Presentation By

The Texas Creditor's Bar Association

To

The Supreme Court Advisory Committee

Austin, Texas
June 22, 2012

Texas Creditor's Bar Association

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June 18, 2012

Supreme Court Advisory Committee
Supreme Court of Texas
Post Office Box 12248
Austin, Texas 78711-2248

Re: Proposed Changes to the Rules of Civil Procedure for Justice Courts

Members of the Advisory Committee:

The Texas Creditor's Bar Association ("TXCBA") is an association of member attorneys from approximately twenty Texas law firms, the majority of whom practice in the area of debt collection. TXCBA member attorneys are responsible for filing more than 100,000 collection cases per year in Texas courts; the majority of which deal with consumer debt and most of which are filed in the justice courts. As such, TXCBA attorneys are uniquely aware of the handling of debt collection cases in these courts and of both the opportunity for improvement, as well as the potential for calamity that a modification of the rules of civil procedure may occasion.

The TXCBA's Executive Committee has reviewed the rule proposal put forward by the Justice Court Rules Task Force. While the TXCBA appreciates the significant effort undertaken, it has grave concerns regarding Rule 578 which pertains to default judgments in debt collection cases. It is the position of the TXCBA that the enactment of Rule 578, as proposed, could result in the decision by debt purchasers to forgo the filing of debt collection cases in Texas; resulting in as many as 50,000 cases being driven from the courts simply by operation of this rule. The TXCBA does not believe this was the legislature's intent when it mandated the current rule making process.

The enclosed document details the TXCBA's response to the rule proposal and sets forth areas of opportunity, as well as suggestions for improvement which it would urge the Supreme Court to consider.

Finally, the TXCBA wishes to express its appreciation for your consideration of these issues and to convey to the Supreme Court and to the members of the Supreme Court Advisory Committee its willingness to contribute to the preparation of a set of rules which meet the goal of the legislation and the needs of the court.

Sincerely,

Michael J. Scott
Texas Creditor's Bar Association
Chairman, Justice Court Rules Executive Committee

EXECUTIVE SUMMARY

The Texas Creditor's Bar Association ("TXCBA"), is an association of attorneys which practice in the area of debt collections. TXCBA attorneys file more than 100,000 collection cases per year in Texas courts; the majority of which concern consumer debts, such as credit cards and auto loans. Most of these cases are filed in the justice courts.

The TXCBA has grave concerns regarding the adoption of Rule 578, pertaining to the default judgment process in justice courts. This rule severely limits the justice court's ability to enter judgments on submission and goes far beyond what is required in courts of record for the granting of a similar judgment. Specifically, Rule 578 requires:

- The providing of numerous account documents, none of which pertain to damages (the only element at issue in a default case);
- The filing of a business records affidavit in every case; and
- The filing of an affidavit by the original credit grantor in every assigned debt case.

Rule 578's requirement for the filing of numerous account related documents has no bearing on the issue of damages. These documents only serve to establish liability; which, as a matter of law, has been confessed by defendant's default. As such, the proposed rule seeks to completely overturn a rational rule that has been applied throughout the entire history of Texas (and American) jurisprudence; dispensing with the full burden of proof upon default by the opposing party is one of the key efficiencies in an adversarial system of justice. Creditors do not seek to evade their duty to prove their damages, but are entitled to the same status as any other litigant with respect to the effect of a default.

Rule 578's requirement for the filing of a business records affidavit apparently seeks to overcome a hearsay objection that has not been raised. The rule ignores the expressed language of Texas Rule of Evidence 802 and contravenes the Supreme Court's decision in *Texas Commerce Bank v. New*, 3 S.W.3d 515 (Tex. 1999). In so doing, the rule attempts to create new law.

Further, the additional requirement for the filing of an affidavit from the original credit grantor in assigned debt cases ignores Texas Rule of Evidence 803(15) and contravenes Texas case law, much of which was authored or adopted by members of the Supreme Court Advisory Committee. As a practical matter, many original lenders no longer exist, having merged with other lenders, thereby prejudicing such claims.

Finally, proposed Rule 578 falls short of the legislative mandate that the rules "may not be so complex that a reasonable person without legal training would have difficulty understanding or applying" the rules. In so doing, it attempts to incorporate (incorrectly) rules of evidence when the statute plainly mandates dispensing with them.

The TXCBA offers recommendations for improvement of Rule 578, as well as for other rules of the justice courts, so as to ensure the fair, expeditious, and inexpensive resolution of justice court cases.

INTRODUCTION

The Texas Creditor's Bar Association ("TXCBA") is an association of member attorneys from approximately twenty Texas law firms, all of whom practice in the area of debt collections. TXCBA member attorneys are responsible for filing more than 100,000 collection cases per year in Texas courts; the majority of which are filed in the justice courts. As such, the TXCBA and its members have a significant interest in the Texas civil court rule making process, especially as it affects its member's practice and the claims of its member's clients. It is from this perspective that the TXCBA wishes to contribute to the rule making process.

Before addressing the specifics of the proposed rules themselves, the TXCBA wishes to express its appreciation for the hard work and Herculean task undertaken by the Justice Court Rules Task Force appointed by Order of the Supreme Court, September 1, 2011 (hereinafter, the "Task Force"). While the TXCBA has significant disagreement as it relates to the issue of default judgments (Rule 578), it does not wish for those concerns to be construed as a lack of recognition for the scope of work effort and the overall accomplishment of the Task Force. Further, the TXCBA wishes to express its appreciation to the Task Force for inviting the TXCBA to make recommendations regarding the proposed rules and in accepting and adopting many of the TXCBA's suggestions.

SUMMARY OF PRESENTATION

The TXCBA strongly believes that Rule 578, pertaining to default judgments, is seriously flawed. As such, much of this presentation will be directed at that rule. However, the TXCBA also believes there are additional opportunities to improve and clarifying the rules advanced by the Task Force. These too will be addressed, though not at a level of detail as will Rule 578.

These materials are organized into three sections,

Section A The Default Judgment Rule - a review of the errors contained in Rule 578 as proposed

Section B A Different Approach - TXCBA's Proposed Debt Collection Rules

Section C Other Opportunities for Improvement - a limited number of suggested rule revisions which would aid in the administration of the rules and simplify the handling of cases

RESOURCE INFORMATION

TXCBA Proposal to the Justice Court Rules Task Force
TXCBA Correspondence to the Justice Court Rules Task Force
TXCBA Response to the Draft Rules by the Justice Court Rules Task Force
TXCBA Lay Article on Admissibility of Records Obtained from Third-Parties

SECTION A

RULE 578 - THE DEFAULT JUDGMENT RULE

While the TXCBA recognizes the many challenges faced by the Task Force, it wishes to convey to the Supreme Court Advisory Committee its grave concerns regarding Rule 578.

As described by Texas Supreme Court Justice Thomas R. Phillips (Ret.), the current efforts by both the legislature and the judiciary seek to make the courts more efficient, more accountable, and the outcome more certain. [1] It is fair to say that Texas Government Code Sec. 27.060 codifies these objectives. The statue mandates that the Texas Supreme Court develop rules of civil procedure ***"to ensure the fair, expeditious, and inexpensive resolution of small claims cases***." [2] And while the statute specifically provides for the creation of a unique set of procedural rules for credit grantor and assigned debt claims ("Debt Collection Cases"), it retains the overall expectation that ***all justice court rules***:

(1) not require that a party be represented by counsel

(2) not be so complex that a reasonable person without legal training would have difficulty understanding or applying the rules; or

(3) not require that discovery rules adopted under the Texas Rules of Civil Procedure or the Texas Rules of Evidence be applied

Rule 578, along with its tie-in provision to Rule 525, is wholly inconsistent with the legislative mandate. Not only does it seek to create a complicated set of rules which enshrine various aspects of the Texas Rules of Evidence, but in so doing, it represents a substantial departure from Texas law. Specifically, Rule 578:

1) Ignores the confession of liability inherent in a defendant's default;
2) Ignores the legislative mandate regarding development of the rules;
3) Is inconsistent with the Texas Attorney General's damage affidavit standards;
4) Imposes an evidentiary standard which does not exist in Texas law; and
5) Attempts to suppress developing case law.

It is the position of the TXCBA that Rule 578, as proposed, would have two major affects. The first would be to unnecessarily increase the operational burden on collection attorneys with no demonstrable benefit to the defendant, the courts or the justice process. The second would be the likely departure of many of these collection cases from the courts. If, in fact, this is the ultimate goal -- to eliminate debt collection cases in Texas -- then Rule 578 is a good start.

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[1] Paraphrase of statement made by Justice Phillips, chair the Supreme Court Task Force for Rules in Expedited Actions, in a presentation on "Rules Affecting Practice from the 82nd Legislature," February 28, 2011, webinar, CLE #901239468.

[2] Sec. 27.060(a).

Rule 578 Ignores the Confession of Liability Inherent in Defendant's Default

Rule 578 contains numerous evidentiary requirements, ***all of which*** go to the issue of liability and ***none of which*** bear on the issue of damages. Specifically, Rule 578 requires that the plaintiff provide the following information in order to obtain a default judgment on submission:

> "(b) Required Documents**.** To support a default judgment, these documents ***must include***:
>
> (1) A document signed by the defendant evidencing the debt or the opening of the account; or
>
> (2) a bill or other record reflecting purchases, payments, or other actual use of the credit card or account by the defendant; or
>
> (3) an electronic printout or other documentation from the original creditor establishing the existence of the account and showing purchases, payments, or other actual use of a credit card or account by the defendant."

[***emphasis added***]

While these documents comprise clear evidence of liability; liability is established as a consequence of the defendant's default and the amount of unliquidated damages remains the only matter to be determined by the court. [3] As such, these documents simply become onerous requirements placed upon plaintiffs for no purpose other than to satisfy the skepticism of the court.

Rule 578 Ignores the Legislative Mandate

Rule 578 creates an evidentiary burden which is inconsistent with Texas law. Specifically, Rule 578 states:

> "(c) Requirements of Affidavit. Any affidavit from the original creditor ***must state***:
>
> (1) that they were kept in the regular course of business,
>
> (2) that it was the regular course of business for an employee or representative of the creditor with knowledge of the act, event, condition, opinion, or diagnosis, recorded to make the record or to transmit information to be included in such record;
>
> (3) the record was made at or near the time or reasonably soon thereafter; and
>
> (4) the records attached are the original or exact duplicates of the original.

[***emphasis added***]

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[3] *Dolgencorp v. Lerma*, 288 S.W.3d 922, 930 (Tex. 2009); *Holt Atherton Indus., Inc. v. Heine*, 835 S.W.2d 80, 86 (Tex.1992); see also TEX.R. CIV. P. 243.

While the required affidavit would seemingly satisfy the requirements of a hearsay exception under Texas Rule of Evidence 803(6) and constitute substantial conformity with Rule 902(10), there remains a central issue: ***the legislative mandate required that the new justice court rules not reference the Texas Rules of Evidence***. Technically speaking, Rule 578 does reference the Texas Rules of Evidence, it simply attempts to restate them. It is doubtful that the legislature intended for the Supreme Court to simply circumvent its mandate in this way.

Rule 578 is Inconsistent with the Texas Attorney General's Damage Affidavit Standards

In 2011, the Consumer Protection Division of the Texas Attorney General's Office brought a civil action against Midland Funding, LLC and related entities ("Midland") alleging, in part, that Midland failed to employ sufficient controls in the preparation of account affidavits utilized by Midland to establish damages in debt collection cases.[4] The case was ultimately settled. In addition to a final judgment in the case, the State of Texas and Midland entered into an *Agreed Assurance of Voluntary Compliance* ("Compliance Agreement").

The Compliance Agreement directly addressed Midland's process for preparing and executing such affidavits. Specifically, paragraph 3(a)(i)-(iii) of the Compliance Agreement requires:

> "a) In connection with the use of affidavits in any court in the State of Texas for the collection of Consumer Debts:
>
> i) Midland will not file an affidavit in a Texas court unless (a) the facts stated in the affidavit are ***based upon the affiant's review of the business records of Midland*** or his or her personal knowledge and (b) the affidavit is signed in the presence of a notary;
>
> ii) For affidavits used to substantiate a Consumer Account, Midland shall include the following information in affidavits executed after the date of this AVC and filed in any Texas court to the extent the information is known to Midland or in Midland's possession:
>
> the identity of the Original Creditor;
> the identity of the subsequent owners of the Consumer Account;
> last four digits of the original account number;
> date of charge off of the Consumer Account by the Original Creditor;
> the amount charged off by the Original Creditor; and
> the current balance owed on the Consumer Account.
>
> To the extent the current balance owed includes any post charge-off interest, fees or other charges, such amounts shall be stated separately. Amounts sought, if any, representing attorneys' fees or reimbursement of court costs shall be supported in accordance with applicable statutes, court rules or procedures.

[4] *State of Texas v. Midland Funding, LLC, et al.*, Cause No. 2011-40626 in the 165th Judicial District Court, Harris County, Texas.

iii) Midland will employ paralegals or other legal specialists to review and sign affidavits, to ***confirm that any Consumer and Consumer Account information referenced in those affidavits is consistent with information contained in Midland's business records and data***, and to review any attachments to proposed affidavits to confirm that true and correct copies of the referenced documents are attached;"

[***emphasis added***, text reformatted for readability]. See **Section A, Exhibit 1**, page 3.

Rule 578 stands in stark contrast to the requirements of the Compliance Agreement. Whereas the Compliance Agreement sets forth a basic list of informational elements which must be addressed in any account affidavit and allows for these items to be based upon a "review of the business records of Midland," Rule 578 takes a much harsher stance; requiring voluminous documentation and testimony from the original creditor.

The TXCBA wishes to highlight to the Supreme Court and to the Advisory Committee the fact that an agency of the State of Texas charged with the protection of Texas consumers has endorsed the creation of a debt purchaser's damage affidavit which (a) contains specific and discrete account information, and (b) is based only upon a review of that debt purchaser's own business records.

Rule 578 Imposes an Evidentiary Standard Which Does Not Exist in Texas Law

> "I am a custodian of records for the bank. I have reviewed the records of the bank and according to those records, the amount owed is $729,510.96."
>
> – Paraphrase of damage testimony *Texas Commerce Bank v. New*

While the affidavit required by Rule 578 would seemingly satisfy the requirements of a hearsay exception under Texas Rule of Evidence 803(6) and constitute substantial conformity with Rule 902(10), there remains another central issue: ***this is a prove-up***. As such, the overcoming of a hearsay objection is a burden to be met at trial once an objection has actually been made; not a responsibility to be imposed upon every petitioner who brings a debt collection case in justice court. Further, Rule 578 wholly discards the Texas Supreme Court's reasoning in *Texas Commerce Bank v. New*, 3 S.W.3d 515 (Tex. 1999). In the *New* case, the Court held that an affidavit may be offered as evidence at a default judgment hearing and that the testimony therein, though hearsay, is admissible to prove-up a claim. The *New* decision was important for a number of reasons: (1) it confirmed that when proving-up a default judgment, the court may rely upon affidavit testimony, (2) it implicitly held that the prove-up affidavit may be based upon a review of the business' records, and not be solely limited to the affiant's own personal knowledge, and (3) it reminded the courts that pursuant to TRE 802, hearsay testimony is admissible as evidence absent an objection, and that it was an abuse of discretion to exclude such evidence in a unopposed prove-up hearing. A copy of the *Texas Commerce Bank v. New* case is attached as **Section A, Exhibit 2**, as is a copy of the damage affidavit in that case (the "*New* Affidavit") (**Section A, Exhibit 3**).

A review of the *New* Affidavit highlights certain key issues in proving up unliquidated damages. In the *New* Affidavit there are no documents, not business record attestations, no expanded detail to prove the trustworthiness of the testimony. The witness simply testifies "I have reviewed the records of the deposit account . . . which is at issue in this lawsuit." The Court found the affidavit's predicate sufficient to sustain a $729,510.96 default judgment award. Unfortunately, the proposed Rule 578 is not so trusting. It chooses, instead, to create a new evidentiary burden. In so doing, Rule 578 turns the Texas Rules of Evidence and Supreme Court precedence upside down; requiring that plaintiff meet and overcome a hearsay objection at default, even in the absence of an opposing party. As such, Rule 578, itself, becomes the defendant's advocate.

Rule 578 Attempts to Suppress Developing Case Law

There exists in Texas an apparent split of authority over whether the assignee of a debt claim may offer as its own business records the information and documents which it obtained from its predecessor-in-interest. Whether such a split truly exists is the subject of considerable debate among debt collection attorneys and judges. In actuality, the admissibility of information and documents obtained from a third-party has been adopted by at least eight separate circuits of the United States Courts of Appeals, as well as eight of the fourteen Texas appellate districts. (See Resource Information for a lay presentation of the case). So, what at first appears to be a split in authority may, in actuality, be reconcilable once the facts of the individual cases are considered.

The issue of the admissibility of such documents is best characterized by a line of cases originating with *Simien v Unifund CCR Partners*, 321 S.W.3d 235 (Tex.App--Houston[1st] 2010). In *Simien*, the court held that documents obtained from a predecessor-in-interest are admissible as the proponent's own business records when:

1) the documents are incorporated and kept in the course of the testifying witness's business;

2) that business typically relies upon the accuracy of the contents of the document; and

3) circumstances otherwise indicate the trustworthiness of the document.

It is probably fair to say that the Task Force does not like *Simien*. In fact, they do not like *Simien* so much, that they are advocating a rule of civil procedure designed specifically to render *Simien* and similar cases ineffective. Specifically, Rule 578 states:

> "(a) **Default Judgment Without Hearing.**
> . . . The following documents . . . must be served on the defendant before a default judgment can be granted without a hearing:
> (1) . . . This document shall be ***supported by affidavit from the original creditor***.
> (2) . . . be attached and shall be ***supported by affidavit from the original creditor***.
>
> "(c) **Requirements of Affidavit.** Any affidavit ***from the original creditor*** must state:"

By requiring an affidavit from the original issuer to prove-up a default judgment, the Task Force is effectively eliminating purchased debt cases from these courts. The reality is that it is practically impossible for a debt purchaser to obtain an affidavit from an original issuer on an account-by-account basis. Further, the natural consequence of this rule is for justice court judges to view these default judgment requirements as the minimum standard of proof; ***effectively establishing this evidentiary burden in all cases and in all circumstances***. The Task Force may say that these rules only pertain to prove-ups – they will not. The Task Force may say that there will be an opportunity for an oral hearing – there will not. The Task Force may say that the court has discretion to consider other evidence – it will not. It is the consensus view of the members of the TXCBA, based upon years of experience in practicing in the justice courts, that there is very little chance that a justice court judge will grant any sort of judgment on evidence which that judge was told was insufficient to prove-up a default in a case.

Finally, the TXCBA urges the Supreme Court and the Advisory Committee to keep in mind the fact that *Simien* is a case pertaining to ***the admissibility of evidence over objection***. The information and documents which were obtained from a third-party in a business transaction, which were material to that transaction, and which were relied upon by the proponent of the information in the conduct of its business, fall squarely within a hearsay exception provided by TRE 803(15) (Statements in Documents affecting an interest in property). Numerous courts have found such information to be admissible, not only for prove-up, but at trail over objection.

Summary of TXCBA's Objections to Rule 578 as Proposed

Rule 578, as proposed, is fixated upon plaintiff's proving the validity of its claim to the satisfaction of a skeptical court. To create such a requirement is to wholly change the nature of a default judgment in Texas. The Task Force seeks to modify the legal standards as they relate to the sufficiency of the evidence offered to prove damages. In the Task Force's view, the testimony of an affiant is no longer enough; properly authenticated business records must be required. And not just any business record; those of the original issuer. Presumably, the Texas Attorney General's Office could have sought to compel Midland to meet such an enhanced standard in its settlement with that debt purchaser, but did not do so; probably because it believed the requirements set forth in the Compliance Agreement were consistent with the requirements of the law and sufficient to protect Texas consumers.

