w.o.j.).

III. PLEADINGS

A. Petition

A sworn copy of the promissory note, upon which the lawsuit is founded, should be

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attached to plaintiff's original petition. The petition should state that the defendant signed the note. "When a claim is founded on the execution of a written instrument, and the defendant does not deny under oath the execution of the instrument, the instrument shall be received in evidence as fully proved." *Boyd v. Diversified Fin. Sys.*, 1 S.W.3d 888, 891 (Tex. App.–Dallas 1999, no pet.), *citing* Rule 93(7). The petition should also state that the plaintiff is the holder of the note and state the balance due on the note.

1. Promissory Note As A Sworn Account Claim

Hou-Tex Printers v. Marbach, 862 S.W.2d 188, 190 (Tex. App.–Houston [14th Dist.] 1993) held that a note is not included within the definition of a sworn account. However, it is arguable that a note is within Rule 185 as a liquidated claim based on written contract between the parties upon which a systematic record has been kept. The court reasons that passage of title to personal property is required for a sworn account. This is not the case. See prior discussion, Part I, Sworn Accounts.

2. Conditions Precedent (Rule 54)

Rule 54 states:

In pleading the performance or occurrence of conditions precedent, it shall be sufficient to aver generally that all conditions precedent have been performed or have occurred. When such performances or occurrences have been so plead, the party so pleading same shall be required to prove only such of them as are specifically denied by the opposite party.

Plaintiff should assert that all conditions precedent have been performed or have occurred. Plaintiff is then required to prove "only such of them as are specifically denied." A condition precedent is an event that must happen or be performed before a right can accrue to enforce an obligation. *Centex Corp. v. Dalton*, 840 S.W.2d 952, 956 (Tex. 1992); *Miller v. University Sav. Assoc.*, 858 S.W.2d 33, 35 (Tex. App.–Houston [14th Dist.] 1993, writ denied)(proof of notice of intent to accelerate a note was waived by guarantor's failure to specifically deny creditor's Rule 54 pleading: "all conditions precedent have been performed or have occurred."); *Belew v. Rector*, 202 S.W.3d 849, 857 (Tex. App.–Eastland 2006, no pet.) (creditor pleaded conditions precedent as to attorney's fees; debtor waived presentment of claim under CPRC 38.002(2) by failing to affirmatively deny the same).

B. Answer

1. General Denial

"A general denial puts in issue allegations that the plaintiff is the owner or holder of the note, that the same is due, and the amount due and owing thereon." *Derbigny v. Bank One*, 809 S.W.2d 292, 294 (Tex. App.–Houston [14th Dist.] 1991, no writ). Of course, if the court were to treat the note, or a preceding debt, as a sworn account, defendant must file a verified answer pursuant to Rule 185.

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2. Denial of Signature

If the defendant denies signing the note, he should file a verified denial of execution pursuant to Rule 93(7). *See Wheeler v. Sec. State Bank, N.A.*, 159 S.W.3d 754 (Tex. App.–Texarkana 2005, no pet.)(as defendant neglected to file a verified denial of signature on a promissory note, the notes were received into evidence as fully proved). If the validity of a signature is denied in the pleadings, the burden of establishing validity is on the person claiming validity. Tex. Bus. & Com. Code §3.308.

3. Payment

Payment is an affirmative defense and must be pleaded by the defendant pursuant to Rule 95. Defendant must file with his plea an account stating distinctly the nature of such payment; failing to do so, he shall not be allowed to prove the same, unless payment is plainly and particularly described in the plea as to give the plaintiff full notice.

4. Conditions Precedent

If plaintiff pleads that all conditions precedent have been performed or have occurred, defendant should itemize and specifically deny all contested conditions. *See Hill v. Thompson & Knight*, 756 S.W.2d 824, 826 (Tex. App.–Dallas 1998, no writ)(defendant's denial of "all conditions precedent" insufficient). One commentator suggests that a Rule 54 denial be verified, though Rule 54 does not expressly require verification. Michol O'Connor & Byron P. Davis, *O'Connor's Texas Rules - Civil Trials 2011*, at 213 (2011). However, denial of some conditions precedent could be within Rule 93's verified denial requirement. For example, denial that notice and proof of loss was given or denial that claim for damage was given, must be verified per Rule 93(12).

