



ZOMBIE DEBT COLLECTORS

and how to beat them

Debt collector causes of action

- Suit on Sworn account; TRCP 185
 - Quantum meruit/unjust enrichment
 - Money had and received
 - Suit on a debt
 - Breach of contract
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3. ***Suit on Sworn Account, Breach of Contract, Unjust Enrichment, Quantum Meruit and/or Money Had and Received.*** In the usual course of business, Plaintiff or the original creditor sold to the Defendant one or more items of goods, wares, merchandise or services, as shown on the attached statement of account. Defendant accepted each item and became bound to pay the creditor the designated price which is the reasonable, usual and customary price for such items.

- a. Pleading in the alternative, the Plaintiff asserts it should recover based on the Defendant's promise, implied by law, to satisfy the debt resulting from the account made the basis of the suit. Otherwise, the Plaintiff will suffer from the Defendant's unjust enrichment.
- b. Pleading in the alternative, Plaintiff asserts that it or the original creditor has paid money in consideration of an act to be done by the Defendant and the Defendant has failed to perform, regardless of whether the Defendant is willing or unable to perform. As such, the Defendant holds money, which in equity and good conscience belongs to the Plaintiff.

4. ***Debt.*** Defendant has defaulted by failing to make payments on the account. The principal balance due Plaintiff on the account is \$17,048.42 after all just and lawful offsets, payments and credits have been allowed, as shown on **Exhibit A**. Plaintiff has demanded that Defendant pay this amount, but the Defendant has not done so.

TRCP 185

- “When any action is founded upon an open account or other claim for goods, wares, and merchandise...”
 - “...affidavit of the party, his agent or attorney...to the effect that such claim 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....”
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TRCP 185

- TRCP 185 is NOT a cause of action
 - “Rule 185 is not a rule of substantive law. Rather it is a rule of procedure regarding the evidence necessary to establish a prima facie right of recovery.” *Panditi v. Apostle*, 180 S.W. 3d 924, 926 (Tex. App. – Dallas 2006).
- Cannot be used for credit card accounts.
 - By its own language, TRCP 185 only applies when there is a claim for goods, wares, and merchandise.
 - *Tully v. Citibank*, 173 S.W. 3d 212 (Tex. App. – Texarkana 2005, no pet.); *Bird v. First Deposit Nat’l Bank*, 994 S.W. 2d 280 (Tex. App. – El Paso 1999, pet. denied).

Suit on Sworn Account

- Elements of suit on sworn account
 - a sale and delivery of goods or services
 - the charges on the account are “just”
 - the prices are charged in accordance with an agreement OR
 - are the usual, customary, and reasonable prices for that good or service
 - the amount remains unpaid
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Suit on Sworn Account

"A sworn account applies only to transactions between persons, *in which there is a sale upon one side and a purchase upon the other, whereby title to personal property passes from one to the other...*" *Bird v. First Deposit Nat'l Bank*, 994 S.W. 2d 280 (Tex. App. – El Paso 1999, pet. denied).

Quantum Meruit

- Elements:
 - P provided valuable services or materials for the D
 - D accepted the services or materials
 - D had notice that P expected to be compensated
 - P cannot recover in quantum meruit if there is a valid express contract.
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Unjust Enrichment

- A party may recover under unjust enrichment when one person has obtained a benefit from another by fraud, duress, or the taking of undue advantage. *Heldenfels Bros., Inc. v. City of Corpus Christi*, 832 S.W. 2d 39, 41 (Tex. 1992).
 - Two year statute of limitations.
 - Cannot recover under theory of unjust enrichment if there is an express contract.
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Money Had and Received

- a person has obtained money from another by fraud, duress, or undue advantage
 - 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
 - the action is to recover money received on consideration that has failed in whole or in part;
OR
 - there is a surplus arising on the sale of the security for a debt.
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Suit on a Debt

- existence of a contract
 - complete performance of the consideration required of it
 - the amount demanded was agreed upon by plaintiff or represented the figure calculable under the contract as the proper amount to be paid
 - Appears to be a breach of contract action
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Breach of Contract

■ Elements

- Valid, enforceable contract
 - P has standing to sue for breach
 - P performed or tendered performance
 - D breached the contract
 - D's breach caused P's injury
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Defendant's Answer

- Verify?
 - Not necessary under TRCP 185
 - Challenge to P's ownership of claim
 - Not clear if the challenge is of capacity or standing
 - If challenge is of capacity, must file verified denial, or issue is waived
 - If challenge is of standing, it is a matter of subject matter jurisdiction and can be raised at any time.
 - Denial of genuineness of the indorsement or assignment. TRCP 93(8). There still must be proof of the *existence* of the assignment.
 - Denial of account. TRCP 93(10)
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Defendant's Answer

- Affirmative Defenses:
 - Statute of Limitations – Four years
 - Special Exceptions
 - Did not plead all elements of its cause of action
 - Suit is precluded by law (P's cause of action does not exist)
 - Pleadings ask for attorney fees in a general allegation but do not specify which statute makes them available.
 - Counterclaim
 - FDCPA; TDCPA
 - Declaratory Judgment
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Discovery Requests

- P's usually incorporate requests into their petition
 - Use requests to set up No Evidence Motion for Summary Judgment.
 - If no response, Motion to Compel and Motion for Sanctions
 - Motion for Sanctions will survive a nonsuit
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Motion for Summary Judgment

- Motion to dismiss for lack of standing.
 - File after adequate time for discovery has passed.
 - P has no evidence of any element of cause of action.
 - No genuine issue of material fact (for claims that require sale of goods or services)
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Plaintiff's Evidence

- Proof of assignment
 - If any produced, check date of document against date of alleged charge-off and assignment
 - Assignments reference an electronic file or other document (ex: profile) which contains the accounts being assigned. That file is never produced.
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Plaintiff's Evidence

- Contract and correspondence
 - Usually only exemplary documents
 - Account information
 - Internally created. Only serves as proof that P *alleges* that D owes debt to P.
 - Does not qualify as business record
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Plaintiff's Evidence

■ Affidavits

- Factual statement made by someone with *personal knowledge*
- Authentication of business records; TRE 803(6); 902
 - Prepared by the custodian of records; custodian only needs personal knowledge of how records are prepared and kept
 - Records must have been made at or near the time of the event
 - Records must be attached to the affidavit
 - If used in trial, must be filed with clerk and notice sent to other parties at least 14 days before trial
- Plaintiffs' affidavits are a mixture and are insufficient for either purpose.

AFFIDAVIT OF ACCOUNT

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

1. My full name is Brenda Aspray
2. I am employed by LVNV Funding LLC, and I or a person under my supervision has care, custody, and control of all records concerning the account of Carmen Longoria, the Defendant.
3. I hereby aver that this claim is within the personal knowledge of the affiant, is just and true, and is due by the Defendant to the Plaintiff and that all just and lawful offsets, payments and credits to this account have been allowed.
4. These records show that a total principal balance of \$17048.42, exclusive of interest, is due and payable by Carmen Longoria, Defendant, to LVNV Funding LLC, Plaintiff, and demand for payment was made more than thirty days ago.
5. The last payment on this account was made on 2/9/2005 and as such, the statute of limitations has not run on this account.

Further Affiant sayeth not.

Brenda Aspray
Authorized Representative
October 2nd, 2006

STATE OF South Carolina)

COUNTY OF Greenville)

Subscribed and sworn to before me, a Notary Public, this 2nd day of October, 2006.

[Signature]
Notary Public