The TXCBA asks the Supreme Court and its Advisory Committee two simple questions:

1) Are the legal underpinnings of the rules of civil procedure, as well as that of Texas jurisprudence, so readily discarded for the sake of social expediency?

2) Are there to be two types of law in Texas? Justice Court law and the law that applies to everything else?

CAUSE NO. 2011-40626

STATE OF TEXAS,	§	**In the District Court of**
	§	
	§	
Plaintiff,	§	**Harris County, Texas**
	§	
v.	§	
	§	
MIDLAND FUNDING LLC,	§	
MIDLAND CREDIT MANAGEMENT, INC.	§	
and ENCORE CAPITAL GROUP, INC.,	§	**165th Judicial District**
	§	
Defendants	§	
	§	

AGREED ASSURANCE OF VOLUNTARY COMPLIANCE

TO THE HONORABLE JUDGE OF SAID COURT:

Plaintiff, the State of Texas ("State"), acting by and through the Attorney General of Texas, Greg Abbott, and Defendants Midland Funding LLC, Midland Credit Management, Inc. and Encore Capital Group, Inc. (collectively, "Midland"), by and through their attorney of record, respectfully submit the following Assurance of Voluntary Compliance ("AVC") for the Court's approval and filing in accordance with the Deceptive Trade Practices – Consumer Protection Act ("DTPA"), Tex. Bus. & Com. Code Ann. § 17.58. This AVC is attached as Appendix A to the Agreed Final Judgment entered in this case.

I. STIPULATIONS/DEFINITIONS

1) The parties hereby agree and stipulate that

   a) Prior to the filing of the present action by the State, Midland had already substantially revised its affidavit procedures, had created and published its Consumer Bill of Rights,

APPENDIX A

and had undertaken several other measures to address concerns articulated by the State in the present action;

b) The State and Midland agree to the entry of this AVC by this Court;

c) The corporate signatories are fully authorized to sign this AVC on behalf of Midland;

d) The Office of the Attorney General has jurisdiction in this matter under the DTPA § 17.47 and Tex. Fin. Code § 392.403(d);

e) The venue of this cause is proper in Harris County, Texas; and

f) Midland's consent to the entry of this AVC is not an admission of liability by Midland, its officers, agents, servants, employees, successors, assigns, or affiliates as to any issue of fact or law.

2) As used in this AVC, the following terms are defined as follows:

a) "Consumer" means an individual residing in the State of Texas who has a Consumer Debt or allegedly has a Consumer Debt.

b) "Consumer Debt" means an obligation, or an alleged obligation, primarily for personal, family or household purposes and arising from a transaction or alleged transaction.

c) "Consumer Account" means an account for a Consumer Debt that Midland has acquired the rights to collect.

d) "Original Creditor" means a party, other than a Consumer, to a transaction or alleged transaction giving rise to a Consumer Debt.

e) "Debt Collection" means an action, conduct, or practice in collecting, or in soliciting for collection, Consumer Debts that are due or alleged to be due.

f) "Procedure" means a procedure developed and utilized by Midland for conducting its business that is in effect as of the effective date of this AVC and includes any future

modifications to the procedure which do not materially alter or undermine the purpose of the procedure.

II. TERMS OF VOLUNTARY COMPLIANCE

3) Midland, its officers, agents, servants, employees, successors, and assigns hereby voluntarily agree and assure the State, from the date of the signing of this AVC, that Midland will itself, or through its affiliates, cause the following:

a) In connection with the use of affidavits in any court in the State of Texas for the collection of Consumer Debts:

i) Midland will not file an affidavit in a Texas court unless (a) the facts stated in the affidavit are based upon the affiant's review of the business records of Midland or his or her personal knowledge and (b) the affidavit is signed in the presence of a notary;

ii) For affidavits used to substantiate a Consumer Account, Midland shall include the following information in affidavits executed after the date of this AVC and filed in any Texas court to the extent the information is known to Midland or in Midland's possession: the identity of the Original Creditor; the identity of subsequent owners of the Consumer Account; last four digits of the original account number; date of charge off of the Consumer Account by the Original Creditor; the amount charged off by the Original Creditor; and the current balance owed on the Consumer Account. To the extent the current balance owed includes any post charge-off interest, fees or other charges, such amounts shall be stated separately. Amounts sought, if any, representing attorneys' fees or reimbursement of court costs shall be supported in accordance with applicable statutes, court rules or procedures;

iii) Midland will employ paralegals or other legal specialists to review and sign affidavits, to confirm that any Consumer and Consumer Account information referenced in those affidavits is consistent with information contained in Midland's business records and data, and to review any attachments to proposed affidavits to confirm that true and correct copies of the referenced documents are attached;

iv) Midland's Procedures for the generation and use of affidavits will be in writing, and each employee who has job duties involving the preparation and signing of affidavits to be used in collection matters will be regularly trained on those Procedures; and

v) Midland's Procedures for the generation and use of affidavits to be used in collection matters will require, at a minimum, the following of those paralegals or other legal specialists who are employed to review and sign affidavits:

(1) Such employees must carefully review any proposed affidavit prior to executing the proposed affidavit;

(2) Such employees must confirm that all of the data points in the proposed affidavit accurately reflect data in Midland's account records prior to executing the proposed affidavit;

(3) To the extent that a proposed affidavit includes attachments, such employees must carefully review the proposed affidavit and attachments to confirm that true and correct copies of documents contained within Midland's records are attached and are accurately described in the proposed affidavit; and

(4) Only after such review and confirmation of any proposed affidavit, such employees will execute those affidavits passing review in the presence of a notary.

b) In connection with Debt Collection of a Consumer Debt in Texas:

i) Midland will follow its Procedures designed to identify Consumer Accounts that are within 150 days before an estimated statute of limitations expiration date using the charge off date of the Consumer Account by the Original Creditor and preclude those Consumer Accounts from being referred for potential litigation in Texas;

ii) Midland will instruct firms to which Midland places Texas Consumer Accounts for Debt Collection ("LO Firms") that the LO Firms are responsible for calculating the limitations period for each Consumer Account according to applicable law, that a lawsuit should not be filed on an account for which the statute of limitations has expired, and that the prosecution of any lawsuit brought to collect on an account must cease and the suit must be non-suited promptly if it is determined the suit was filed after the applicable statute of limitations had expired unless there is a good faith belief that a lawful exception to limitations exists to a particular account not including the good faith belief that a payment made on an account renews or restarts the limitations period;

iii) Midland will provide the following information to LO Firms to the extent the information is available to Midland and instruct LO Firms to include in their petitions, where permitted by court rules, the following information to the extent available: the identity of the Original Creditor; last four digits of the original account number; date of the charge off of the Consumer Debt and amount charged off; and

iv) Midland will instruct its LO Firms in suits for collections of Consumer Debts not to serve requests for admissions on a Consumer which requests the Consumer to admit a fact that LO Firm knows or has reason know is false.

c) In order to prevent the misrepresentation of the character, extent, or amount of Consumer Debt owed on an account, Midland will continue to adhere to the following Procedures regarding the collection of Consumer Debt from residents of the State of Texas: Midland will request from the seller of a Consumer debt portfolio information regarding the identity and address of the individual(s) responsible for the account, the balance owed, the date of last payment, the charge-off date, and the applicable interest rate pursuant to the terms and conditions of the credit agreement. Once Midland owns an account, Midland will use its Procedures to update regularly the Consumer Account information, which in addition to the information listed above, will include whether the account has been discharged in bankruptcy, or if the individual(s) responsible for the account are deceased. Midland will base all communications with the individuals responsible for the debt, credit bureaus, and/or any other parties entitled to such communications on data which it reasonably believes to be reliable and will comply with all applicable laws and regulations regarding such communications.

d) Midland will not knowingly employ or permit its agents, employees, representatives, LO Firms, or affiliates to employ any deceptive means to collect a debt or obtain information concerning a consumer.

e) Midland will continue to adhere to Procedures that are designed to address disputes, allow for modifications of Midland's Debt Collection practices, where appropriate, and provide account holders an opportunity to cure.

f) Midland will continue to dedicate representatives to resolve disputes or address questions from Texas Consumers.

g) Midland will instruct its LO Firms that they may not utilize process servers other than (i) officers from the local sheriff or constable's office; and (ii) process servers who are certified process servers pursuant to Rule 14 of the Rules of Judicial Administration, as promulgated by the Texas Supreme Court, and who have not had their certification suspended or revoked by the Process Server Review Board at any time; provided however, that for rural counties or other areas in which a certified process server is not available, LO Firms may utilize a reputable non-certified process server.

h) Within 90 days of the effective date of this AVC, Midland will notify the credit reporting bureaus, Equifax, Experian, and Trans Union that Midland requests the lawsuits and judgments be removed from the credit reports of any Consumer who (1) was a defendant in an action filed on behalf of Midland or its affiliates to collect a Consumer Debt between January 1, 2002 and August 31, 2009, (2) was a Texas resident at the time the action was filed, and (3) against whom a judgment was entered. The notice to the above-referenced credit reporting bureaus will contain a list of affected account holders.

i) Within 30 days of the effective date of this AVC, Midland will provide notice of this Assurance of Voluntary Compliance and Agreed Final Judgment to each of Midland's LO Firms handling collection matters on Midland's behalf in Texas.

j) Within 30 days of the effective date of this AVC, Midland will provide the Consumer Protection Division of the Office of Attorney General with the name and contact information of a representative of Midland who will be responsible for assisting with responding to Consumer complaints received by the Consumer Protection Division.

III. GENERAL PROVISIONS

4) The effective date of this AVC shall be deemed in effect from the day the Agreed Final Judgment is entered by the Court.

5) To seek a modification or termination of this AVC for any reason, Midland will send a request to the Attorney General. The Attorney General will make a good faith evaluation of the then existing circumstances, and after collecting information the Attorney General deems necessary, make a prompt decision as to whether to agree to the modification or termination of this AVC. In the event the Attorney General timely denies the modification or termination, Midland reserves all rights to pursue any legal or equitable remedies that may be available to it. No waiver, termination, modification, or amendment of the terms of this AVC shall be valid or binding unless made by order of the Court; provided, however, the parties may agree to an extension of any time periods in this AVC without an order of the Court.

6) Midland will respond to reasonable requests by the Office of Attorney General regarding its compliance with the provisions of this AVC.

7) Jurisdiction is retained for the purpose of enabling any party to this AVC to apply to the Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this AVC, for modification of the provisions, and for enforcement.

8) This AVC is not intended to grant or limit any legal rights or remedies of any nature of any third party. This AVC may not be relied upon by third parties to assert or defend any rights or remedies that they might have or pursue.

9) The State's execution of this AVC does not constitute approval by the State of any Procedures of Midland.

10) Any notices or other documents required by this AVC to be sent to the Attorney General or to Midland shall be sent to the following addresses:

Office of the Texas Attorney General
Consumer Protection & Public Health Division
Attention: Assistant Attorney General Rosemarie Donnelly
808 Travis, Suite 1520
Houston, Texas 77002

Midland Credit Management, Inc.
Attention: General Counsel
3111 Camino del Rio North, Suite 1300
San Diego, CA 92108

11) This AVC may be executed in any number of counterparts and each of which when so executed shall be deemed an original and all of which taken together shall constitute one and the same AVC. True and correct copies of signatures by any of the parties hereto are as effective as original signatures.

AGREED this 22 day of December, 2011

GREG ABBOTT
Attorney General of Texas

DANIEL T. HODGE
First Assistant Attorney General

BILL COBB
Deputy Attorney General for Civil Litigation

TOMMY PRUD'HOMME
Chief, Consumer Protection Division

PAUL D. CARMONA
Deputy Chief, Consumer Protection Division

MIDLAND FUNDING, LLC

Signed By: _____

Print Name: GREG CALL

Print Title: SECRETARY

MIDLAND CREDIT MANAGEMENT, INC.

Signed By: _____

Print Name: Greg Call

Print Title: SVP, General Counsel

ENCORE CAPITAL GROUP, INC.

Signed By: _____

Print Name: Greg Call

Print Title: SVP, General Counsel

ROSEMARIE DONELLY
SBN 05983020
Assistant Attorney General
Consumer Protection Division
808 Travis, Suite 1520
Houston, Texas 77002
Telephone 713-225-8919
Facsimile 713-223-5821

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ANDREW WEBER
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Telephone: 512-495-6451
Facsimile: 512-495-6930

ATTORNEYS FOR MIDLAND FUNDING, LLC, MIDLAND CREDIT MANAGEMENT, INC., AND ENCORE CAPITAL GROUP, INC.

Signed By:_____

Print Name:_____

_____ Print Title:_____

ROSEMARIE DONELLY
SBN 05983020
Assistant Attorney General
Consumer Protection Division
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Facsimile 713-223-5821

ATTORNEYS FOR THE STATE OF TEXAS

ENCORE CAPITAL GROUP, INC.

Signed By:_____

Print Name: _____

Print Title:_____

_____

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Facsimile: 512-495-6930

ATTORNEYS FOR MIDLAND FUNDING, LLC, MIDLAND CREDIT MANAGEMENT, INC., AND ENCORE CAPITAL GROUP, INC.

STATE OF TEXAS
COUNTY OF HARRIS

I, Chris Daniel, District Clerk of Harris County, Texas, certify that this is a true and correct copy of the original record filed and or recorded in my office, electronically or hard copy, as it appears on this date.

Witness my official hand and seal of office this

CHRIS DANIEL, DISTRICT CLERK
HARRIS COUNTY, TEXAS

Deputy

H

Supreme Court of Texas.
TEXAS COMMERCE BANK, NATIONAL ASSOCIATION, n/k/a Chase Bank of Texas, National Association, Petitioner,
v.
Robin NEW d/b/a River City Auto Sales and William Pacheco d/b/a Pacheco Motor Car Sales, Respondents.
No. 98-0744.

Sept. 9, 1999.

Bank brought action against customer and customer's partner in check kiting scheme, alleging breach of contract, fraud, conspiracy to defraud, and violations of civil theft statute. The District Court, Travis County, 353rd Judicial District, F. Scott McCown, P.J., granted default judgment and awarded damages and attorney fees. Defendants appealed. The Court of Appeals, 971 S.W.2d 711, affirmed in part, reversed in part, and remanded. Petition for review was filed. The Supreme Court held that: (1) affidavits to which no hearsay objection was made constituted probative evidence as required for consideration of claim for unliquidated damages before entry of default judgment, and (2) affidavits of bank officers and bank's legal counsel were legally sufficient to support default judgment awarding both damages and attorney's fees.

Affirmed in part, reversed in part, and remanded to trial court for entry of judgment.

West Headnotes

[1] Damages 194
115k194 Most Cited Cases
Affidavits to which no objection was made were probative evidence, even if they constituted hearsay, and thus satisfied requirement under Rules of Civil Procedure that court hear evidence on claim for unliquidated damages before entry of default judgment. Vernon's Ann.Texas Rules Civ.Proc., Rule 243; Rules of Evid., Rule 802.

[2] Damages 194
115k194 Most Cited Cases
Affidavits of bank officers averring personal knowledge, describing check kiting scheme resulting in loss to bank, and identifying total amount owed on overdrawn account, were legally sufficient to support default judgment awarding damages to bank.

[3] Damages 194
115k194 Most Cited Cases
Testimony of the total amount due under a written instrument is legally sufficient to support an award of that amount in a default judgment proceeding.

[4] Costs 207
102k207 Most Cited Cases
Affidavit of legal counsel for bank was legally sufficient to support default judgment awarding attorney fees to bank, where affidavit stated that bank had contract with customer entitling bank to recover its reasonable attorney fees, that affiant was duly licensed attorney, that he was familiar with usual and customary fees in county, and that $30,000 was reasonable fee for prosecuting bank's claims based on his knowledge of services rendered to bank.

***515** G. Alan Waldrop, C. W." Rocky" Rhodes, Barbara M. Ellis, Austin, Susan P. Kravik, Dallas, for Petitioner.

William B. Gammon, William Pacheco, Austin, for Respondents.

PER CURIAM.

Texas Commerce Bank obtained a default judgment against Robin New, d/b/a River City Auto Sales, and William Pacheco, d/b/a Pacheco's Motor Car Sales. To support its motion for default judgment, Texas Commerce presented three affidavits. No oral testimony was taken at the default judgment hearing. On appeal, the court of appeals held that the affidavits,

constituting hearsay, were not evidence under Rule 243 of the Texas Rules of Civil Procedure, which requires that the trial court "hear evidence" on unliquidated ***516** damages. [FN1] The court of appeals further held that even if affidavits constitute evidence under Rule 243, these affidavits were not legally sufficient to support the trial court's judgment. Accordingly, the court of appeals affirmed on the issue of New and Pacheco's liability and reversed and remanded for a new trial on the issue of unliquidated damages and attorney's fees. [FN2]

FN1. tex.R. Civ. P. 243.

FN2. 971 S.W.2d 711.

We conclude that because unobjected-to hearsay is, as a matter of law, probative evidence, affidavits can be evidence for purposes of an unliquidated-damages hearing pursuant to Rule 243. We further conclude that the affidavits here are legally sufficient to support the trial court's judgment on both damages and attorney's fees. Consequently, we affirm the court of appeals' judgment on the issue of liability, reverse on the issue of unliquidated damages and attorney's fees, and render judgment for Texas Commerce Bank.

At the outset, Texas Commerce contends that New and Pacheco did not preserve for the court of appeals' consideration the issues of whether the affidavits constituted evidence of unliquidated damages under Rule 243 or whether the affidavits, if evidence, were legally sufficient. We assume without deciding that these issues were properly preserved.

In addressing the merits, the court of appeals correctly stated:

> It is well settled that once a default judgment is taken against a non-answering defendant on an unliquidated claim, all allegations of fact set forth in the petition are deemed admitted, except the amount of damages. [citations omitted] [FN3]

FN3. 971 S.W.2d at 713.

Therefore, we know that New and Pacheco were partners in a check-kiting scheme that resulted in a loss to Texas Commerce. New would deposit checks into his Texas Commerce account drawn against insufficient funds in Pacheco's Norwest Bank checking account. Before the normal banking deadlines for return of items drawn on insufficient funds ran, New would write checks on the Texas Commerce account for deposit in Pacheco's Norwest account to cover the overdraft created in the Norwest account by the previous day's checks. Then Pacheco would write additional checks from the Norwest account for deposit to the Texas Commerce account to cover the overdraft that would appear in New's Texas Commerce account. This scheme had the effect of keeping a group of checks "floating" in the banking system that were not supported by real deposits. Norwest discovered this scheme and stopped payment on all checks drawn from Pacheco's Norwest account. As a result, several items New deposited in his Texas Commerce account were returned. Texas Commerce charged these items as debits on New's account, resulting in an overdraft that neither New nor Pacheco covered.

Texas Commerce filed suit against New and Pacheco for various causes of action, including fraud, breach of contract, conspiracy to defraud, and violations of the civil theft statute. [FN4] When New and Pacheco did not answer, Texas Commerce filed a motion for default judgment asking among other relief to be awarded damages and attorney's fees. This the trial court granted. And the court of appeals reversed in part.

FN4. *See* tex. Civ. Prac. & Rem.Code §§ 134.001-.005.

[1] The first issue is whether affidavits constitute evidence as required by Rule 243. That rule provides:

> If the cause of action is unliquidated or be not proved by an instrument in writing, *the court shall hear evidence as to damages* and shall render judgment therefor, unless the defendant shall demand and be entitled to a trial by jury in ***517** which case the judgment by default shall be noted, a writ of inquiry awarded, and the cause entered on the jury docket. [FN5]

FN5. tex.R. Civ. P. 243 (emphasis added).