IV. EVIDENTIARY ISSUES

A. Summary Judgment

To prevail on a motion for summary judgment, a plaintiff seeking to enforce payment under the note must establish: (1) the instrument in question; (2) that the party sued on the instrument signed the instrument; (3) that the plaintiff is the owner and holder of the note; and (4) that a certain balance is due and owing. *Docken v. Bank of Am., N.A.*, No. 04-04-00380-CV (Tex. App.–San Antonio April 20, 2005, no pet.)(unpublished, 2005 Tex. App. Lexis 2964); *Bean v. Bluebonnet Sav. Bank FSB*, 884 S.W.2d 520, 522 (Tex. App.–Dallas 1994, no writ); *Scott v. Commercial Servs. of Perry, Inc.*, 121 S.W.3d 26, 29 (Tex. App.– Tyler 2003, pet denied); *Blankenship v. Robins*, 899 S.W.2d 236, 238 (Tex. App.–Houston [14th Dist] 1994, no writ); *TrueStar Petroleum Corp. v. Eagle Oil & Gas Co.*, 323 S.W.3d 316, 319 (Tex. App.–Dallas 2010, n.p.h.). But, an affidavit stating that the, "principal balance [on a \$400,000 note], plus accrued interest and charges through March 31, 2004, . . . [is] . . . \$215,741.82," was conclusory; respondent's objection should have been sustained; summary judgment reversed. *Fairbank v. First Am. Bank*, No. 05-06-00005-CV (Tex. App.–Dallas, August 7, 2007, no pet.)(2007 Tex. App. Lexis 6228)(mem. op.). See also Proof of Balance Due, at page 30.

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B. Proof of the Note

“In an action by the holder of a note against the maker, the introduction of the note in evidence makes a prima facie case for the holder, where the execution of the note has not been denied under oath.” *Clark v. Dedina*, 658 S.W.2d 293, 296 (Tex. App.–Houston [1st Dist.] 1983, writ dismiss’d w.o.j.)(summary judgment for holder affirmed where a photocopy of a note, attached to an affidavit, in which the affiant swore that the photocopy was a true and correct copy of the original, that the affiant was the holder of the note, and that a balance was due in the amount stated).

C. Proof of Ownership

Regarding the issue of ownership, testimony in an affidavit that a particular person or entity owns the note is generally sufficient, even in the absence of supporting documentation, if there is no controverting summary judgment evidence. *Docken v. Bank of Am., N.A.*, No. 04-04-00380-CV (Tex. App.–San Antonio April 20, 2005, no pet.)(unpublished, 2005 Tex. App. Lexis 2964), citing *Zaergas v. Bevan*, 652 S.W.2d 368, 369, 26 Tex. Sup. Ct. J. 455 (Tex. 1983); *Calbert v. Assocs. Asset Mgmt., LLC*, No. 01-09-01062-CV (Tex. App.–Houston [1st Dist.], n.p.h.)(2010 Tex. App. Lexis 4383)(mem. op.).

1. Gap in Chain of Title

In *Docken, supra*, summary judgment for the bank was reversed because there was no evidence to explain how title to the note passed from a third party automotive dealer to the bank. When there is an unexplained gap in the chain of title, there is an issue of material fact regarding the ownership of the note, and the owner is required to prove the transfer by which it acquired the note. *Jernigan v. Bank One, Tex., N.A.*, 803 S.W.2d 774, 776-77 (Tex. App.–Houston [14th Dist.] 1991, no writ).

2. Corporate Merger

Ownership of a note may be obtained through corporate merger. *Couturier v. Tex. State Bank*, No. 13-03-00013-CV (Tex. App.–Corpus Christi, August 18, 2005, no pet.)(2005 Tex. App. Lexis 6630)(mem. op.).