Although several courts of appeals have held that affidavits can constitute evidence of unliquidated damages, [FN6] the court of appeals here held that they cannot. It concluded that Rule 802 of the Texas Rules of Evidence, the hearsay rule, prevents the use of affidavits "because the application of Rule 802 anticipates opposing counsel's and/or an opposing party's presence at the hearing to object to such inadmissible hearsay." [FN7] It further concluded, therefore, that a trial court does not hold "an evidentiary hearing merely by accepting the affidavits attached to [the] motion." [FN8]

FN6. *See, e.g., Irlbeck v. John Deere Co.*, 714 S.W.2d 54, 57-58 (Tex.App.--Amarillo 1986, writ ref'd n.r.e.); *K-Mart Apparel Fashions Corp. v. Ramsey*, 695 S.W.2d 243, 247 (Tex.App.--Houston [1 st Dist.] 1985, writ ref'd n.r.e.); *Naficy v. Braker*, 642 S.W.2d 282, 285 (Tex.App.-- Houston [14 th Dist.] 1982, writ ref'd n.r.e.); *Angelo v. Champion Restaurant Equip. Co.*, 702 S.W.2d 209, 211 (Tex.App.--Houston [1 st Dist.] 1985), *rev'd on other grounds*, 713 S.W.2d 96 (Tex.1986).

FN7. 971 S.W.2d at 714.

FN8. *Id.*

The court of appeals is incorrect. Rule 802 says, "Inadmissible hearsay admitted without objection shall not be denied probative value merely because it is hearsay." [FN9] Nothing in rule 802 limits its application to contested hearings. The rule is not ambiguous and requires no explication. Consequently we will give it none. [FN10] Because unobjected to hearsay constitutes probative evidence, it satisfies the requirement of Rule 243 that there be evidence of unliquidated damages. The trial court did not err when it considered the affidavits in rendering its default judgment.

FN9. tex. Civ. R. Evid. 802; *see also Irlbeck*, 714 S.W.2d at 57-58 (concluding that Rule 802 provides for hearsay admitted without objection to support a default judgment for damages and attorney's fees).

FN10. *See Bridgestone/Firestone, Inc. v. Glyn-Jones*, 878 S.W.2d 132, 133 (Tex.1994).

[2] The court of appeals also concluded that the affidavits here were conclusory and, therefore, not legally sufficient to support the trial court's award for unliquidated damages and attorney's fees. [FN11] Texas Commerce presented three affidavits at the default judgment hearing. Two of the affidavits were from Texas Commerce vice presidents, Thomas Neville and Roger Bott. Neville explained the details of the check-kiting scheme and that, as a result, the Texas Commerce account had a considerable overdraft balance. Bott stated that he had reviewed pertinent bank records and that the Texas Commerce account was overdrawn in the amount of $729,510.96.

FN11. 971 S.W.2d at 714-15.

[3] Testimony of the total amount due under a written instrument is legally sufficient to support an award of that amount in a default judgment proceeding. [FN12] Texas Commerce's bank officers' affidavits aver personal knowledge of the facts, describe the scheme resulting in the bank's loss, and identify the total amount owed on the overdrawn Texas Commerce account. The affidavits are legally sufficient to support the trial court's damage award.

FN12. *See Irlbeck*, 714 S.W.2d at 57-59. *See also, e.g., 8920 Corp. v. Alief Alamo Bank*, 722 S.W.2d 718, 720 (Tex.App.--Houston [14 th Dist.] 1986, writ ref'd n.r.e.); *American 10-Minute Oil Change, Inc. v. Metropolitan Nat'l Bank-Farmers Branch*, 783 S.W.2d 598, 601 (Tex.App.-- Dallas 1989, no writ).

[4] The third affidavit, from Texas Commerce legal counsel G. Alan Waldrop, was legally sufficient to support the trial court's attorney's fees award. Waldrop testified that among other things, Texas Commerce had a contract with New entitling Texas Commerce to recover its reasonable attorneys' fee. He further testified that he is a duly licensed attorney, that he was familiar with the usual and customary attorney's fees in Travis County, ***518** and, based on his knowledge of the services rendered to Texas Commerce on this matter,

which he detailed, $30,000 was a reasonable fee for prosecuting Texas Commerce's claims. This was legally sufficient to support the trial court's judgment for attorney's fees. [FN13]

> FN13. *See, e.g.*, *Cap Rock Elec. Coop. v. Texas Utils. Elec. Co.*, 874 S.W.2d 92, 101-02 (Tex.App.--El Paso 1994, no writ) (uncontested affidavit establishing prima facie case for attorney's fees legally sufficient to support attorney's fees award); *Murrco Agency, Inc. v. Ryan*, 800 S.W.2d 600, 606 (Tex.App.--Dallas 1990, no writ).

Accordingly, pursuant to Rule 59.1 of the Texas Rules of Appellate Procedure, the Court grants the petition for review of Texas Commerce Bank and, without hearing oral argument, affirms the court of appeals' judgment on liability, reverses the judgment on the issue of damages and attorney's fees, and remands to the trial court for entry of judgment for Texas Commerce Bank consistent with this opinion.

3 S.W.3d 515, 42 Tex. Sup. Ct. J. 1175

END OF DOCUMENT

CAUSE NO 97-08490

TEXAS COMMERCE BANK NATIONAL ASSOCIATION, *Plaintiff,*	§	IN THE DISTRICT COURT OF
v.	§	TRAVIS COUNTY, TEXAS
ROBIN D. NEW d/b/a RIVER CITY AUTO SALES and WILLIAM PACHECO d/b/a PACHECO'S MOTOR CAR SALES, *Defendants.*	§	353rd JUDICIAL DISTRICT

AFFIDAVIT IN SUPPORT OF PLAINTIFF'S APPLICATION FOR WRIT OF ATTACHMENT PRIOR TO JUDGMENT

STATE OF TEXAS §
§
COUNTY OF TRAVIS §

BEFORE ME, the undersigned authority on this day personally appeared Roger D. Bott, Vice President of Texas Commerce Bank National Association, known to me to be the person whose name is subscribed hereto and having been by me duly sworn upon oath states that he is authorized to make this Affidavit and further states as follows:

1. "My name is Roger D. Bott. I am over the age of eighteen (18) years, of sound mind and have never been convicted of a felony or any crime involving moral turpitude. I have personal knowledge of all facts set forth herein and am fully competent to testify to these facts.

2. "I am a Vice President of Texas Commerce Bank National Association ("Texas Commerce") and in that position have obtained personal knowledge of the facts recited herein, and these facts are true and correct. I am the custodian of records for Texas Commerce. I have reviewed

EXHIBIT A

the records of the deposit account of Robin New d/b/a River City Auto Sales (the "Texas Commerce Account"), which is at issue in this lawsuit.

3. "As of July 18, 1997, account number 09921041835 (the "Texas Commerce Account") at the 700 Lavaca branch of Texas Commerce in Austin, Travis County, Texas in the name of Robin D. New d/b/a River City Auto Sales is overdrawn in the amount of $729,510.96.

4. "I was involved in communications with a representative for Robin New on July 31, 1997. Mr. New's representative indicated that Mr. New is financially unable to make restitution to Texas Commerce and he has declined to offer any restitution to Texas Commerce."

FURTHER AFFIANT SAYETH NOT.

Roger D. Bott, Vice President
Texas Commerce Bank N. A.

SUBSCRIBED and SWORN TO BEFORE ME, the undersigned authority on this 5th day of August 1997, by Roger D. Bott, Vice President of Texas Commerce Bank N.A.

KELLY GOURLEY
Notary Public, State of Texas
Commission Expires: 12-10-99

Notary Public, State of Texas
Printed Name: Kelly Gourley
My Commission Expires:

A1995A:28322-1
50175:0328

SECTION B

A DIFFERENT PERSPECTIVE

In 2009, the Federal Trade Commission undertook a review of the use of litigation in connection with debt collection. The resulting report, entitled ***Repairing a Broken System, Protecting Consumers in Debt Collection Litigation and Arbitration***, concluded with four principle findings, two of which bear on the issues which are before the Texas Supreme Court in its efforts to propose new rules. The Commission found:

(1) Complaints filed in debt collection suits often do not contain sufficient information to allow consumers in their answers to admit or deny the allegations and assert affirmative defenses, and

(2) Consumers frequently fail to appear or defend themselves and that collectors sometimes fail to properly notify consumers of suits they have filed.

While a variety of collection industry professionals take issue with the methodology of the FTC and its willingness to accept unsubstantiated statements as fact, the issues represented by the two points stated are hard to dispute. The FTC Report suggested that the states consider requiring collectors to include more debt-related information in their complaints and adopt measures to increase consumer participation in suits against them. The TXCBA supports these objectives. Consumers should know (a) that they are being sued, (b) why they are being sued, and (c) what they need to do to contest the litigation, should they desire to do so.

Similarly, the Texas Attorney General's Compliance Agreement with Midland took up the issue of what information needs to be stated in a consumer debt collection case in order to properly apprise the consumer of the basis for the claim. After completing an investigation of the consumer collection practices of Midland, the Attorney General and Midland agreed:

> "Midland will provide the following information to [Texas local counsel] to the extent the information is available to Midland and instruct [Texas local counsel] to include in their petitions, where permitted by court rules, the following information to the extent available:
>
> the identity of the Original Creditor;
> last four digits of the original account number;
> date of charge off of the Consumer Debt; and
> the amount charged off.

[text reformatted for readability]. See **Section A, Exhibit 1**, paragraph 3(b)(iii), page 5.

The TXCBA Wishes to Offer a Revised Set of Rules for Consideration by the Supreme Court and the Advisory Committee

Attached are two proposed rules of civil procedure in justice courts; one addressing pleading requirements and the other, the default judgment process. These rules squarely meet the concerns of both the Texas Attorney General and the FTC with regard to pleading requirements, as well as due process issues with regard to the default judgment. TXCBA's proposed Rule 577 generally tracks the recommendations of the Justice Court Rule Task Force, with a few notable exceptions. However, Rule 578 is a new rule which seeks to accomplish both efficiency and due process

TXCBA's proposed Rule 577 differs from that of the Task Force in a number of ways; all of which reflect a removal of unnecessary or confusing information, including the requirement that plaintiff:

(1) State the name and address appearing on the original creditor's records. This information is not readily available (it is no maintained in data records), cannot generally be verified at the time of suit, and will contribute to confusion as to the debtor and the service address.

(2) State the date and amount of the last payment. Neither of these items is relevant to either plaintiff's claim or defendant's affirmative defense.

(3) Disclose collection bond information. Such disclosure is irrelevant to a debt collection suit, becoming relevant only if a claim is filed against the creditor. As such, it only serves to encourage litigation and promote third-party claims against the bonds of legitimate creditors.

As a separate matter, the TXCBA wishes to note that it supports the filing of some form of account related document with the Original Petition as a way of helping the defendant better understand the nature of the claim against them. Some of the states -- albeit a significant minority -- require the filing of the charge-off statement at the time of suit. This document is generally available to plaintiffs and is the most relevant of the account related document to plaintiff's claim for damages. It is the belief of the TXCBA that by better informing the defendant as to the specifics of the underlying claim, the defendant could better understand and meet the claim of the plaintiff.

The TXCBA supports an enlarged plenary period for justice courts in which the defendant may seek to set aside any default judgment. Nothing in the rules of civil procedure can force a consumer to participate in the litigation process; however, the TXCBA believes that the new rules should be designed to address the concerns of both the Commission and the Courts. A default taken in error, or in a circumstance where the defendant intended to answer, but simply failed to do so, is not beneficial to the parties or to the courts. Everyone benefits when debtors appear, participate in the process, and seek to resolve their problems.

Finally, creditors should know that their claims will be respected by the courts and will not be disallowed simply for social expediency. Similarly, the courts need to be able to handle these claims in a systematic way which affords to the parties the assurances of due process while addressing the courts' burgeoning case loads and resulting demands upon court staff.

Task Force Proposal	Texas Creditor's Bar Association Proposal
RULE 577. PLAINTIFF'S PLEADINGS (a) The following information must be set forth in the petition of a suit filed under this chapter: (1) The defendant's name and address ~~as appearing on the original creditor's records~~; (2) The name of the original creditor; (3) The original account number; (4) The date of origination/issue of the account; (5) ~~The date and amount of the last payment;~~ (6) The charge-off date and amount; (7) If the plaintiff seeks post-charge-off interest, then the petition shall state whether the rate is based on contract default or statute, and the amount of post-charge-off interest claimed; (8) If the plaintiff is represented by an attorney, then the attorney's name, address, and telephone number; and (9) Whether the plaintiff is the original creditor. (b) If the plaintiff is not the original creditor, the petition shall also state: (1) ~~The date on which the debt was assigned to the plaintiff;~~ (2) The name of each previous owner of the account and the date on which the debt was assigned to that owner. (c) ~~If the plaintiff is a third party debt collector, the debt collector must plead that it has complied with Texas Finance Code Section 392.101 requiring a bond. The petition should include the name of the bonded debt collector and the date it filed a copy of the bond with the Texas Secretary of State.~~	**RULE 577. PLAINTIFF'S PLEADINGS** (a) The following information shall be set forth in the petition of a debt collection case: (1) Plaintiff's name and capacity; (2) Defendant's name / co-defendant's name and service address; (3) Account or card name, if different from that of the plaintiff, if known; (4) Account number (which may be masked); (5) Date of issue or origination of the account, if known; (6) Date of charge-off or breach of the account, if known; (7) The damage amount claimed as of a date certain (preferably at the time of charge-off or breach); (8) Whether plaintiff seeks continuing interest and, if so, (i) the effective interest rate claimed, (ii) whether the interest rate is based upon contract or statute, (iii) the reference date for beginning to compute interest, and (iv) the dollar amount of interest claimed as of a date certain. (b) Additionally, if the pleading pertains to an assigned debt claim, the pleading must include: (1) a statement that the claim has been transferred and/or assigned; and (2) the name of the original creditor, the account/card name.

Task Force Proposal	Texas Creditor's Bar Association Proposal
RULE 578. DEFAULT JUDGMENTS ~~(a) Default Judgment Without Hearing. The following documents may be attached to the petition, and must be served on the defendant before a default judgment can be granted without a hearing:~~ ~~(1) A copy of the contract, promissory note, charge-off statement or an original document evidencing the original debt which must contain a signature of the defendant. This document shall be supported by affidavit from the original creditor.~~ ~~(2) If a claim is based on credit card debt and no such signed writing evidencing the original debt ever existed, then a copy of the card member agreement in effect at the time the card was charged-off and copies of documents generated when the credit card was actually used must be attached and shall be supported by affidavit from the original creditor.~~ ~~(b) Required Documents. To support a default judgment, these documents must include:~~ ~~(1) A document signed by the defendant evidencing the debt or the opening of the account; or~~ ~~(2) a bill or other record reflecting purchases, payments, or other actual use of the credit card or account by the defendant; or~~ ~~(3) an electronic printout or other documentation from the original creditor establishing the existence of the account and showing purchases, payments, or other actual use of a credit card or account by the defendant.~~ ~~(c) Requirements of Affidavit. Any affidavit from the original creditor must state:~~ ~~(1) that they were kept in the regular course of business,~~ ~~(2) that it was the regular course of business for an employee or representative of the creditor with knowledge of the act, event, condition, opinion, or diagnosis, recorded to make the~~	**RULE 578. DEFAULT JUDGMENTS** (a) If the defendant does not file an answer by the answer date, the judge may enter a default judgment as to such defendant based upon: (1) Plaintiff's pleading, if plaintiff's claim is liquidated and such claim is proved by an instrument in writing, attached to the petition, and capable of being calculated by the court; or (2) Plaintiff's evidence of damage, if plaintiff's claim is unliquidated and proved by plaintiff. (b) The court may grant a default judgment based upon the documents attached to the pleading and/or submitted by a party in support of judgment. (c) The court may grant default judgment on submission and need not conduct a hearing in order to do so. (d) Affidavit of Damages. (1) An affidavit in support of plaintiff's claim will be sufficient to obtain a default judgment if it: (i) attests to the ownership of the account, (ii) identifies the person obligated to pay the account, (iii) attests to the closing of the account, and (iv) attests to the amount due on the account as of a date certain after all payments, credits and offsets have been applied. (2) The affidavit may be made by a representative of a legal entity and may be based upon that person's review of the account information as maintained by that legal entity.

Task Force Proposal	**Texas Creditor's Bar Association Proposal**
~~record or to transmit information to be included in such record;~~ ~~(3) the record was made at or near the time or reasonably soon thereafter; and~~ ~~(4) the records attached are the original or exact duplicates of the original.~~ ~~(d) Default Judgment after Hearing. If the plaintiff does not file with the court and serve on the defendant the documents required above, and the defendant files a timely answer, the court will proceed with the case as usual. If the plaintiff does not file with the court and serve on the defendant the documents required above, and the defendant fails to file a timely answer, the case will proceed under Rule 525(c). If a defendant who had failed to answer appears at a default judgment hearing, the judge must reset the case or may proceed with trial on the merits, if all parties agree to proceed.~~ ~~(e) Post-Answer Default. If a defendant who has answered fails to appear for trial, the court may proceed to hear evidence and render judgment accordingly.~~	(e) If the defendant files an answer or otherwise appears in the case before a default judgment is signed by the judge, the judge may not enter a default. (f) If a default judgment cannot be entered as described above, the plaintiff may request a hearing at which the plaintiff shall appear, in person or by telephonic or other electronic means, and prove its damages. If the plaintiff proves its damages, the judge shall grant judgment for the plaintiff in the amounts proven; otherwise, the case shall be set for trial. Justices are encouraged to allow parties to appear by telephonic or other electronic means whenever practicable.

SECTION C

OTHER RULE RECOMMENDATIONS

The TXCBA believes there are other areas for concern and opportunities for improvement in the rules proposed by the Task Force.

The Rules of Evidence Should Not Be Strictly Enforced but They Should Be Respected

The TXCBA is concerned about the wording of Rule 504. The TXCBA urges that the language of the final rule clearly communicate to the justices of the justice courts that while the Texas Rules of Evidence need not be strictly applied, the court must respect evidence offered in conformity to these rules. The new rule should not be so broad as to create the sense that the justice courts operate without any guiding legal principals.

Task Force Proposal	Texas Creditor's Bar Association Proposal
RULE 504. RULES OF EVIDENCE The Texas Rules of Evidence do not apply to justice courts except to the extent the judge hearing the case determines that a particular rule must be followed to ensure that the proceedings are fair to all parties.	**RULE 504. RULES OF EVIDENCE** (a) The Texas Rules of Evidence do not apply to justice courts except to the extent the judge hearing the case determines that a particular rule must be followed to ensure that the proceedings are fair to all parties. (b) A justice court judge may not disregard evidence that would be admissible under the Texas Rules of Evidence.

[Continued on Next Page]

The Parties Should be Allowed to Accomplish Post-Answer Service by First-Class Mail

The TXCBA asks that Rule 515 be expanded. The TXCBA urges that the language rule be modified to allow for service by first class mail. First class mail is considered an acceptable method of service:

1) by the court when notifying the parties of a hearing date;
2) by the court when notifying a party of the entry of judgment; and
3) by the federal courts in civil cases (see Fed.R.Civ.Proc. Rule 4(e)(2)(b)).

The simple fact of the matter is that first class mail is more reasonably calculated to reach its intended recipient than is certified mail. A certificate of service still operate to create a presumption of service; a presumption which can still be rebutted upon the testimony of a party that service was not actually received. Further, pro se defendants generally find the requirement for certified mail cumbersome and an impediment to their participation in the legal process.

Task Force Proposal	**Texas Creditor's Bar Association Proposal**
RULE 515. SERVICE OF PAPERS OTHER THAN CITATION Every notice required by these rules, and every pleading, plea, motion, or other form of request required to be served under these rules of civil procedure, other than the citation, may be served by a party to the suit, an attorney of record, a sheriff or constable, or by any other person competent to testify and may be served by: . . . (b) courier receipted delivery or by certified or registered mail, to the party's last known address. Service by certified or registered mail will be complete when the document is properly addressed and deposited in the United States mail, postage prepaid;	**RULE 515. SERVICE OF PAPERS OTHER THAN CITATION** Every notice required by these rules, and every pleading, plea, motion, or other form of request required to be served under these rules of civil procedure, other than the citation, may be served by a party to the suit, an attorney of record, a sheriff or constable, or by any other person competent to testify and may be served by: . . . (b) courier receipted delivery or by first class, certified or registered mail, to the party's last known address. Service by first class, certified or registered mail will be complete when the document is properly addressed and deposited in the United States mail, postage prepaid;

[Continued on Next Page]

The Should Be No Bond Requirement When Appealing a Take-Nothing Judgment

The TXCBA asks that Rule 560 be revised. The TXCBA is concerned that the language of the proposed rule imposes an unnecessary and unworkable burden on a plaintiff who is appealing a take-nothing judgment. Under such a circumstance, the plaintiff's payment of the filing fee for the appeal should sufficiently meet the concerns of the court. Further, a $500 bond made payable to the appellee could only operate as a fine or penalty for initiating the appeal in that there is no actual liability to the appellee at the time of the appeal. The rule, though well intentioned, needs to be revised to meet the most common circumstance encountered by the justice courts.

Task Force Proposal	**Texas Creditor's Bar Association Proposal**
RULE 560. APPEAL (a) *Plaintiff's Appeal*. ~~If the plaintiff wishes to appeal the judgment of the court, the plaintiff or its agent or attorney shall file a bond in the amount of $500 with the judge no later than the 20th day after the judgment is signed or the motion for new trial, if any, is denied. The bond must be supported by such surety or sureties as are approved by the judge, or cash in lieu of surety, must be payable to the appellee, and must be conditioned that the appellant will prosecute its appeal to effect and will pay off and satisfy such costs if judgment or costs be rendered against it on appeal.~~	**RULE 560. APPEAL** (a) *Plaintiff's Appeal*. Plaintiff may appeal the judgment of the court by filing a notice of appeal in the justice court within 20 days after the date of judgment or any motion for new trial is denied and by timely paying the applicable filing fee with the County Court.

TXCBA Proposal
To the
Justice Court Rules Task Force

RECOMMENDED RULE CHANGES

In 2009, the Federal Trade Commission undertook a review of the use of litigation in connection with debt collection. The resulting report, dated July 2010 and entitled *Repairing a Broken System, Protecting Consumers in Debt Collection Litigation and Arbitration*, concluded with four principle findings, two of which bear on the issues which are before the current rules committee. The Commission found that:

(1) The complaints filed in debt collection suits often do not contain sufficient information to allow consumers in their answers to admit or deny the allegations and assert affirmative defenses, and

(2) Consumers frequently fail to appear or defend themselves and that collectors sometimes fail to properly notify consumers of suits they have filed.

While a variety of collection industry professionals take issue with the methodology of the FTC and its willingness to accept unsubstantiated statements as fact, the issues represented by the two points stated are hard to dispute. Consumers should know (a) that they are being sued, (b) why they are being sued, and (c) what they need to do to contest the litigation, should they desire to do so. Similarly, creditors should know that their claims will be respected by the courts and will not be disallowed simply for social expediency. Finally, the courts need to be able to handle these claims in a systematic way that affords to the parties the assurances of due process, while facilitating the courts' handling of their burgeoning case loads and resulting demands upon the courts' staffs.

The FTC Report suggested that the states consider requiring collectors to include more debt-related information in their complaints and adopting measures to increase consumer participation in suits against them. While nothing in the Texas Rules of Civil Procedure force a consumer to participate in the litigation process, the TXCBA believes that the rules that it is suggesting are a substantial improvement in the handling of these consumer debt cases and makes significant headway in addressing the concerns of the Commission and the Courts. Everyone benefits when debtors appear and discuss their problems.

The basic goals of the TXCBA in designing these rules are to:

(1) Ensure that the nature of each case is clearly and concisely stated;
(2) Provide defendants with a simple, plain English method to answer the lawsuit;
(3) Create a structured approach to the granting of a default judgment;
(4) Ensure that the defendant has an opportunity to set aside a default judgment without undue burden on the parties;
(5) Standardize the expectations placed upon the parties at trial; and
(6) Remove gamesmanship from the legal process.

Ensure That the Nature of the Cases in Clearly and Concisely Stated.

The proposed rules anticipate form pleadings with specific information requirements for both original credit grantors and debt buyers. Amounts sought, and the basis for each element of plaintiff's claims are specifically enunciated.

Provide Defendants with a Simple, Plain English Method to Answer the Lawsuit

The proposed rules anticipate that a service is not proper unless a standardized answer form is delivered to the defendant as part of the service of process package. This answer form will contain instructions listing what is needed to answer the lawsuit and will provide a structured format for the defendant to assert special issues and/or defenses.

Create a Structured Approach to the Granting of Default Judgment

The proposed rules require that to proceed under Debt Collection Case Rules, certain documents should be filed with the petition. The required documents include an account affidavit, a copy of a statement, an affidavit of non-military service, and verification that the attorney's fees sought are reasonable and necessary. These are essentially the evidentiary elements necessary for any default judgment. A complete set of these documents will be provided to the court at the initiation of the case and will be served on the defendant as part of the service of process package, along with an answer form.

If the defendant does not answer the lawsuit, the rules mandate that the court enter a default judgment in the ordinary course of business. If judgment is not entered after the answer date, the plaintiff may request entry. The court must, within 30 days, either enter judgment or inform the plaintiff why judgment cannot be entered.

Ensure That the Defendant Has an Opportunity to Set Aside a Default Judgment Without Undue Burden on the Parties

Although the delivery of an answer form should result in increased defendant participation in lawsuits, the rules also contemplate an expanded period of time (20 days) in which the defendant may request a new trial. This allows the defendant additional time to evaluate the fact that a default judgment has been entered and to seek to have such judgment set aside for good cause shown.

Standardize the Expectations Placed upon the Parties at Trial

The proposed rules require the parties to specifically describe those matters which give rise to either a claim or a defense so that the issues to be presented at trial are fully disclosed.

Remove Gamesmanship from the Legal Process

The proposed rules require the exchange of suit related information prior to trial and curtails other discovery except to that which is shown to be needed.

PROPOSED RULES

RULE NO. 1. SCOPE

- **RATIONALE:**

  This rule allows the automatic application of the rules of this chapter to debt collection cases based upon the initial designation of the case by the plaintiff, but also allows the court to modify or revoke that status as needed to promote justice.

- **RULE:**

  Scope. The rules in this chapter shall apply to any case designated as a debt collection case by the plaintiff, unless the designation is changed by an order of the court after finding that the designation was improper or should not apply.

RULE NO. 2. CONSTRUCTION OF RULES

- **RATIONALE:**

  This rule encourages the courts to consider important factors when resolving ambiguities or uncertainties regarding the reading and implementation of these new rules.

- **RULE:**

  Construction of Rules. The rules in this chapter should be interpreted in such a manner as to promote judicial efficiency, enhance uniformity amongst justice courts, ensure due process for all parties, and lessen the burdens of litigation on both plaintiffs and defendants.

RULE NO. 3. APPLICABILITY OF SMALL CLAIMS RULES TO DEBT COLLECTION CASES

- **RATIONALE:**

  This rule is designed to promote efficiency in debt collection cases by incorporating small claims court rules (which are less formal) into debt collection cases.

- **RULE:**

  Applicability of Small Claims Rules to Debt Collection Cases. Except as otherwise provided in this chapter, small claims rules will apply in debt collection cases.

RULE NO. 4. DESIGNATION AS DEBT COLLECTION CASE

- **RATIONALE:**

  Under this rule, the designation of a case as a debt collection case is automatically made by the plaintiff's use of the form petition; therefore, no court order is needed. The rule also limits the use of the form to cases involving the recovery of a debt.

- **RULE:**

  Designation as Debt Collection Case. A plaintiff may designate his case as a debt collection case by using the form petition promulgated by the Supreme Court of Texas. A plaintiff may only designate a case as a debt collection case if the plaintiff seeks the recovery of a debt from defendant.

RULE NO. 5. CONTESTING DESIGNATION AS DEBT COLLECTION CASE

- **RATIONALE:**

  Under this rule, the court has the authority to remove a case from the scope of the debt collection rules upon determining that the case was improperly filed.

- **RULE:**

  Contesting Designation as Debt Collection Case. [1] Any party may contest the improper designation of a case under this chapter, and after a hearing, the court shall affirm or revoke the designation. If the court revokes the designation, the case shall not be dismissed but the rules of this chapter will no longer apply to the case.

[1] Plaintiff's election to proceed under debt collection case rules is presumed to be appropriate unless it becomes clear from the pleadings or the evidence that the case is improperly designated. As such, a motion challenging the designation of a case as a debt collection case should be presumed to be brought in bad faith and for the purpose of harassment and is available for sanction under Rule 215-2b, unless it is founded upon specific facts or assertions which would prohibit the case from proceeding under those rules.

RULE NO. 6. PLAINTIFF'S PLEADINGS

- **RATIONALE:**

  The rule in written in anticipation of form pleadings which may ultimately lead to information being communicated with the courts in an electronic format, rather than the paper process currently employed. As such, the rule contemplates the use of electronic signatures by plaintiff's counsel.

- **RULE:**

  a. Plaintiff's pleading shall be in writing utilizing the form promulgated by the Supreme Court of Texas. [2]

  b. Plaintiff shall file with its pleading,

     i. an Affidavit of Debt, as described herein,

     ii. an affidavit as to defendant's non-military status,

     iii. a proposed default judgment, and

     iv. a proposed answer form in the format promulgated by the Supreme Court of Texas.

  c. Plaintiff's pleading may be endorsed by plaintiff or plaintiff's attorney with a digital image of an attorney's signature or other electronic signature.

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[2] That pleading must state:
- a. Plaintiff's name
- b. Plaintiff's capacity
- c. Defendant's name / co-defendant's name and service address
- d. Account/card name, if different from plaintiff
- e. Account number (may be masked)
- f. Date of issue/origination, if known
- g. Date of last payment, if known
- h. Date of chargeoff or breach
- i. Amount owed at chargeoff/breach
- j. Whether plaintiff seeks post-chargeoff interest, and if so,
  - i. the chargeoff date,
  - ii. whether rate is based on contract/default or statute, and
  - iii. amount of post-chargeoff interest claimed.

Additionally, if the pleading relates to an assigned claim, the pleading must include
- a. a statement that the claim has been transferred and/or assigned, and
- b. the name of the original creditor.

RULE NO. 7. AFFIDAVIT OF DEBT

- **RATIONALE:**

  The proposed rule incorporates the elements found in the *Unifund vs. Simien* case which held that the affidavit of a successor-in-interest which contained the listed elements was sufficient evidence of a claim.

- **RULE:**

  Affidavit of Debt. An affidavit in support of the debt will be sufficient to obtain a default judgment if it:

  a. attests to the amount due,

  b. verifies that the attached documentation which it incorporates are kept in the course of plaintiff's business,

  c. attests that the business relies upon the accuracy of the contents of the document in the conduct of its business, and

  d. attaches the following documentation to the affidavit:

     i. a copy of the contract evidencing the debt, or in the case of a credit card account or other type of revolving line of credit, at least one monthly statement evidencing the debt; and

     ii. if the plaintiff is not the original lender, a bill of sale, affidavit of account or other evidence of plaintiff's ownership of the debt.

RULE NO. 8. ATTORNEYS FEES IN DEBT COLLECTION CASES

- **RATIONALE:**

  Attorneys in most debt collection cases have significant operations which allow them to meet the security and information demands of their clients. As such, by the time a case is filed, substantial firm resources have been brought to bear to support an attorney's request for attorneys' fees. The proposed rule makes it clear that the attorney may attest to this effort at the time the suit is filed and that the court may rely upon the attorney's attestation in awarding a default judgment.

- **RULE:**

  Attorneys Fees in Debt Collection Cases. If a plaintiff seeks the recovery of attorneys' fees from the defendant under the contract or by statute, the plaintiff may attach to the original petition or file separately an affidavit of the attorney evidencing the amount of plaintiff's reasonable attorneys' fees, and the court may consider the affidavit in awarding attorneys' fees at the time of judgment.

RULE NO. 9. SERVICE ON DEFENDANT

- **RATIONALE:**

  The proposed rule contemplates that the defendant will be provided with a copy of all documents which plaintiff would rely upon in obtaining a default judgment, as well as an answer form to facilitate the defendant's response to the lawsuit.

- **RULE:**

  Service on Defendant.

  a. In a debt collection case, the defendant must be served with citation, plaintiff's petition, any supporting affidavits filed with plaintiff's petition, and an answer form in the format promulgated by the Supreme Court of Texas.

  b. Service may be made in the same manner as set forth in TRCP 535.

  c. In the event that service of process is accomplished upon the defendant at a residential address other than that set forth in plaintiff's petition, the person making the affidavit of service shall file with the court a Certificate of Last Known Address setting forth the residential address at which service was accomplished.

RULE NO. 10. SUBSTITUTED SERVICE OF PROCESS

- **RATIONALE:**

  The proposed rule allows either the party or any process server to request an order for substituted service from the court. The process server, as an agent of the court, should have sufficient standing to facilitate the service which they are commanded to perform.

- **RULE:**

  Substituted Service of Process. Application for substituted service of process under Rule 106 may be made by any party or their attorney, or the sheriff, constable, or licensed private process server attempting service of citation on a defendant.

RULE NO. 11. METHODS OF SERVICE

- **RATIONALE:**

  Pro se defendant's rarely claim certified mail and the court's have long believed that certified mail is not an effect method of service. The rule simply recognizes that first class mail is the most effective method of communication with most defendant's and protects the defendant from being disadvantaged because they did not claim a certified letter.

- **RULE:**

  Methods of Service. In addition to the methods of service set forth in Tec.R.Civ.Proc. Rule 21a, service of any notice required by these rules, and every pleading, plea, motion, or other form of request required to be served under Rule 21, other than the citation to be served upon the filing of a cause of action may be made by depositing that notice, pleading, plea, motion, or other form of request with the United States Postal Service, proper first class postage prepaid and addressed to the party's last known address.

RULE NO. 12. DEFENDANT'S ANSWER

- **RATIONALE:**

  The defendant's answer often does not include information that is required by the rules. The TXCBA is working to develop a standardized answer form, but believes that the rule, itself, should list the critical elements. The proposed rule establishes the informational elements of an answer and the effect of filing a general denial. Part (b) of the rule reiterates the continued responsibility of the defendant to assert certain please and defenses. The purpose is to avoid the "kitchen sink" response that claims every possible denial and defense, with no support.

- **RULE:**

  Defendant's Answer.

  a. Defendant's answer must be in writing and utilize the Answer Form promulgated by the Supreme Court of Texas. A written answer filed by a pro se defendant that is in a form other than the approved Answer Form shall be considered a general denial to the claims in plaintiff's petition only.

  b. Affirmative defenses, verified pleas, and pleas of payment must be in writing and pled with specificity as required by in Tex.R.Civ.Proc. Rules 93-95. [3]

  c. If the defendant's fails to meet the pleading requirements of this rule, the defendant may not offer evidence of that matter at trial. In such an event, the plaintiff has no burden to refute the unsubstantiated contention.

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[3] The rule continues to incorporate the verified pleas, affirmative defenses and pleas of payment requirements set forth in Tex.R.Civ.Proc. Rules 93-95. These include, for example:

a. denial of the account (Rule 93(10))
b. assertion of Payment (Rule 95)
b. allegation of ID Theft or Fraud (Rule 93(4), 93(7)),
c. challenge to assignment of claim (Rule 93(8))

For example, Rule 93(8) requires the defendant to place the validity of the assignment of a claim at issue through a verified plea. "The genuineness of an assignment by Rule 93's provisions, is held as fully proved in the absence of a sworn denial." *American Hydrocarbon Corp v. Hickman,* 393 S.W.2d 197 (Tex.Civ.App. — Texarkana 1965, no writ). Further, specific denials under Rule 93 are affirmative defenses. *Gray v. West,* 608 S.W.2d 771, 778 (Tex.Civ.App.-Amarillo 1980 writ ref'd n.r.e.) (Denials under Rule 93 are affirmative defenses. No burden of proof was placed on West for a defense never properly raised by Gray under Rule 93.).

RULE NO. 13. COUNTERCLAIMS

- **RATIONALE:**

  Counterclaims are increasingly used by opposing counsel as both a negotiating ploy and as a method for generating attorneys' fees. The trial courts should expect to see an increasing number of these claims. The proposed rule ensures that plaintiff's pleading burden in debt collection cases is being shared by a defendant who counterclaims. The counter-plaintiff must describe the conduct giving rise to a cause of action and state generally what that cause of action is. The rule is intended to require the defendant to specify the factual and legal grounds for a counterclaim.

- **RULE:**

  Counterclaims.

  a. A counterclaim must be in writing and specify the actions or omissions that give rise to a claim.

  b. If the counter-plaintiff does not meet his burden, the court must enter a take-nothing judgment on the counterclaim.

  c. The counter-defendant is presumed to have asserted a general denial and need not answer a counterclaim, other than to assert certain defenses.

RULE NO. 14. DEFAULT JUDGMENTS

- **RATIONALE:**

The pleading requirements associated with the Debt Collection Cases will satisfy plaintiff's burden of proof when the suit is filed. The failure to answer a properly served suit entitles the plaintiff to a default judgment. The proposed rule emphasizes that the plaintiff need take no further action and that the responsibility for entry of the default judgment rests with the court. The rule requires that upon request, the court either enter a default judgment or advise the plaintiff of any issue that is preventing the court from granting judgment. This process allows the plaintiff to take corrective action.

In proposing this rule, it is anticipated that the period for setting aside a default judgment will be enlarged to 20 days. This will provide additional protection to a defendant who may have mistakenly failed to answer the lawsuit.

- **RULE:**

Default Judgment.

a. The Court must enter a default judgment in the amount prayed for by the plaintiff when:

   i. The petition, with attachments, meets the requirements of Rule __;

   ii. A properly executed return of service is on file;

   iii. The answer date has passed; and

   iv. The Court has not received a written answer or other written communication from the defendant denying at least part of the suit;

b. Last Known Address. The court may rely upon the service address for the defendant as set forth in plaintiff's pleadings, subject to any revision resulting from the service of process when granting a default judgment.

c. No Requirement to Request Entry. If the requirements of section (a) are met, the court must enter a default judgment for the plaintiff within ____ days of the answer due date without further action by the plaintiff.

d. Notice of Deficiency. If the court determines that the requirements of section (a)(i) are not met, the court must send a notice of deficiency that specifies the reasons why judgment has not been entered. Such Notice shall set forth the deficiency or omissions which plaintiff must cure in order to obtain judgment or otherwise inform plaintiff of the reason judgment may not be entered.

RULE NO. 15. DISCOVERY

- **RATIONALE:**

Debt Collection Cases are very straightforward contests. Unfortunately, discovery is often employed solely to harass, rather than as a mechanism for developing a case. The proposed rule adopts the premise that if a party intends to use a document or an issue at trial, it must disclose that document or issue to the opposing party in advance, through mandatory disclosures. Additional discovery is limited to that which the court allows based upon the circumstances of the case.