D. Lost Note

A person who is not in possession of an instrument is entitled to enforce the instrument if: (1) the person was in possession of the instrument and entitled to enforce it when loss of possession occurred; (2) the loss of possession was not the result of a transfer by the person or a lawful seizure; and (3) the person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process. Tex. Bus. & Com. Code § 3.309(a). A person seeking enforcement of an instrument under Subsection (a) must prove the terms of the instrument and the person's right to enforce the instrument. Tex. Bus. & Com. Code § 3.309(b). See generally *Briscoe v. Goodmark Corp.*, 130 S.W.3d 160 (Tex. App.–El Paso 2003, no pet.)(holding that the notes could be enforced without the originals, because the creditors established that they were the owners, that the original notes were lost, the reason for their inability to produce them, and

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copies of the notes were admitted into evidence).

E. Proof of the Balance Due

To collect on a promissory note, the plaintiff must prove that a balance is due and owing. *See Cadle Co. v. Regency Homes*, 21 S.W.3d 670, 678 (Tex. App.–Austin 2000, pet. denied)(in addition to establishing that the principal on the notes remained unpaid, creditor must establish a certain balance was owing on the notes); *Bailey, Vaught, Robertson & Co. v. Remington Invs.*, 888 S.W.2d 860, 864 (Tex. App.–Dallas 1994, no writ (to recover on the note, creditor had to establish a sum certain due on the note). Courts do not usually require the movant to file detailed proof reflecting calculations of the balance due on a note in order to support a motion for summary judgment. *Obasi v. Univ. of Okla. Health Sci. Ctr.*, No. 04-04-00016-CV (Tex. App.– San Antonio, October 27, 2004, pet. denied)(2004 Tex. App. Lexis 9435)(mem. op.), *citing* Timothy Patton, Summary Judgments in Texas, § 9.06(2)(e) (3rd ed. 2002). Generally, an affidavit, based on personal knowledge, which identifies an attached copy of the actual note as being true and correct, the amount of the principal and interest owing on the date of default, and the interest rate accruing from the date of default is considered sufficient proof of the amount owing on a note. *Id.*; *Sandhu v. Pinglia Invs. of Tex., L.L.C.*, No. 14-08-00184-CV (Tex. App.–Houston [14th Dist.], June 25, 2009, pet. denied)(2009 Tex. App. Lexis 4781)(mem. op.)(same). *But see Fairbank v. First Am. Bank*, (Tex. App.–Dallas, August 7, 2007, no pet.)(2007 Tex. App. Lexis 6228)(mem. op.)(summary judgment affidavit that did not offer facts explaining the difference between the face amount of the note and the principal balance alleged, nor contain a ledger sheet with credits or offsets, held conclusory; judgment reversed).

Payment-history records may be used to prove the balance due at trial. Spreadsheets and data compilations may be admitted into evidence through a business record affidavit. *See* Tex. R. Evid. 902(10); *East Plano Retail Joint Venture v. Amwest Sav. Ass'n*, No. 05-93-01573-CV (Tex. App.–Dallas, August 18, 1994, no writ)(unpublished, 1994 Tex. App. Lexis 3985)(based upon the affidavit of the bank's vice-president that he monitored the status of promissory notes and collected the amounts, was the custodian of records, was familiar with the bank's procedures for keeping payment records, that he prepared the payment-history records, that records were made at or near the time in which the payment was received, and that records were true and correct copies, the bank's payment history spreadsheets qualified for the business-records exception, and the court properly considered them). The balance due may also be proved through requests for admissions or other discovery devices.

F. Variable Interest Rates

The Texas Supreme Court addressed the use of variable interest rate notes in *Amberboy v. Societe de Banque Privee*. The court held that a variable rate note which contains a provision for interest to be paid at a variable rate that is readily ascertainable by reference to a bank's published prime rate is compatible with the Uniform Commercial Code's objective of commercial certainty and is negotiable. *Amberboy v. Societe de Banque Privee*, 831 S.W.2d 793, 796 (Tex. 1992)(commercial certainty is satisfied when the information is readily

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available to the public, regardless of the means utilized to make that information available); *Pinkston v. Diversified Fin. Sys., L.P.*, NO. 07-99-0489-CV (Tex. App.–Amarillo 2000, pet. denied)(2000 Tex. App. Lexis 6962). *See also Bailey, Vaught, Robertson & Co. v. Remington Invs.*, 888 S.W.2d 860, 866 (Tex. App.–Dallas 1994, no writ)("reasonable" rate of interest applied to a note when interest is based on the no-longer-published prime rate of a defunct financial institution).

"After *Amberboy* was decided, the legislature codified its rationale by adopting the following Code section addressing the calculation of interest: Interest may be stated in an instrument as a fixed or variable amount of money or it may be expressed as a fixed or variable rate or rates. The amount or rate of interest may be stated or described in the instrument in any manner and may require reference to information not contained in the instrument. If an instrument provides for interest, but the amount of interest payable cannot be ascertained from the description, interest is payable at the judgment rate in effect at the place of payment of the instrument and at the time interest first accrues. . . ." *Cadle Co. v. Regency Homes*, 21 S.W.3d 670, 679 (Tex. App.–Austin 2000, pet. denied). *See* Tex. Bus. & Com. Code § 3.112(b).

V. ACCELERATION & NOTICE

A. Generally

Presentment, notice of intent to accelerate, and the notice of acceleration are distinct concepts. "Presentment to the maker of a note is required before the note holder can exercise an optional right to accelerate the time for any payment due on the note." *Shumway v. Horizon Credit Corp.*, 801 S.W.2d 890, 892 (Tex. 1991); *Ogden v. Gibraltar Sav. Ass'n*, 640 S.W.2d 232, 233 (Tex. 1982). "The note holder must also notify the maker of his intent to accelerate and of the acceleration, absent contractual waiver of those duties of notice." *Price v. Bustamante*, NO. 01-98-00881-CV (Tex. App.–Houston [1st Dist.] 2001, pet. denied)(2001 Tex. App. Lexis 5251); *Shumway v. Horizon Credit Corp.*, 801 S.W.2d 890, 892 (Tex. 1991)

B. Presentment

Presentment means a demand made by or on behalf of a person entitled to enforce an instrument to the party obligated to pay the instrument. Tex. Bus. & Com. Code §3.501(a)(1).

C. Notice of Intent to Accelerate

"Notice of intent to accelerate is necessary in order to provide the debtor an opportunity to cure his default prior to harsh consequences of acceleration and foreclosure." *Ogden v. Gibraltar Sav. Ass'n*, 640 S.W.2d 232, 234 (Tex. 1982). The notice of intent to accelerate must be unequivocal. *See Ogden*, 640 S.W.2d at 233 (holding that the statement: "Your failure to cure such breach may result in acceleration. . ." was insufficient notice of an intent to accelerate; judgment granted in favor of debtor against the savings association for wrongful foreclosure).

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D. Notice of Acceleration

Notice of acceleration cuts off the debtor's right to cure his default and gives notice that the entire debt is due and payable. *Ogden v. Gibraltar Sav. Ass'n.*, 640 S.W.2d 232, 233 (Tex. 1982).

E. Waiver

Presentment and notice of dishonor can be waived, see Tex. Bus. & Com. Code § 3.504. Obtaining effective waiver of notice of intent to accelerate and notice of acceleration must be done carefully. See *Shumway v. Horizon Credit Corp.*, 801 S.W.2d 890, 893 (Tex. 1991), holding "that a waiver of presentment, notice of intent to accelerate, and notice of acceleration is effective if and only if it is clear and unequivocal." To meet this standard, a waiver provision must state specifically and separately the rights surrendered. Waiver of "demand" or "presentment", and of "notice" or "notice of acceleration", in just so many words, is effective to waive presentment and notice of acceleration. *Id.* See, e.g., *Real Estate Exchange, Inc. v. Bacci*, 676 S.W.2d 440, 441 (Tex. App.-Houston [1st Dist.] 1984, no writ)(holder "shall have the option without demand or notice to the maker . . . to declare this note immediately due") (citation omitted) "Likewise, a waiver of 'notice of intent to accelerate' is effective to waive that right" (citations omitted) *Id.* at 894. "Waiver of 'notice' or even 'all notice' or 'any notice whatsoever', without more specificity, does not unequivocally convey that the borrower intended to waive both notice of acceleration and notice of intent to accelerate, two separate rights. We disapprove cases that have reached contrary results" (citation omitted) *Shumway v. Horizon Credit Corp.*, 801 S.W.2d at 894.