- **RULE:**

Discovery.

a. Discovery in a Debt Collection Case is limited to that set forth in this rule.

b. Parties to Make Required Disclosures. When an answer is filed contesting any part of a claim, the parties to the disputed claim must make certain specific disclosures.

i. Disclosures Generally

(1) Disclosure by each party is to be made not more than 45 days following the filing of the answer and must be supplemented timely as needed.

(2) Disclosures may not be supplemented less than 14 days before the date of trial.

(3) When a disclosure requests the identification of a witness, the identification must include the name, address, and telephone number of the witness, a brief statement of the person's connection with the case, and a brief summary of the expected testimony. If the witness is an expert witness, the party shall also disclose:

(a) the expert's name, address, e-mail address, fax, and telephone number;

(b) the subject matter on which the expert will testify;

(c) the general substance of the expert's mental impressions and opinions and a brief summary of the basis for them, or if the expert is not retained by, employed by, or otherwise subject to the control of the responding party, documents reflecting the information;

(d) if the expert is retained by, employed by, or otherwise subject to the control of the responding party:

(e) all documents, tangible things, reports, models, or data compilations that have been provided to, reviewed by, or prepared by or for the expert in anticipation of the expert's testimony; and

(f) the expert's current resume and bibliography.

ii. Plaintiff's Disclosures.

(1) Plaintiff must disclose the identity of any witness whom plaintiff intends to call at trial, except that plaintiff may identify generally any records custodian whose affidavit will be submitted before trial or that may appear at trial.

(2) Plaintiff must provide defendant with copies of all documents which plaintiff intends to introduce at trial.

(3) Documents included in plaintiff's initial filings served on the defendant or included in a timely submitted business records affidavit need not be separately disclosed.

iii. Defendant's Disclosures

(1) Defendant must disclose the identity of every witness whom defendant intends to call to testify at trial.

(2) Defendant must provide to plaintiff copies of all documents that defendant intends to introduce at trial.

iv. A party may not call as a witness nor offer as evidence any document not disclosed pursuant to this rule.

c. The court may, on a case-by-case basis, allow additional discovery to be conducted, provided that the party seeking such discovery shows good cause why the discovery required by this rule would not be sufficient to properly develop the case for trial.

d. Nothing is this rule shall preclude a party from conducting a deposition on written question of its own witness.

RULE NO. 16. MOTION FOR SUMMARY JUDGMENT

- **RATIONALE:**

  The rules require plaintiff to file a substantial amount of material at the initiation of the case. Under existing Texas law, these documents would overcome any no-evidence motion for summary judgment. As such, a no-evidence motion for summary judgment would simply be filed to harass the plaintiff, rather than to promote the parties' legitimate legal interests. The prohibition operates against the plaintiff as well, to ensure a balanced approach.

- **RULE:**

  No party may file a no-evidence motion for summary judgment in a debt collection case.

RULE NO. 17. EVIDENCE

- **RATIONALE:**

There is a significant amount of discrepancy among the courts regarding the evidentiary standards and burdens of proof requirements in Debt Collection Cases. These issues also pose a tremendous burden upon the justices in that they require the justices to have a level of sophistication for which many are untrained. The purpose for this rule is to provide to the courts some basic guidance to serve as a foundation for the management of Debt Collection Cases. The proposed rule is based upon the following: (a) the legal requirements created under Regulation Z of the Fair Credit Reporting Act; (b) the role of hearsay and proof affidavits expressed by the Texas Supreme Court of *Texas in Texas Commerce Bank vs. New*; and (c) the elements of proof in an assigned debt case as stated in *Unifund vs. Simien*. The objective of the rule is to create a prima facie proof standard against which the court can measure the adequacy of the evidence presented.

- **RULE:**

Evidence.

a. The plaintiff makes a prima facie showing of its case if it offers as evidence,

i. An Account Affidavit, the contents of which testifies to:

(1) the existence of the account;

(2) the identity of the person obligated to pay the account;

(3) the date the account was charged-off/closed;

(4) the balance of the account on the date of chargeoff/closure;

(5) the effective interest rate on the account on the date of chargeoff/closure, if applicable;

(6) the balance of the account on the date of the affidavit after all payments, credits, and offsets have been applied; and

ii. Attaches a copy of the contract or chargeoff statement.

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b. Sufficiency of the Account Affidavit. The Account Affidavit:

i. may be made by a representative of the plaintiff;

ii. may be based upon a review of the plaintiff's business records;

iii. in the case of a successor-in-interest, may be based upon information received from plaintiff's predecessor-in-interest; and

iv. may be a copy or reproduction of the original.

c. The judge must hear the testimony of the parties and the witnesses that the parties produce and must consider the other evidence offered, as in small claims cases.

RULE NO. 18. HEARINGS

- **RATIONALE:**

  The proposed rule seeks to minimize the burden on the parties for purely procedural motions and scheduling conferences.

- **RULE:**

  Hearings.

  a. Notice. The Court will provide to each party a notice of hearing at least seven days prior to any hearing date.

  b. Telephonic Hearing. When practicable and subject to the consent of the court, a party may attend a hearing by telephonic means.

RULE NO. 19. TRIAL

- **RATIONALE:**

  The proposed rule seeks to ensure that the parties are afforded sufficient opportunity to prepare for trial and that the trial be conducted according to the same standards as in the majority of other justice court cases.

- **RULE:**

  Trial.

  a. Notice. The Court will provide to each party a notice of trial at least 45 days prior to the date on which the case is set to be tried.

  b. Telephonic Hearing. When practicable and subject to the consent of the court, a party may attend a trial by telephonic means if they do not intend to offer into evidence anything more than their own testimony and the documents which were attached to their records affidavit or current pleading. In such an event, the documents should bear sufficient identification to ensure that they are identifiable to the court and any party to the litigation. A party may not attend a jury trial telephonically.

  c. Trial Limited to Issues Pled. The parties at trial are limited to those claims, disputes, pleas and defenses as disclosed in their active pleadings.

  d. Trial is Informal. The trial is informal, with the primary objective being to dispense speedy justice between the parties.

  e. Jury Trial. A party is entitled to a jury trial if the requesting party files a request not later than fourteen days before the date on which the hearing is to be held and at the same time pays the jury fee.

RULE NO. 20. FAILURE TO APPEAR

- **RATIONALE:**

  The proposed rule seeks to clarify how a court should dispose of a case if one or more parties do not appear at trial. In proposing this rule, it is anticipated that the period for requesting a new trial will be enlarged to 20 days. This will provide additional protection a defendant who may have mistakenly failed to appear.

- **RULE:**

  Failure to Appear at Trial.

  a. If a defendant who has been served with citation fails to appear at trial, the judge must enter a default judgment for the plaintiff in the amount pled.

  b. If the plaintiff fails to appear at trial, the judge may enter an order dismissing the action without prejudice.

RULE NO. 21. CONFESSION OF JUDGMENT

- **RATIONALE:**

  The proposed rule addresses two issues. First, Tex.R.Civ.Proc. Rule 563 is being utilized by some consumer attorneys to confess judgment in an amount substantially less than that claimed by the plaintiff, the effect of which is to disruptive the legal process and propel the case to an appeal. Second, the rule adopts a process which is available in other states which allows for the parties to a dispute to agree to the entry of judgment without the need for issuance of a citation or for service of process.

- **RULE:**

  Confession of Judgment

  a. Any party may appear in person, by written instrument, or by an attorney, before any justice of the peace and confess judgment for any amount within the jurisdiction of the justice court, and such judgment shall be entered on the justice's docket as in other cases if:

     i. in a case where the party's appearance is prior to the filing of a petition by a plaintiff, the plaintiff, his agent or attorney shall make and file an affidavit signed by him, to the justness of his claim, or

     ii. in a case where the party's appearance is after the filing of a petition by a plaintiff, the plaintiff, his agent or attorney agrees to the confession of judgment.

RULE NO. 22. SETTING ASIDE DEFAULT JUDGMENT

- **RATIONALE:**

  The proposed rule enlarges the period of time in which a party may seek to set aside a judgment by default or of dismissal.

- **RULE:**

  A justice may within twenty days after a judgment by default or of dismissal is signed, set aside such judgment, on motion in writing, for good cause shown, supported by affidavit. Notice of such hearing shall be given to the opposite party at least three full days prior to the hearing and such hearing must be held and order entered within the twenty days or the motion is deemed denied by operation of law.

RULE NO. 23. APPEAL

- **RATIONALE:**

  The proposed rule expands the availability of appeal to both parties by reducing the number of sureties and allowing a parties attorney to stand for their client in guaranteeing the performance of a judgment.

- **RULE:**

  a. Appeal from a Debt Collection Case is perfected upon filing a cash or verified surety bond equal to double the amount of the judgment, within twenty days of the judgment date.

     i. The surety bond may be filed by the defendant and one good and sufficient surety, which surety may be the parties attorney.

     ii. No appeal bond is required to appeal a take-nothing judgment or dismissal.

     iii. The appeal applies only to the judgment against the appealing party.

     iv. Judgment may be severed as to the non-appealing party, with the judgment's being enforceable.

  b. Enforcement against sureties.

     i. If judgment is granted against appellant, the judgment is executable against the sureties, without further order. Entry of judgment against the sureties is not required.

TXCBA Correspondence
To the
Justice Court Rules Task Force

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January 6, 2012

The Honorable Russell B. Casey
Chairman, Texas Supreme Court
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1400 Main St. Suite 220
Southlake, Texas 76092

Re: Texas Creditor's Bar Association's Proposal and Presentation to the Supreme Court Task Force at its December 7, 2011 Meeting

Dear Judge Casey and
Members of the Supreme Court Justice Court Task Force:

The Texas Creditor's Bar Association (TXCBA) sincerely appreciates the opportunity to make recommendations regarding the important task which your committee is undertaking.

In thinking back on our exchange during the recent committee meeting, we felt that a couple of points should be addressed.

The TXCBA Proposal Sought To Address The Goals Of The Statute

The TXCBA believes that HB 79 sought to create a simple, speedy and fair set of rules for the handling of bank loan, credit card and assigned debt claims (collectively, Debt Claim Cases). Further, these rules needed to be easy for the courts to administer and for the litigants to understand. To this end, the TXCBA proposed changes to the current rules of civil process which were designed to increase the information available to all parties, with the least amount of delay or confusion.

The TXCBA's proposal included a number of changes from the current legal practice in Texas; the most striking of which was ***the burdens placed upon the plaintiff*** in these cases. Specifically, the TXCBA proposed (a) the marshalling of default judgment evidence when the lawsuit is filed, and (b) the mandatory disclosure by plaintiff of both its witnesses and its documents to be used at trial. These are significant departures from the current practice in Debt Claim Cases or, for that matter, any type of lawsuit in Texas.

In exchange for the increased burden of marshalling evidence, the TXCBA asked:
1) For certainty in obtaining a default judgment;
2) That the default judgment be handled by submission; and
3) That the defendant not be allowed to file a no evidence summary judgment (as the evidence necessary to defeat the motion was already filed with the petition).

In exchange for the voluntary disclosure of witnesses and documents, the TXCBA only asked:
1) That a reciprocal duty be placed upon the defendant; and
2) For limited discovery, unless the circumstances of the cases warranted expanded litigation.

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The TXCBA Proposal Was A Comprehensive Approach

The TXCBA proposal was a comprehensive set of procedures designed to interface with the other rules, not simply an ad hoc collection of ideas. As such, it sought to address in a comprehensive fashion the ordinary issues faced by the parties and the courts in Debt Claim Cases. Unfortunately, it seemed that this approach was perhaps misunderstood by some present at the meeting, who looked for an "evil intention" in every rule. For example, the discussion regarding limitation on no evidence summary judgment motions seemed to occur without any recognition of the fact that the TXCBA was proposing significant pleading/proof requirements and mandatory disclosure. Similarly, the committee seemed dead-set against the idea of specificity in the defendant's answer, when the TXCBA was simply proposing that both sides move away from notice pleadings, and put the issues clearly and succinctly before the court so that discovery and motions can be curtailed or eliminated. The federal rules, as well as most other states, require specific denials, not just a general denial.

The TXCBA Believes That Its Members Should Not Be Held to a More Onerous Standard

It also concerned us that it appears to be the desire of some of the task force members to do away with or severely curtail debt cases in the new justice courts. The TXCBA does not believe that this was part of the legislative mandate to the Supreme Court of Texas, nor the Court's mandate to the task force. The discussion about the "high price of admission" that creditors should be forced to pay was both troubling and counter to the guiding principles of Texas jurisprudence. Creditors, regardless of their level of sophistication or background, must have the same opportunities as all civil litigants to prove their cases by a preponderance of the evidence – that they are “more likely than not” entitled to a judgment.

The TXCBA Is Hoping For Clarity

Texas justice court judges are often confused by the legal standards being quoted by the myriad of attorneys who bring and defend Debt Claim Cases. While anecdotal stories can capture the imagination, they constitute a poor basis for establishing rules of court. Add to this a fair amount of misinformation and basic misunderstandings, and we have a recipe for disaster. For example, during the presentation, there ensued a discussion about how the TXCBA was attempting to circumvent the limitations of TRCP 185 (Suit on Sworn Account) and TRCP 241 (Assessing Damages on Liquidated Demands). In actuality, the TXCBA was merely attempting to provide, at the time of filing, the evidence that the plaintiff would ordinarily offer as proof of damages under TRCP 243 (Unliquidated Demands). If the very intelligent people gathered in one room cannot come to an easy understanding of the distinction between these two approaches, what are the odds that 800+ justices of the peace, many of whom are not attorneys, will be able to do so? This example, alone, cries out for clarity as to what is sufficient evidence of a claim.

The TXCBA’s proposal at its most basic, fundamental level is a request for clarity, so that a former-teacher-turned-judge has the same understanding as an experienced attorney as to how these types of cases should be heard. We believe that was the spirit of the legislation, and we hope to see it preserved in the rules proposed by the task force.

The TXCBA is Hoping for Additional Participation

The decision by the task force to consider a debtors' bar counter-proposal set of rules without an adequate opportunity for comment by creditors is particularly dismaying, given the opportunity the debtor’s bar had to review and comment on our proposal at the December meeting. Our understanding, as it stands today, is that the recommendations (not yet written) of the debtor's bar would be reviewed and discussed in the absence of any representation/participation from the creditors' bar. In the view of the TXCBA, this is highly problematic. We are cognizant of the

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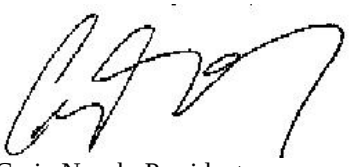
time deadlines faced by the task force and understand the desire to keep moving forward. However, we believe the best possible rules will come from fair and active participation from both sides. We hope that this decision will be reconsidered, and we stand ready to assist in any way necessary.

The TXCBA Is Prepared for the Challenge

Finally, we ask that the task force understand and acknowledge that the TXCBA has offered a totally new pleading concept; one that is foreign to Texas law. Never before has a party been expected to marshal its evidence at the time of filing suit, nor make mandatory disclosures upon the joining of the action by an opposing party. Such a change should be supported by a compelling justification; namely a significant improvement in the handling and disposition of Debt Claim Cases. The task force has an opportunity to recommend substantial improvements to Texas civil process. Conversely, should the task force seek to simply impose a "price of admission" for creditors, then the TXCBA would suggest that a tremendous opportunity will have been missed. We would urge the task force to seize the opportunity for change, rather than to merely impose a burden, as has been advocated by some.

In conclusion, it has been a privilege to be involved, even tangentially, in your discussions, and we look forward to rules that treat both sides fairly, increase court efficiency without sacrificing justice, and set a new standard for the twenty-first century.

We remain respectfully yours,



Craig Noack, President
Texas Creditor's Bar Association

Michael J. Scott, Chair
Executive Committee

TXCBA Response
To the Draft Rules by the Justice Court Rules Task Force

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March 14, 2012

The Honourable Russell B. Casey
Chairman, Texas Supreme Court
Justice Court Task Force
Southlake Government Complex
1400 Main St. Suite 220
Southlake, Texas 76092

Re: Texas Creditor's Bar Response to the Proposed Rules Under Consideration by The Supreme Court Task Force

Dear Judge Casey and
Honourable Members of the Supreme Court Justice Court Task Force:

This response is made by the Texas Creditor's Bar Association ("TXCBA") to the Justice Court Rules Task Force appointed by order of the Texas Supreme Court on September 17, 2011 ("Task Force"), and pertains to the proposed rules governing debt collection cases in Justice Courts first circulated on or about February 8, 2012, and as subsequently revised on March 7, 2012 (the "Proposed Rules"). Members of the TXCBA Executive Committee have had an opportunity to review the Proposed Rules and to speak with various members of the Task Force regarding the legal basis and practical effect of these rules.

The TXCBA believes that it is necessary to convey to the Task Force our extreme concern over these rules and their effect, should they be enacted. By separate document, the TXCBA will address the specifics of each rule and provide to the Task Force its recommendations.

The critique which follows is based upon four tenets. It is the position of the TXCBA that the Proposed Rules:

- cannot be implemented by the justice courts;
- do not treat all parties equally;
- run contrary to the clear legislative mandate; and
- are contrary to established Texas law.

The details of our concerns follow:

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The Proposed Rules Cannot Be Implemented

The Proposed Rules are so unwieldy that they cannot be implemented in a fair or efficient manner. The TXCBA proposed an alternative procedure that conformed to current case law and where creditors could elect to put on a *prima facie* showing in exchange for consistency amongst the hundreds of justice courts in considering the evidence and rendering default judgments. The Proposed Rules have turned that on its head; it has made mandatory a system whereby *justice court clerks* are the arbiters of justice, by denying creditors even an opportunity to have citation issued unless a laundry list of requirements and evidence is met to the clerk's or the judge's satisfaction.

The Proposed Rules also would likely not survive a constitutional challenge. The Proposed Rules prohibit claims from being heard unless a creditor's entire case is proven up front, and effectively require third-party testimony for assignees before a plaintiff may even present its claim. No other state has such a requirement, because it bars a class of claimant access to the courts for no reason. Gone are confessions of judgment, friendly suits, and the typical result of a justice court suit: a settlement beneficial to both creditor and consumer, whereby the creditor takes less than is owed and the consumer cleans up his or her credit.

The practical effect of these rules would be to reduce case filings in the Justice Courts by somewhere between 50,000 and 100,000 cases statewide per year, with the commensurate loss of filing fees to each county and court. This is because the burdens placed upon the claimants by Rule 586, Plaintiff's Pleadings, would exceed either their ability or willingness to comply.

The Proposed Rules Do Not Treat All Parties Equally

Many of the pleading requirements and all of the documentation requirements included in the Rule 586 are not necessary to state a claim. The Proposed Rules shift the plaintiff's burden from that of articulating the legal and factual basis of a claim, to actually proving its case at the time of suit; and yet they go even further, to demand that a plaintiff defeat the defendant's affirmative defenses, verified denials, and possible counterclaims . . . ***all before the defendant is actually served***.

In short, the Proposed Rules scrap the adversarial system of justice that has been present in Texas and in the United States since their founding, in favor of a stacked deck against creditors from the very start. The Proposed Rules represent a "Main Street" versus "Wall Street" bias that is inappropriate in judicial rules, and inaccurately paints all creditors with the same brush. The truth is that creditors would no longer be equal under the law with other parties. While any other party in justice court could allege a fact and, if not denied, rely upon the court to accept the allegation as true (excluding damages), the Proposed Rules would effectively refuse to believe creditors on any fact issue unless evidence is produced.

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Both the Federal Trade Commission and the Texas Attorney General's Office have each reviewed the issue of pleading requirements in debt collection cases. (See Exhibits 1 and 2, attached). Their conclusions were remarkable similar to the TXCBA's proposal and radically different than the Proposed Rules. Given that these two organizations each exist, in part, to protect the consumer, it is clear that the Task Force has created rules that seek to accomplish something more: to create an environment favorable to a defendant in a creditor lawsuit. While such a scheme may be a politically popular amongst some, it is not justice. The TXCBA believes that justice lies in creating rules that allow for claims to be heard and all parties to settle their claims fairly and equitably if possible.

The Proposed Rules Run Contrary to the Clear Legislative Mandate

As described by Texas Supreme Court Justice Thomas R. Phillips (Ret.), the current efforts by both the legislature and the judiciary seek to make the courts more efficient, more accountable, and the outcome more certain.

Texas Government Code Sec. 27.060 establishes these objectives. The statue mandates that the Texas Supreme Court develop rules of civil procedure ***"to ensure the fair, expeditious, and inexpensive resolution of small claims cases."***[1] And while the statute specifically provides for the creation of a unique set of procedural rules for credit grantor and assigned debt claims ("Debt Collection Cases"), it retains the overall expectation that ***all justice court rules***:

> (1) not require that a party be represented by counsel;
>
> (2) not be so complex that a reasonable person without legal training would have difficulty understanding or applying the rules; or
>
> (3) not require that discovery rules adopted under the Texas Rules of Civil Procedure or the Texas Rules of Evidence be applied. [11]

Many of the Proposed Rules are so complex that a reasonable person, acting on behalf of a plaintiff *or* defendant, could not apply them. Any small plaintiff, whether the original creditor or an assignee, attempting to apply Rule 586 would almost certainly fail, rendering their claim's resolution unfair, not expeditious, and expensive. Additionally, it is absurd that the Proposed Rules essentially enshrines a particular (and incorrect) view of evidentiary law under the guise of doing away with the application of the Texas Rules of Evidence.

The legislative mandate was to make a simple system of justice that anyone could use. The Task Force has done the opposite; it has decided to impose complex and expensive rules upon creditors. Respectfully, the TXCBA submits that a simple system of justice must apply through ***all*** Justice Court Rules, not just through some; and to ***all*** parties, not just to defendants.

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[1] Sec. 27.060(d).

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The Proposed Rules are Contrary to Established Texas Law

The issues taken up in this section pertain to the requirement in the Proposed Rules that an assignee must file an affidavit from the original issuer before the justice court can issue a citation.

The Proposed Rules seem to be directed at the hearsay nature of an assignee's affidavit. It is, of course, hearsay, just as all business records affidavits, regardless of their source, are technically hearsay. Any affiant testifying to any business records has no personal knowledge of the claim other than that which he gleaned from a review of the company's records. Yet the laws of our country and our state have determined that their reliability is such that an *exception* to hearsay is warranted for such testimony and documentation. The only remaining issue, then, is whether there is something in an assignee's affidavit testimony to justice court that changes this time-honored rule.

First, the Texas Supreme Court has squarely held that in the absence of an objection, a court *must* admit and consider the testimony. In *Texas Commerce Bank v. New*, 3 S.W.3d 515 (Tex. 1999), the Texas Supreme Court held that an affidavit may be offered as evidence at a default judgment hearing and that the testimony therein, though hearsay, is admissible to prove-up a claim. The *New* decision was important for a number of reasons: (1) it confirmed that when proving-up a default judgment, the court may rely upon affidavit testimony, (2) it held that the affiant's affidavit may be based upon a review of the businesses records, and not be solely limited to the affiant's personal knowledge, and (3) it reminded the courts that hearsay testimony is admissible as evidence in Texas, absent an objection, and that it is an abuse of discretion to exclude such evidence in a unopposed prove-up hearing. As noted by the Court,

> "Rule 802 says, 'Inadmissible hearsay admitted without objection shall not be denied probative value merely because it is hearsay.' Nothing in rule 802 limits its application to contested hearings. The rule is not ambiguous and requires no explication."

Id. at 517. The Court's rather curt treatment of any argument to the contrary is instructive and should be heeded by the Task Force.

Second the information about which the assignee is testifying is derived from information obtained from the predecessor-in-interest as the result of a business transaction wherein the information was material to the transaction. As such, this information qualifies for a hearsay exception under Tex.R.Evid. Rule 803(15). [1] Supporting this is the fact that *eight* Texas District Courts of Appeal have held that the records of a third-party may be adopted and incorporated by a successor-in-interest or assignee, ***thereby becoming the business records of the current claim holder*** and thus qualifying as an exception to hearsay rule under Tex.R.Evid. Rule 803(6). [2, 3] As such,

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[1] **Tex.R.Evid. 803(15) Statements in Documents Affecting an Interest in Property.**
A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the

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an affiant's testimony satisfies multiple exceptions to the hearsay rule and would be admissible even over objection.

Third, *Simien* [4] and its brethren opinions from several other appellate courts require the admission of third-party derived business records ***over the defendant's objection, and specifically in the context of collection cases***. Over the past two years, every court considering the *Simien* rule has adopted it, recognizing that due to the high level of federal regulation over major lenders, the documents referenced in a collection case are inherently reliable and admissible, noting the strong possibility of business failure and heavy criminal and civil penalties if it were otherwise.

The Proposed Rules, in short, go against the great weight of Texas jurisprudence in numerous ways: in excluding unobjected-to testimony, regardless of its nature; in singling out one class of plaintiff for heighted evidentiary requirements; and in disregarding the learned opinions of numerous courts who have recently considered these issues. The TXCBA respectfully suggests a reworking of the Proposed Rules to more accurately reflect Texas law.

Conclusion

It is the belief of the TXCBA that the current effort of the Task Force is misguided on the above issues and that there is no substantive basis for several of the rules that are being proposed. The effect of the Proposed Rules are devastating to the clients we represent, will be devastating to the courts we practice in, and are ruinous to the concept of simple and fair justice.

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document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

[2] **Tex.R.Evid. 803(6) Records of Regularly Conducted Activity.**
A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by affidavit that complies with Rule 902(10), unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. "Business" as used in this paragraph includes any and every kind of regular organized activity whether conducted for profit or not.

[3] See Exhibit 3 for article regarding business records obtained from third-party.

[4] *Simien v Unifund CCR Partners*, 321 S.W.3d 235 (Tex.App--Houston[1st] 2010).

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The TXCBA continues to be willing to work with the Task Force in an effort to develop a set of rules which it and its members can support. In addition, there are many other organizations that would be affected by the Proposed Rules, such as the Texas Bankers Association, the Texas Process Servers Association, the National Association of Retail Collection Attorneys, the International Association Credit and Collection Professionals and the Debt Buyers Association International. We are in the process of reaching out to these organizations so that we can, with a common voice, work with the Task Force. But this must be said: if the Proposed Rules stand as they are currently written, then the TXCBA will have no choice but to actively oppose them.

As always, the Texas Creditors Bar Association appreciates the opportunity to work with the Task Force, and eagerly looks forward to a fair set of rules governing our practice.

We remain respectfully yours,

Michael J. Scott, Chair
Executive Committee
Texas Creditor's Bar Association

SUMMARY OF RECOMMENDED REVISIONS
TEXAS CREDITOR'S BAR ASSOCIATION

March 14, 2012

Rule	Topic	Scope	Comment
503	**Applicability to Other Rules**	**Clarifies and Expands Rule**	**Enlarges the proposed rule to include the Texas Rules of Civil Procedure discovery rules and ensures proper integration with the remainder of those rules.** [1]
510	**Venue**	**Eliminates Rule**	**Venue is established by statute, not by rule.** [2]
512	**Service**	**Clarifies and Expands Rule**	**Expands rule to allow for service methods available under federal law; specifically, delivery to a person of competent age at the residence of the defendant.** [3]
513	**Alternative Service**	**Clarifies and Expands Rule**	**Allows private process servers to request alternative service and allows service by posting of the citation.**
514	**Service of Papers other than Citation**	**Clarifies and Expands Rule**	**Allows service by first class mail** [4] **and expands the circumstances when email may be utilized to include its first use by another party.**
516	Answer Filed	Clarifies Rule	No substantive change to rule
517	**General Denial**	**Clarifies and Expands Rule**	**Requires defendant to plead specific defenses and payment; but there is no verification requirement and there is no verified plea**
518	Counterclaim	Clarifies Rule	No substantive change to rule
521	Unclear Filings	Clarifies Rule	No substantive change to rule
525	**If Defendant Fails to Appear**	**Revises Rule**	**Allows the court discretion in holding default judgment hearing when Rule 586 not fully satisfied. Removes dismissal with prejudice prior to trial or dismissal hearing.**
526	**No Dispute of Facts**	**Revises Rule**	**Allows for summary judgments, but limits their use to uncontested matters** [5]
527	**Setting**	**Clarifies and Expands Rule**	**Requires 14 day notice of trial when case is reset**

Rule has been changed, but IT IS NOT significantly different from Task Force Proposal
Rule has been changed and IT IS significantly different from Task Force Proposal

Rule	Topic	Scope	Comment
531a	Trial Setting	Clarifies Rule	No substantive change to rule
555	Setting Aside Default Judgments and Dismissals	Clarifies Rule	No substantive change to rule
560	**Appeal Bond**	**Clarifies Rule**	**Removes plaintiff's bond requirement when appealing a take-nothing judgment [6]**
581	**Definitions**	**Eliminates Rule**	**The definitions are not otherwise referenced in the rules and are unnecessary**
582	**Scope**	**Revises Rule**	**Adopts language of the Tex.Gov.Code 27.060**
583	**Construction of Rules**	**Revises Rule**	**Clarifies uniformity of Rules**
584	Applicability of Rules of Procedure for Justice Courts	Clarifies Rule	No substantive change to rule
585	**Removal to County or District Court**	**Clarified and Revises Rule**	**Eliminates use of paupers affidavit to satisfy filing fees when case is removed**
586	**Plaintiff's Pleading**	**Revises Rule**	**Brings rule into conformity with Texas law and historical pleading standards while addressing issues raised by the FTC and the Texas Attorney General [7]**
587	**Service**	**Eliminates Rule**	**Revisions to Rule 512 render this rule unnecessary**
New	**Discovery in Collection Cases**	**Proposed Rule**	**Establishes a disclosure system for handling pre-trial exchange of information and documents**
New	**Duty of Parties to Develop Case**	**Proposed Rule**	**Supercedes Rule 507**
New	**Mediation**	**Proposed Rule**	**Controls cost of mediation is these cases to ensure that costs are not disproportionate to the amount of the claim and that mediation is beneficial to the parties**

Rule has been changed, but IT IS NOT significantly different from Task Force Proposal
Rule has been changed and IT IS significantly different from Task Force Proposal

Endnotes:

1. *Tex.Gov.Code* Section 27.060(d)(3) provides that "[t]he rules adopted by the supreme court may not . . . require that discovery rules adopted under the Texas Rules of Civil Procedure or the Texas Rules of Evidence be applied except to the extent the justice of the peace hearing the case determines that the rules must be followed to ensure that the proceeding is fair to all parties.

2. *Tex.Civ.Prac.&Rem.Code* Chapter 15 establishes the rules pertaining to venue. These cannot be superceded by rule.

3. *Fed.R.Civ.Proc.Rule* 4(e) provides that "an individual . . . may be served . . . by . . (2) doing any of the following:
   (a) delivering a copy of the summons and of the complaint to the individual personally;
   (b) leaving a copy of each at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there; or
   (c) delivering a copy of each to an agent authorized by appointment or by law to receive service of process.

4. Service by First Class Mail is recognized as an acceptable method of service in all federal court cases and in a significant number of individual states as well. *See Fed.R.Civ.Proc.* Rule 4.

5. *Tex.Gov.Code* Section 27.060(a) requires that the rules of civil procedure promulgated by the supreme court should "***ensure the fair, expeditious, and inexpensive resolution of small claims cases***." Summary judgment is most often utilized as a tactical annoyance, than as a true tool for the resolution of a legal matter. As such, its availability should be eliminated or greatly reduced. If a party wishes to move a case to trial, they need only ask.

6. If the plaintiff loses a case, they should not be required to post a $500 bond when there is no judgment to satisfy and there are no costs of prosecution which will not be immediately borne by the plaintiff in paying the filing fee to the county or district court. As such, a $500 bond is unnecessary, and certainly not one payable to the defendant.

7. See letter from Texas Creditor's Bar Association to Justice Court Rules Task Force dated March 14, 2012.

Rule has been changed, but IT IS NOT significantly different from Task Force Proposal
Rule has been changed and IT IS significantly different from Task Force Proposal

RULE 503. APPLICABILITY OF OTHER RULES

(a) The pre-judgment discovery rules in the Texas Rules of Civil Procedure do not apply to justice courts unless, after notice and hearing, the judge orders that a rule must be followed to ensure that the proceedings are fair to all parties. The enforcement of a judgment shall not be affected by any rule in this chapter.

(b) The Texas Rules of Evidence do not apply to justice courts unless, after notice and hearing, the judge orders that a rule must be followed to ensure that the proceedings are fair to all parties.

(c) Although the Texas Rules of Evidence do not apply to justice courts, the judge may not disregard evidence that would be admissible under the Texas Rules of Evidence.

RATIONALE: The Rule as written would allow a justice court to change the rules relating to the admissibility of evidence at any point in the trial process, including in the middle of trial. The proposed changes are not significantly different, but would require notice and hearing before a judge applies evidentiary rules to a particular case and would prevent a judge from ignoring what would otherwise be admissible evidence.

RULE 510. VENUE

[This Proposed Rule conflicts with the governing venue statute.]

RATIONALE: The Task Force's proposed rule conflicts with Texas Civil Practice & Remedies Code Chapter 15. While the TXCBA feels that the justice courts should be empowered to freely transfer venue as appropriate, a rule prohibiting filing would be contrary to the statute and would confuse unsophisticated parties.

RULE 512. SERVICE

(a) The plaintiff is responsible for serving the defendant with the citation, a copy of the petition, and the documents that are a part of the petition.

(b) To obtain service, the plaintiff may:

(i) Request the sheriff or constable to personally serve the defendant. The plaintiff must pay the service fee or provide a sworn statement why plaintiff is unable to pay;

(ii) Request the court to serve the defendant by registered or certified mail, return receipt requested, restricted delivery requested. The plaintiff must pay the actual cost of the certified or registered mail;

(iii) Employ a private process server licensed by the Supreme Court of Texas to serve the defendant by personal delivery or by registered or certified mail, return receipt requested.

(iv) File a written request with the court to allow any other uninterested party who is at least 18 years old to serve the defendant by personal delivery or by registered or certified mail, return receipt requested. If the court approves the request, the authorized person may serve the defendant in any of the above listed methods.

(c) Personal service is accomplished when a copy of the citation, petition and the documents that are a part of the petition are:

(i) Personally delivered to the defendant;

(ii) Left at the defendant's dwelling or usual place of abode with someone of suitable age and discretion who resides there, and a copy is mailed by first class mail to the defendant at that address; or

(iii) Delivered to an agent authorized by appointment or law to receive service of process.

(d) Neither the plaintiff nor any person with an interest in the case may serve the citation.

(e) If service is by registered or certified mail, return receipt requested, in order for the service to be valid, the defendant's signature must be present acknowledging receipt for the service.

RATIONALE: The rule is enlarged to include delivery to a person of suitable age at the defendant's home. The language of the rule is taken directly from *Fed.R.Civ.Proc. 4(e)(2)(B).*

RULE 513. ALTERNATIVE SERVICE

(a) If the methods under Rule 512 are insufficient to accomplish service, the plaintiff constable, sheriff or private process server licensed by the Texas Supreme Court may request alternative service. This motion must include a sworn statement detailing the methods attempted. The plaintiff, constable, sheriff or licensed private process server may request that the citation, petition and documents that are part of the petition be:

(i) Mailed first class mail to the defendant,

(ii) Attached to a door or gate at the defendant's residence or other place where the defendant can probably be found, or

(iii) Any other method that is reasonably likely to notify the defendant of the suit.

(b) The judge shall approve the method requested if it is reasonably likely to notify the defendant of the suit. If denied, a different method may be requested.

RATIONALE: The Texas Supreme Court licenses and regulates private process servers. The rule should be amended to provide that licensed process servers should also be allowed to move for alternative service.

Alternative service should be allowed by first class mail for small claims cases, so long as said service is attested to by a sheriff, constable, or licensed process server. This process exists in other states. *See Ohio Civ.R. 4.6.*

RULE 515. SERVICE OF PAPERS OTHER THAN CITATION

(a) Except as expressly provided in these rules, every pleading, notice, or motion that these rules require be served, other than the citation, may be served by a party, an attorney or record, a sheriff or constable, or any other person competent to testify, and may be served by:

(i) Delivering a copy to the party to be served, or the party's authorized agent or attorney;

(ii) Mailing a copy by first class mail, to the party's last known address. Service by mail is complete upon depositing the paper, enclosed in a postpaid, properly addressed wrapper, in a post office or official depository under the care and custody of the United States Postal Service;

(iii) Faxing a copy to the recipient's current fax number. Service by fax after 5:00 p.m., local time of the recipient, is deemed to be served the following day;

(iv) Emailing a copy to an email address expressly provided by the party for such service or utilized by the party for communication regarding the case. Service by email after 5:00 p.m., local time of the recipient, is deemed to be served the following day; or

(v) Any manner that the court may direct.

(b) Service by fax, mail, or email adds three days to the time that a party has to respond.

(c) The party or attorney of record shall sign a statement explaining how all filings were served or certify service in open court. A certificate by a party or an attorney of record, the officer's return, or the sworn statement of any person showing service of a notice, pleading, plea, motion, or other document is presumptive evidence of service.

(d) A party to whom service is directed may offer proof that the notice or instrument was not received or, if service was by mail, that it was not received within three days from the date of deposit in a post office or official depository under the care and custody of the United States Postal Service, and upon so finding, the court may extend the time for taking the required action, or grant such other just relief.

RATIONALE: Service by first class U.S. mail is recognized as an acceptable method of service in all federal courts and in a significant number of individual states as well. *See Fed.R.Civ.P. 5(b)(2)(C).*

RULE 516. ANSWER FILED

(a) Defendant must file with the court a written answer to a lawsuit by the end of the 14th day after the day of on which the defendant was served with the citation, and must send a copy of the answer to the plaintiff as provided by Rule 515.

(b) If defendant is served by publication, the time in which the defendant has to answer the lawsuit is 42 days, instead of 14 days.

(c) If defendant’s answer date falls on a weekend or a legal holiday, or if the court in which the answer is due closes before 5:00 p.m. on the answer day, the answer is due on the next business day.

(d) Defendant's appearance shall be noted on the docket, and the case may be set for trial by the court.

RATIONALE: No substantive changes have been proposed for this rule.

RULE 517. GENERAL DENIAL

(a) Defendant's general denial of the suit filed is sufficient to constitute an answer and appearance, but does not raise any specific defense at trial.

(b) If defendant wishes to raise a specific defense to plaintiff's claim or to assert that a payment has been made, the defendant must provide sufficient detail to allow plaintiff to understand the basis of the defense or claim of payment.

RATIONALE: The Task Force has eliminated all forms of discovery for cases, and also seeks to eliminate all forms of disclosure by a defendant. To avoid surprise, affirmative defenses should be disclosed in the answer. Otherwise, a claimant will not have sufficient knowledge to request limited discovery in order to investigate a contested issue.

RULE 518. COUNTERCLAIM

A defendant who seeks to recover money from a plaintiff must file a counterclaim. The counterclaim must include all information in the counter petition that is required under Rule 509, and the defendant must pay a filing fee or provide a sworn statement of inability to pay the fees. A citation need not be served on the plaintiff, but the defendant must serve the counterclaim on all other parties, as provided by Rule 515.

RATIONALE: There are no substantive changes proposed to this rule.