VI. DEFENSES

A. Limitations

Avoid limitations issues. Sue and serve defendants promptly. It is perhaps best to practice as though limitations is four years, though it is generally longer.

The reader is referred to O'CONNOR'S CPRC Plus (2010-2011) and other authorities as to this important defense. See pages 81-83 where sixteen debt collection limitations periods are summarized. A suit to enforce a note payable at a definite time must be brought within six years after the due date, or, if a due date is accelerated, within six years after the accelerated due date. Tex. Bus. & Com. Code § 3.118(a). See *Gorzell v. Tillman*, No. 11-09-00110-CV (Tex. App.-Eastland, September 9, 2010, n.p.h.)(2010 Tex. App. Lexis 7455)(mem. op.)(installment notes are notes payable at a definite time; six-year statute applies). A suit to enforce a demand note must generally be made within six years after demand. If no demand for payment is made, an action to enforce the demand note is generally barred if neither principal or interest on the note has been paid for a continuous period of 10 years. Tex. Bus. & Com. Code § 3.118(b).

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A four-year limitations period may apply to notes secured by a real property lien. See Tex. Civ. Prac. & Rem. Code § 16.035; *Shankles v. Shankles*, 195 S.W.3d 884, 885 (Tex. App.–Dallas 2006, no pet.)(four-year limitations applied to note and deed of trust); *Alsheikh v. Arabian Nat'l Shipping Corp.*, No. 14-05-00787-CV (Tex. App.–Houston [14th Dist.] June 20, 2006, no pet.)(2006 Tex. App. Lexis 5229). If a note payable in installments is secured by a lien on real property, limitations does not begin to run until the maturity date of the last installment. *CA Partners v. Spears*, 274 S.W.3d 51, 65 (Tex. App.–Houston [14th Dist.] 2008, no pet.), citing Tex. Civ. Prac. & Rem. Code § 16.035(e). If a note contains an optional acceleration clause, default does not ipso facto start limitations running on the note. *Holy Cross Church of God in Christ v. Wolf*, 44 S.W.3d 562, 566 (Tex. 2001). Rather, the action accrues only when the holder actually exercises its option to accelerate. *Id.*

1. Acknowledgment Exception

An acknowledgment of the justness of a claim that appears to be barred by limitations is not admissible in evidence to defeat the law of limitations if made after the time that the claim is due unless the acknowledgment is in writing and is signed by the party to be charged. Tex. Civ. Prac. & Rem. Code § 16.065.

"Texas courts have consistently interpreted this statute to require that an agreement: 1) be in writing and signed by the party to be charged; 2) contain an unequivocal acknowledgment of the justness or the existence of the particular obligation; and 3) refer to the obligation and express a willingness to honor that obligation." *Stines v. Stewart*, 80 S.W.3d 586, 591 (Tex. 2002)(per curiam). See also *David v. David*, No. 01-09-00787-CV (Tex. App.–Houston [1st Dist.] April 7, 2011, n.p.h.)(2011 Tex. App. Lexis 2563)(suit on 1991 note not barred because maker acknowledged the debt with a signed writing in 2006, satisfying § 16.065; suit filed in 2007).

2. Time-Barred Note; Creditor in Possession of Collateral

Where one holds the personal collateral to guarantee a debt, the holder should be able to keep the collateral, or, if the terms of the agreement so provide, sell the collateral and satisfy the debt. *Miller, Hiersche, Martens & Hayward, P.C. v. Bent Tree Nat'l Bank*, 894 S.W.2d 828, 830 (Tex. App.–Dallas 1995, no writ)(court upheld creditor's foreclosure on the collateral after the statute of limitations had run on the underlying note).

B. Payment

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