RULE 521. UNCLEAR FILINGS

A party may file a motion court asking that another party clarify any pleading filed with the court. The court shall determine if the pleadings are sufficient to place all parties on notice of the issue and scope of the suit. If the pleading is insufficient, the court shall order the party to amend the pleading, and set a date by which to make the corrections. If the party refuses, the pleading may be stricken.

RATIONALE: There are no substantive changes proposed to this rule.

RULE 525. IF DEFENDANT FAILS TO APPEAR

If the defendant does not file an answer by the date listed in Rule 516, the judge shall proceed in the following manner:

(a) If the plaintiff's claim is based on a written instrument signed by both parties, a copy of which is on file, along with plaintiff's affidavit proving the copy's authenticity and the amount owed after all payments, credits and offsets have been applied, the judge must enter judgment for plaintiff, as sought, without a hearing. Plaintiff's attorney may submit affidavits supporting reasonable and necessary attorney's fees, which the court must consider.

(b) If the suit is a Debt Claim case that is filed in accordance with Rule 586 and a copy of the charge-off statement along with a sworn statement from the plaintiff have been filed, the judge must enter judgment for plaintiff, as sought, without a hearing. Plaintiff's attorney may submit affidavits supporting reasonable and necessary attorney's fees, which the court must consider.

(c) If a default judgment cannot be entered as described in paragraph (a) or (b), the plaintiff may request a default judgment hearing at which the plaintiff must appear, in person or by telephonic or electronic means, and prove the right to the damages sought. If the plaintiff proves the right to judgment, the judge must grant judgment for the plaintiff in the amounts proven. If plaintiff does not prove the right to judgment, the case shall be set for trial.

(d) Justices are encouraged to allow plaintiffs to appear by telephonic or electronic communication systems.

(e) If the defendant files an answer before a default judgment is signed, the judge may not enter a default judgment and the case shall be set for trial.

RATIONALE: The proposed changes allows the court discretion in holding a default judgment hearing when Rule 586 is not fully satisfied as determined by the court. Otherwise, a plaintiff has no recourse to request reconsideration of a court or clerk’s determination of compliance with the rule.

The proposed changes also remove the concept of dismissal with prejudice prior to the trial or dismissal hearing.

RULE 526. NO DISPUTE OF FACTS

(a) If defendant admits the debt, plaintiff may file a request for entry of judgment and must serve a copy of the request on all parties. If the defendant does not dispute plaintiff's request within 21 days, the court may proceed to review plaintiff's request and the answer filed by the defendant, and may enter a judgment if it appears that there is not disagreement between the parties as to defendant's liability.

(b) A party may file a motion for summary judgment asking to court to enter judgment on its behalf and setting forth the evidence of its claim or defense. The opposing party has 21 days to submit a written statement disputing the evidence or otherwise showing why the motion should be denied. If the court does not receive a response to the motion, it must then consider the motion and the sufficiency of the supporting evidence and may enter judgment if the motion proves the relief that is sought; otherwise, the motion shall be denied.

(c) A case brought under this chapter may not be disposed of through a no-evidence motion for summary judgment.

RATIONALE: Tex. Gov't Code Sec. 27.060(a) requires that the changes to the rules should "ensure the fair, expeditious, and inexpensive resolution of small claims cases." Summary judgment is most often utilized in justice court as a tactical annoyance, rather than as a true tool for the resolution of a legal matter. As such, its availability should be greatly reduced and its resolution simplified. If a party wishes to obtain a resolution in a case, they may request an expedited trial setting.

RULE 527. SETTING

After defendant answers, the case shall be set on a pretrial or trial docket, at the judge's discretion. The date, time, and place of the setting must be sent by the court to all parties at their addresses of record, and must be mailed or otherwise served at least 45 days before the setting date, unless the judge determines that an earlier setting is required in the interests of justice. All subsequent settings must be sent to all parties at their addresses of record at least 14 days prior to the trial date, unless all parties agree to shorter notice.

RATIONALE: A minimum notice period should be required for trial resettings; otherwise, parties may not be adequately notified or prepared for trial, or even be available for the time and date of the reset.

RULE 528. CONTINUANCE

The judge, for good cause shown, may continue any setting.

RATIONALE: No substantive changes have been proposed to this rule.

RULE 531a. TRIAL SETTING

On the day and time that the case is set for trial, the judge shall call the cases in their order. If the plaintiff does not appear when the case is called, the judge may postpone the case or dismiss the suit, without prejudice. If the defendant does not appear when the case is called, the judge may postpone the case or take evidence. If the judge proceeds and takes evidence and plaintiff proves the case, judgment must be awarded in the amounts proven; otherwise, a take-nothing judgment must be rendered in favor of defendant.

RATIONALE: No substantive changes have been proposed to this rule.

RULE 555. SETTING ASIDE DEFAULT JUDGMENTS AND DISMISSALS

(a) A plaintiff whose case is dismissed may move to reinstate the case within ten days of the dismissal. The plaintiff must serve all parties with a copy of the motion by the next business day using a method approved under Rule 515. If plaintiff shows good cause why the case should be reinstated, the court may reinstate the case.

(b) A defendant against whom a default judgment is granted may file a motion, seeking to set aside the judgment, within ten days of the date of the judgment. The defendant must serve all other parties with a copy of the motion by the next business day, using a method approved under Rule 515. If the defendant shows good cause why the judgment should be set aside, the court may set aside the judgment and proceed with a trial setting.

(c) If the court denies a motion for new trial, or motion to reinstate, the party making the motion is entitled to appeal that court's dismissal or judgment as provided by Section 6, and will receive a new trial in the receiving court if the appeal is properly perfected.

RATIONALE: No substantive changes have been proposed to this rule.

RULE 560. APPEAL BOND

(a) Plaintiff may appeal the judgment by filing a notice of appeal, personally or by plaintiff's attorney, within 20 days after the judgment date or any motion for new trial is denied.

(b) Defendant may appeal the judgment by filing a notice of appeal and a bond, personally or by defendant's attorney, within 20 days after the judgment is rendered The bond must equal twice the total judgment amount, must be signed by two sureties approved by the judge, must be payable to the plaintiff, and must include the condition that the defendant will prosecute the appeal to effect and pay the judgment that may be granted against him on appeal.

(c) The appealing party must serve a copy of the notice of appealand bond on all parties. The court hearing the appeal may not enter an order of default judgment without proof that the notice of appeal was served.

(d) The appeal is perfected when the notice and bond, if applicable, have been filed. All parties must make their appearances at the next term of the receiving court.

(e) The appeal may not be dismissed for procedural defects or irregularities, either as to form or substance, without allowing appellant five days after notice to correct or amend the pleadings. This notice must be given by the court to which the cause has been appealed.

RATIONALE: The proposed change eliminates the bond for the appeal of a take-nothing judgment. Given the extreme reduction in available discovery and dispositive motions, a plaintiff should not be required to post a $500 bond for appeal. There is no judgment to satisfy and no costs of prosecution which will not be immediately borne by the plaintiff in paying the filing fee to the county or district court.

RULE 581. DEFINITIONS

[TXCBA recommends that this rule be deleted]

RATIONALE: The definitions section includes numerous terms that are not used in the rules, and do not comport with the statute's goal of crafting rules that are understandable by a lay person.

RULE 582. SCOPE

(a) This chapter applies to:

(i) an assignee of a claim or other person seeking to sue on an assigned claim;
(ii) a person primarily engaged in the business of lending money at interest; or
(iii) a collection agency or collection agent,

to the extent that the claim pertains to monies lent to or advanced on behalf of the defendant.

(b) The court has authority to remove a case from the scope of this chapter if it determines this chapter does not apply.

(c) The court may require parties to adhere to this chapter if it determines that this chapter applies.

RATIONALE: The proposed changes adopt the language of Texas Government Code Sec. 27.060.

RULE 583. CONSTRUCTION OF RULES

The rules in this chapter should be interpreted in such a manner as to promote judicial efficiency, enhance uniformity among justice courts, and ensure due process for all parties.

RATIONALE: The second sentence proposed by the Task Force is prejudicial and would seem to be a blanket rule to support judges in inferring that individuals, as opposed to corporations, are entitled to “more” justice. In the hands of judges who are not necessarily trained attorneys, such a rule could lead to substantial injustice.

RULE 584. APPLICABILITY OF RULES OF PROCEDURE FOR JUSTICE COURTS

(a) Except as outlined in this chapter, the rules of civil procedure promulgated by the Texas Supreme Court for justice courts shall apply.

(b) Upon request, a justice of the peace hearing a cause of action to which this chapter applies may, determine that the Texas Rules of Evidence and Texas Rules of Civil Procedure should be followed to ensure that the proceeding is fair to all parties.

RATIONALE: No substantive changes have been proposed to this rule.

RULE 585. REMOVAL TO COUNTY OR DISTRICT COURT

(a) If either party in a suit to which this chapter applies wishes to remove the suit to a county or district Court with concurrent jurisdiction, that party may do so by filing a motion for removal.

(b) Removal is not automatic; the court has discretion to grant or deny the motion. The court may consider whether:

(i) The parties are represented by counsel;
(ii) The amount in controversy; and
(iii) If justice would be served by allowing the case to be adjudicated in a higher court.

(c) If the motion for removal is granted:

(i) The court shall send its court file to the court to which the suit is removed; and
(ii) The moving party must pay the filing fee for the higher court.

(d) A defendant seeking removal under this rule is not allowed to avoid the payment of the filing fee by submitting an affidavit of indigency in accordance with Texas Rule of Civil Procedure 145.

RATIONALE: It is outside the purview of the Task Force to allow a pauper's affidavit to waive filing fees for removed cases. Such a modification should only be considered, if at all, by the county and district courts.

RULE 586. PLAINTIFF'S PLEADINGS

(a) The petition of a suit filed under this chapter must contain:
- (i) Each defendant's name and address;
- (ii) The name of the original creditor, if different from plaintiff;
- (iii) The original account number, which may be masked;
- (iv) The account's date of origination/issuance;
- (v) The charge-off date and amount, if applicable to the claim;
- (vi) If the plaintiff seeks post-charge-off interest, whether the rate of interest is based on a contract or statutory rate, and the amount of post-charge-off interest claimed; and
- (vii) If the plaintiff is represented by an attorney, the attorney's name, address, and telephone number.

(b) A copy of a document evidencing the existence of the account may be incorporated into petition, for instance:
- (i) the contract;
- (ii) the promissory note;
- (iii) a charge-off statement; or
- (iv) other documents that prove the debt.

(c) Plaintiff's affidavit, attesting to the amount that is owed after all payments, offsets or credits due to the defendant have been applied, may be incorporated into the petition.

RATIONALE: The Task Force's proposed rule is a significant deviation from any state's practice and extant Texas case law. It is incomprehensible to the lay person and acts as an unconstitutional bar to access to the courts by creditors, by essentially requiring proof of an entire case before a citation will even be issued. The Texas Creditors Bar Association laid out the significant issues inherent in the rule in its letter to the Task Force dated March 14, 2012.

The TXCBA agrees that significant disclosure in a petition is a way to enhance disclosure of the relevant facts to a defendant; however, this rule essentially attempts to create a "rule of evidence", in direct contravention of the statute, which must be satisfied before a case may even be presented to the defendant. There is no mechanism for contesting a court's determination of whether the rule has been satisfied.

RULE 587. SERVICE ON DEFENDANT

[Eliminated]

RATIONALE: Revisions to proposed Rule 512 make this rule unnecessary.

RULE 5__. DISCOVERY IN DEBT COLLECTION CASES

(a) Within 30 days after the defendant has filed an answer, each party must serve a written notice on all other parties that identifies every person who has knowledge of facts that are relevant to the case and must provide a brief summary of those facts.

(b) If, at any time after the initial disclosure required by paragraph (a), an additional witness becomes known, or the information known to a previously identified witness should change, this information must be communicated to all parties as soon as practicable, and not fewer than 14 days before trial.

(c) A party that intends to offer the affidavit of a custodian of records need only provide such documents in compliance with paragraph (d). A custodian of records does not need to be identified under paragraph (a).

(d) As soon as is practicable, but not fewer than 14 days before trial, each party to the lawsuit must deliver to the other parties a copy of every document that they intend to use during the trial.

(e) ,After good cause is shown, the court may order discovery, to ensure that the proceeding is fair to all parties.

(f) This rule supercedes Rule 505.

RATIONALE: This new rule proposed by the TXCBA establishes a simple method to exchange witness and documentary evidence prior to the trial date. Because collection cases often revolve around documentary evidence, this will allow for the full disclosure of most issues in the absence of standard discovery.

Custodians of business records are inherently protected by the Texas Rules of Evidence from being used as pawns in litigation. Specifically, an affidavit which substantially conforms to Texas Rule of Evidence 902(10) “shall be sufficient.” See Tex.R.Evid. 902(10)(b). Therefore, there is no particular purpose in disclosing the custodian’s identity when the function of the custodian is simply the certification of the records, rather than the offering of testimony.

RULE 5___. DUTY OF THE PARTIES TO DEVELOP THEIR CASE

In a case brought under this chapter, it is the duty of the parties, rather than the judge, to develop the facts of the case.

RATIONALE: This rule would supersede proposed Rule 507. The TXCBA is concerned that the proposed rules attempt to create a continental system of "judge-directed" discovery and trial, as opposed to the time-honored American model of party-directed litigation. Such a dramatic shift is outside the purview of the Task Force and the statutorily-mandated changes.

RULE 5__. MEDIATION

(a) The judge may require the parties to participate in third-party mediation, provided that the costs incurred by any party does not exceed $50.

(b) A party may only be required to attend one mediation.

(c) The attorney for plaintiff in a Debt Collection case may serve as the corporate representative of the plaintiff at mediation.

RATIONALE: The statute requires the expeditious and inexpensive resolution of small claims cases. Many counties have established low-cost resolution through mediation, which should be encouraged, but there should be a rule capping the expense of alternative dispute resolution.

TXCBA Lay Article
On the Admissibility of Records Obtained from Third-Parties

Just in Case

A Review of Issues Facing the Legal Collection Industry

Admissibility of Third-Party Records

A Question and Answer Session

Michael J. Scott

In 2010, the Court of Appeals of Texas, First District, Houston, rendered its decision in *Simien v Unifund CCR Partners*, 321 S.W.3d 235 (Tex.App--Houston[1st] 2010). Whether the panel of justices considering the case understood the contrast in opinions, both legal and personal, that *Simien* has created is unclear. What is clear is that the admissibility of third-party records as the business records of the proponent, *a la Simien*, (Third-Party Records) is an issue that is challenging for both the courts and counsel.

Simien involved an affidavit offered by the representative of a debt purchaser to prove-up that party's claim. The court held that the admission of the affidavit over a hearsay objection was not an abuse of discretion. In so doing, it determined that the affidavit fell within an allowed exception to the hearsay rule under Tex.R.Evid. Rule 803(6) [1] because it met certain criteria. These criteria constitute a three-pronged test which has become the *Simien* standard. Specifically, for third-party records to be admissible as a proponent's own business records, the affiant must show that:

1) the documents are incorporated and kept in the course of the testifying witness's business;
2) the business typically relies upon the accuracy of the contents of the document; and
3) circumstances otherwise indicate the trustworthiness of the document.

Purpose

The purpose of this article is to show that *Simien* was not only correctly decided, but that it is:

1) consistent with a substantial line of legal authority;
2) consistent with the rulings in other Texas courts; and
3) becoming widely adopted.

[1] Going forward, the rules of evidence will be referred to by rule numbers only. Please note that the Texas Rules of Evidence are patterned after the Federal Rules of Evidence.

Presentation

The argument goes as follows:

Q-01: Is there any legal basis for admitting the documents of a third-party as a proponent's own business records?

A-01: Not only yes, but heck yes. As the Rules of Evidence were formalized in their current form, the issue of the interplay between the hearsay exception afforded by Rule 803(6) and Third-Party Records came to the forefront. Substantially all United States Circuit Courts of Appeal have considered the issue and have ruled that documents furnished originally from a third-party source but kept in the regular course of business and relied upon by the proponent of that record may be properly admitted under 803(6).[2]

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[2] The following cases hold that Rule 803(6) does not require that a document actually be prepared by the business entity proffering the document. Rather, the cases stress two factors which are indicative of reliability and would allow an incorporated document to be admitted based upon the foundational testimony of a witness with first-hand knowledge of the record keeping procedures *of the offering business*, even though that business did not actually prepare the document. These two factors are:

1) that the incorporating business rely upon the accuracy of the document incorporated, and

2) that there are other circumstances indicating the trustworthiness of the document.

Case Summary

Fed. Cir.	*Air Land Forwarders, Inc. v. US*, 172 F. 3d 1338 (Fed. Cir. 1999) (Loss estimates produced by third party estimators were "business records" of the military . . . both reliance and additional assurances of credibility to be present in that the repair estimates at issue were clearly relied upon by the military during the claims adjudication process and the military considered the entire record, third-party repair estimates, in making its decision on the proper amount of compensation to be paid to the service member.)
1st Cir.	*United States v. Doe*, 960 F.2d 221, 223 (1st Cir.1992) (invoice properly admitted even though it was previously the record of another company)
2nd Cir.	*United States v. Jakobetz*, 955 F.2d 786 (2d Cir.1992), the Second Circuit also adopted this application of the business records exception in admitting into evidence toll receipts that had been incorporated into the business records of a construction company. The court stated: Rule 803(6) allows business records to be admitted "if witnesses testify that the records are integrated into a company's records and relied upon in its day to day operations." *Matter of Ollag Constr. Equip. Corp.*, 665 F.2d 43, 46 (2d Cir. 1981). Even if the document is originally created by another entity, its creator need not testify when the document has been incorporated into the business records of the testifying entity.

Q-02: Why do so many of these Federal cases involve the United States as a party?

A-02: When the United States is a party to litigation, the case often involves criminal conduct. The import of this fact is that not only are these federal courts of appeal prepared to consider Third-Party Records, but they are willing to deprive a person of his liberty (put him in jail) based upon this exception.

Q-03: Well, that's all fine and good, but what about Texas? What do Texas courts care about how the federal government construes its rules of evidence?

A-03: The Texas Rules of Evidence are patterned after the Federal Rules of Evidence, and thus cases that interpret the federal rules guide the application of the Texas rules unless the

	citing *United States v. Carranco*, 551 F.2d 1197, 1200 (10th Cir.1977).
3rd Cir.	*United States v. Sokolow*, 91 F.3d 396, 403 (3d Cir.1996) (explaining that business records exception still applies even though the records were derived from outside sources as long as there are other assurances of accuracy present)
5th Cir.	*United States v. Ullrich*, 580 F.2d 765, 771-72 (5th Cir.1978) (documents furnished originally from other sources but kept in the regular course of business and relied upon to confirm inventory were properly admitted under 803(6)).
9th Cir.	*United States v. Childs*, 5 F.3d 1328, 1334 (9th Cir.1993), the Court of Appeals for the Ninth Circuit held that documents prepared by third parties and integrated into the records of an auto dealership were properly admitted based on testimony that the documents were kept in the regular course of business and were relied upon by the dealership. The Ninth Circuit found the fact that the auto dealership relied upon the accuracy of the documents in its day-to-day business activities particularly relevant. *MRT Const., Inc. v. Hardrives*, 158 F.3d 478, 483 (9th Cir.1998) ("[R]ecords a business receives from others are admissible under Federal Rule of Evidence 803(6) when those records are kept in the regular course of business, relied upon by that business, and where that business has a substantial interest in the accuracy of the records.")
10th Cir.	*United States v. Hines*, 564 F.2d 925, 928 (10th Cir. 1977), cert. denied 434 U.S. 1022, 98 S.Ct. 748, 54 L.Ed.2d 770 (1978) ("The test of whether such records should be admitted rests upon their reliability. Here the test of reliability is met. Automobile manufacturers have a great interest in assuring that the VIN's on their products correspond with the appropriate invoices, for without careful, reliable identification procedures their business would greatly suffer or even fail.")
11th Cir.	*United States v. Parker*, 749 F.2d 628, 633 (11th Cir. 1984), also agreed that it is not necessary under Rule 803(6) that the records be prepared by the business that has custody of them and the fact that "the witness and his company had neither prepared the certificate nor had first-hand knowledge of the preparation does not contravene Rule 803(6)."

language of the rule clearly departs from its federal counterpart. [3] Also, the Texas Supreme Court says it is important. [4]

Q-04: Has any Texas criminal court adopted the Third-Party Records standard as the federal courts have?

A-04: Yes. There are at least two Texas criminal court decisions that have adopted the Third-Party Records exceptions applied by the federal courts. [5] [6]

Q-05: When was the first occasion where a Texas court recognized that Third-Party Records could be made part of a proponent's own business records?

A-05: Although *Harris v. State* (1993) is the first application of the Third-Party Records principle in the context of a criminal case, there are two decisions that pre-date *Harris*: *Cockrell v. Republic Mortg. Ins. Co.*,[7] rendered by Dallas Court of Appeals and *GT & MC, Inc. v. Tex.*

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[3] *Cole v. State*, 839 S.W.2d 798, 801 (Tex.Crim.App.1990) ("To begin with, our Texas Rules of Criminal Evidence, and the Texas Rules of Civil Evidence for that matter, are patterned after the Federal Rules of Evidence, and cases interpreting federal rules should be consulted for guidance as to their scope and applicability unless the Texas rule clearly departs from its federal counterpart.").

[4] *Guevara v. Ferrer*, 247 S.W.3d 662, 667 n.3 (Tex. 2007) ("Considering federal precedent as to evidentiary matters is appropriate.").

[5] *See Harris v State*, 846 S.W.2d 960 (Tex.App.-Houston [1st Dist.] 1993, pet. ref'd.) (Witness allowed to treat a certificate of origin from a car manufacturer as their business record, notwithstanding the fact that the witness was unaware of who created it, or if that that person had personal knowledge of the information contained within [adopting Tenth Circuit's analysis in *United States v. Hines*, holding that documents created by a third party incorporated into the regular course of the testifying witness's business are admissible under Federal Rule of Evidence 803(6]).

[6] *See Bell v State*, 176 S.W.3d 90 (Tex.App-Houston[1st] 2004) (Letters prepared by a third-party, and relied upon by company representative were admissible as that company's business record in a criminal proceeding where the company relied upon and incorporated the documents into its business practices. The court noted that there was an indication of trustworthiness based upon the company's use of the letters in meeting regulatory compliance).

[7] *Cockrell v. Republic Mortg. Ins. Co.*, 817 SW 2d 106 (Tex.App--Dallas 1991, no writ). (Republic pled that it was the owner and holder of the notes by virtue of an assignment from the notes' originator. Republic's affiant was allowed to testify over objection that in her capacity as claims manager, she was custodian of and familiar with the records relating to Republic's claim and

City Ref., Inc.,[8] rendered by the Houston [14th Dist] Court of Appeals. Both *Cockrell* and *GT & MC, Inc.* were key cases relied upon by the Houston [1st Dist] Court of Appeals in deciding *Simien*.

Q-06: What exactly is the issue that the federal courts are attempting to address when considering Third-Party Records?

A-06: Reliability of the records is the primary basis for admitting evidence under the business records exception. [9]

Q-07: Are the issues similar for Texas courts?

A-07: The short answer is yes. Reliability of Third-Party Records is central to any decision regarding whether these records should be admitted. Texas courts typically formalize the inquiry by describing those circumstances under which reliability can be presumed. They are:

1) Records of a third-party that have become another entity's primary record of the underlying transaction; [10]

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that the claim for loss, the notice of intention to foreclose, and the loan histories on the notes were all provided by the predecessor, and that it is the regular course of business for Repulic to keep such records and to rely upon them in the conduct of its business.)

[8] *GT & MC, Inc. v. Tex. City Ref., Inc.*, 822 S.W.2d 252, 258 (Tex. App.-Houston [14th Dist.] 1991, writ denied). (Invoices for the movement and storage of oil, including inspection reports regarding the storage facility were admitted as the proponent's business records, as documents originated by third parties. The witness testified that the invoices were maintained by the plaintiff in the regular and normal course of its business. The court held that the documents "became buyer's primary record of information about the underlying transaction").

[9] *See Munoz v. Strahm Farms, Inc.*, 69 F.3d 501, 503 (Fed.Cir.1995).

[10] *See Garcia v. Dutcher Phipps Crane & Rigging Co.*, No. 08-00-00387-CV, 2002 WL 467932, at *1 (Tex.App.-El Paso March 28, 2002, pet. denied) (mem. op., not designated for publication); *see also GT & MC, Inc. v. Texas City Refining, Inc.*, 822 S.W.2d 252, 257 (Tex.App.-Houston [1st Dist.] 1991, writ denied) (invoices received from outside vendors were admissible upon testimony by custodian of records as to the procedure by which the invoices became the company's business records).

2) Records of a third-party where the accuracy of the information contained therein has been verified by the proponent of the record; [11] or

3) Records of a third-party that form the basis for ongoing transactions." [12]

Q-08: Which Texas courts have adopted some form of a Third-Party Records provision regarding Rule 803(6)?

A-08: Each of the following Appellate Districts has adopted, or applied the Third-Party Records provisions:

1) Beaumont; [13]
2) Corpus Christ; [14]
3) Dallas; [15]
4) El Paso; [16]

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[11] *See Id.*; *see also Duncan Dev., Inc. v. Haney*, 634 S.W.2d 811, 812-13 (Tex.1982) (subcontractors' invoices became integral part of builder's records where builder's employees' regular responsibilities required verification of the subcontractor's performance and verification of the accuracy of the invoices).

[12] *See Abrego v Harvest Credit Management VII, LLC*, 2010 Tex. App. LEXIS 3117, at **7-8 (*citing Cockrell v. Republic Mortgage Ins. Co.*, 817 S.W.2d 106, 112 (Tex. App.-Dallas 1991, no writ)).

[13] *Nice v. Dodeka, L.L.C.*, No. 09-10-00014-CV, 2010 WL 4514174, at *6 (Tex. App.-Beaumont Nov. 10, 2010, no pet.) (mem. op., not designated for publication) (Debt Buyer's affidavit that alincluded (1) various credit card agreements; (2) documents indicating DB's purchase of the account; (3) monthly statements, (4) DB's demand letter; and (5) an Affidavit of Indebtedness and Assignment was admissible, though ultimately insufficient to prove pre-judgment interest because the affidavit lacked specificity as to how the amount was calculated.)

[14] *Abrego v Harvest Credit Management VII, LLC*, 2010 Tex. App. LEXIS 3117 (Tex.App–Corpus Christi 2010).

[15] *Cockrell v. Republic Mortg. Ins. Co.*, 136 S.W.3d 762 (Tex.App.-Dallas 2004, no pet.) (previously described).

[16] *Martinez v. Midland Credit Management, Inc.*, 250 SW 3d 481 (Tex.App-El Paso 2008, no pet.) (Court enunciated *Simien* standards, but determined that witness not qualified to testify as to the accuracy of the documents because he did not produce name of third party, his own full name, information of original acquisition, or any evidence of qualification to testify).

5) Fort Worth; [17]
6) Houston [1st Dist]; [18]
7) Houston [14th Dist.]; [19]
8) San Antonio. [20]

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[17] *Fleming v Fannie Mae*, No. 02-09-00445-CV (Tex.App.-Fort Worth November 24, 2010) (mem. op., not designated for publication) (Affidavit of law firm paralegal allowed testify as to business records of client servicing company and non-judicial foreclosure of property.).

[18] *Harris v State*, 846 S.W.2d 960 (Tex.App.-Houston [1st Dist.] 1993, pet. ref'd.); *Bell v State*, 176 S.W.3d 90 (Tex.App-Houston[1st] 2004) (previously described); *Simien v Unifund*, 321 S.W.3d 235 (Yex.App-Houston[1st] 2010) (previously described); *Monroe v. Unifund CCR Partners*, No. 01-09-00101-CV (Tex.App.-Houston[1st] May 13, 2010) (mem. op., not designated for publication) (Affidavit of debt purchaser contained assignment from credit grantor, Bill of Sale, monthly statements, and card member agreement. All documents were admitted over objection. The court noted that the same 16-digit account number was used for both the monthly account statements and the proponent's account that was acquired and is some evidence that the account was that of the defendants.); *Wood v Pharia*, No. 01-10-00579-CV (Tex.App.-Houston[1st] December 9, 2010) (mem. op., not designated for publication) (Debt purchaser's affidavit attesting to the assignment history of an account from credit grantor to debt purchaser and the amount owed, and attaching a Bill of Sale/Authorization for Assignment, a cardmember agreement, and numerous account statements was admitted as business records because the trustworthiness of the documents was supported by the fact that debt purchaser's predecessors in interest must keep careful records of their customer's debts or else their businesses would suffer or fail, and inaccurate records could result in civil or criminal penalties); and *Wande v Pharia*, No. 01-10-00481-CV (Tex.App.-Houston[1st] August 25, 2011) (mem. op., not designated for publication) (Debt purchaser's affidavit that (a) attached illegible portions of a card member agreement, (b) failed to include portions of the agreement document, (c) did not explain how the terms of the agreement supported the claimed balance, and (d) failed to offer testimony or evidence setting forth the calculations used to arrive at its claimed outstanding balance was (1) was admissible, (2) was insufficient to prove its claim, but (2) was sufficient to withstand a no-evidence summary judgment motion.).

[19] *GT & MC, Inc. v. Tex. City Ref., Inc.*, 822 S.W.2d 252, 258 (Tex. App.-Houston [14th Dist.] 1991, writ denied) (previously described); and *Jaramillo v. Portfolio Acquisitions, LLC*,No. 14-08-00939-CV, (Tex.App.-Houston[14th] March 30, 2010) (mem. op., not designated for publication) (Debt purchaser entered into evidence a credit card agreement and account statements that had been issued to the credit grantor (which reflected purchases and payments made on the account), and testified that the agreement provided by debt purchaser was the agreement controlling the account. Court found evidence insufficient to prove breach of contract, but sufficient to prove claims under Account Stated and Quantum Meruit theories of recovery).

[20] *Dodeka v Campos*, No. 04-11-00339-CV, 2002 Lexis 10003 (Tex.App.-San Antonio Dec. 21, 2011) (Debt purchaser offered into evidence an Affidavit of Assignment, Damages, and Business Records, which the trial court excluded. The court, in following *Simien*, held that the exclusion of

Q-09: Okay, but what about cases like *Martinez* [21] and *Riddle* [22] out of El Paso?

A-09: Cases are not just about the law; they are also about the facts. The analysis is sometimes confusing and can lead to what appear to be contradictory quotations. For example, in *Martinez*, the Court cited as authority all of the issues previously discussed. [23] In fact, *Martinez* was cited by *Simien* as authority in support of its decision. Only after the *Martinez* Court described the conditions under which third-party records could be admitted, did it then turn to the issue of the admissibility of the specific affidavit that was before it. The court determined that the proffered affidavit was insufficient to meet the requirements of the rule; observing that the affiant did not state the name of the third party, nor even the affiant's own full name for that matter, nor did he provide any information about the account's acquisition,

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the evidence was an abuse of discretion).

[21] *Martinez v. Midland Credit Management, Inc.*, 250 SW 3d 481 (Tex.App-El Paso 2008, no pet.) (Court enunciated *Simien* standards, but determined that the witness was not qualified to testify as to the accuracy of the documents because he did not produce the name of predecessor, his own full name, information of original acquisition, or any evidence of qualification to testify.).

[22] *Riddle v. Unifund CCR Partners*, 298 S.W.3d 780, 782 (Tex.App.-El Paso 2009, no pet.).

[23] Specifically, in the paragraph immediately preceding the disallowance of Midland's affidavit, the Court stated:

> "Business records that have been created by one entity, but which have become another entity's primary record of the underlying transaction may be admissible pursuant to rule 803(6). *Garcia v. Dutcher Phipps Crane & Rigging Co.*, No. 08-00-00387-CV, 2002 WL 467932, at *1 (Tex.App.-El Paso March 28, 2002, pet. denied) (mem. op., not designated for publication); see also *GT & MC, Inc. v. Texas City Refining, Inc.*, 822 S.W.2d 252, 257 (Tex.App.-Houston [1st Dist.] 1991, writ denied) (invoices received from outside vendors were admissible upon testimony by custodian of records as to the procedure by which the invoices became the company's business records). In addition, a document can comprise the records of another business if the second business determines the accuracy of the information generated by the first business. Id.; *see also Duncan Dev., Inc. v. Haney*, 634 S.W.2d 811, 812-13 (Tex.1982) (subcontractors' invoices became integral part of builder's records where builder's employees' regular responsibilities required verification of the subcontractor's performance and verification of the accuracy of the invoices); *Cockrell v. Republic Mortgage Ins. Co.*, 817 S.W.2d 106, 112-13 (Tex. App.-Dallas 1991, no writ) (testimony by employees of mortgage insurer that documents received from a loan servicer were kept in the ordinary course of business and formed the basis for an insurance payment satisfied the requirements of rule 803(6))."

Martinez v. Midland Credit Management, Inc., 250 SW 3d at 485.

the way that the business records were relied upon by Midland, or provide any other indicium of trustworthiness that the court could rely upon in admitting the records.

Once a party fails to meet the requirements of Third-Party Records, the analysis of admissibility collapses to that of a traditional Rule 902(10) business records affidavit where the proponent is testifying as to its own records, or regarding records of a third-party where the proponent has knowledge as to how the records are created and maintained. For example, the exclusion of the testimony in ***Riddle*** was warranted because the affiant did not meet the requirements of Rule 803(6) and the Third-Party Record exceptions. Once that occurred, the court was left to determine if the records could be proved-up in a traditional way. They could not, as the proponent's testimony showed that he could not meet this requirement. [24]

Q-10: What, exactly then, is the importance of *Simien*?

A-10: *Simien* was a ***simple*** articulation. Further, *Simien* provided a three-prong test for the admissibility of third-party records. The proponent must show that:

1) the documents are incorporated and kept in the course of the testifying witness's business,
2) the business typically relies upon the accuracy of the contents of the document, and
3) circumstances otherwise indicate the trustworthiness of the document.

It must be recognized, however, that *Simien* was not new law. The *Simien* decision was rendered on April 15, 2010. There are at least six previous Texas cases discussing Third-Party Records,[25] many of which the *Simien* court relied upon in reaching its decision.

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[24] Id. (In testifying about the telemarketing application, the witness stated that the information was input by someone at First USA, although he had no personal information about how the information was input or how the information was obtained. The same observation could be made about the account statements, and the cardholder agreement.).

[25] These cases are:

1) *Cockrell v. Republic Mortg. Ins. Co.*,817 SW 2d 106 (Dallas 1991);
2) *GT & MC, Inc. v. Tex. City Ref., Inc.*, 822 S.W.2d 252 (Houston [14th Dist.] 1991;
3) *Harris v State*, 846 S.W.2d 960 (Houston [1st Dist.] 1993);
4) *Bell v State*, 176 S.W.3d 90 (Houston[1st] 2004);
5) *Martinez v. Midland Credit Management, Inc.*, 250 SW 3d 481 (El Paso 2008); and
6) *Jaramillo v. Portfolio Acquisitions, LLC*, No. 14-08-00939-CV, (Houston [14th Dist.] 2010).

Simien was simply a clean and concise articulation of the legal principles expressed by these predecessor cases.

Q-11: How does this affect pending debt purchasers cases?

A-11: Answer - Part 1.

To answer this question, there must first be a basic understanding of the debt purchase industry. Accounts are acquired as part of debt portfolios, each of which is comprised of multiple individual accounts. These portfolios are priced in the hundreds of thousands, if not millions of dollars. Pricing is based upon a multitude of factors, two of which are the balance of each account and the availability of supporting documents; though certainly not a complete list of factors. The credit grantor sells to the debt purchaser the account and provides critical information about the account, including balance, last payment date, address, etc., and delivers a copy of various account documents, which may include statements, applications and terms and conditions pertaining to the transferred accounts. This information and these documents are material components to the transaction and their availability affects the purchase price.

The information and the related documents become the core of the debt purchaser's business. It is based upon this information that the debt purchaser makes decisions on how to collect, which vendors to employ, and which costs should be incurred in its collection efforts. In addition, all written communications that are sent to the debtor are predicated upon this information and are subject to the requirements of both state and federal law. The original credit grantor and the debt purchaser would be subject to substantial civil penalties if it were determined that the information contained in their communications were incorrect. Additionally, credit grantors, which are typically national banks or similar lending institutions, are subject to numerous regulatory oversight. It is this source information, obtained from the credit grantor, that forms the basis of the debt purchasers business.

A-11: Answer - Part 2.

Comparing the holding in *Simien* with Texas case law, we see that *Simien* distills two prior concepts of admissibility into its three-prong test; roughly paralleling what previously were characterized as independent bases for admissibility.

Prior Cases	***Simien***
The documents have become another entity's primary record of the underlying transaction	The documents are incorporated and kept in the course of the testifying witness's business
The documents form the basis for ongoing transactions	The business typically relies upon the accuracy of the contents of the document

Finally, *Simien* set forth the additional requirement of trustworthiness, harkening back to the core principal which justifies the admission of these documents: ***reliability***.

Applying *Simien* to the facts associated with debt purchasers, in can readily be seen why Third-Party Records should be admitted upon the filing of a proper affidavit.

***Simien* Requirements**	**Debt Purchase Industry**
The documents are incorporated and kept in the course of the testifying witness's business	The entire business model and operation of a debt purchaser's business revolves around its reliance on the information that it obtains in connection with claims it acquires from predecessors. These accounts are acquired in transactions involving upwards of hundreds of thousands, or even millions of dollars and the reliability of the information lies at the heart of the debt purchaser's business.
The business typically relies upon the accuracy of the contents of the document	The debt purchaser makes decisions based upon information obtained from the predecessor-in-interest regarding how to collect the debt, which vendors to employ, and which costs should be incurred in its collection efforts.
Circumstances otherwise indicate the trustworthiness of the document	The debt collection industry is subject to both state and federal laws, and general oversight by both the Federal Trade Commission and the newly formed Consumer Financial Protection Bureau. The penalty for the violation of the Fair Debt Collection Practices Act can be $1,000 per violation plus attorneys fees. Debt purchasers that elect to sue to collect their debt will incur costs averaging $200 per account. It is against this backdrop that the issue of trustworthiness is evaluated. Given the substantial civil liability and financial costs, the debt purchasers are certainly justified in treating the prior business records as valid.

Conclusion

Simien is a logical articulation of legal principals that are well established in both state and federal law. For those who push back against *Simien*, the disagreement general occurs in two forms:

1) That isn't the law in this part of the state, or
2) I just don't see how a person can testify about documents he didn't create.

In response to the "It's not the law here" argument, (a) it probably is, you just don't realize it,[26] or (b) it simply hasn't been presented cleanly or phrased properly enough to result in a similar decision.

In response to the "I don't see how" argument, one need only note that a substantial number of courts and judges, including some eight federal courts of appeal, two Texas criminal court cases, and eight Texas appellate districts have not only found the arguments persuasive, but have advanced these arguments themselves. *Simien* is merely a statement of the law, not a departure from it, which creates and easily applied three-prong test for the admissibility of third-party documents which have become the business record of the proponent.

Practice Tips

The Records are the Proponent's Records

The records that are being offered into evidence must be characterized as the records of the proponent. While the origin of the record is from a third-party, admissibility is premised upon the record having been incorporated into the business of the proponent. As such, the record must be characterized as the proponent's business record.

Simien Does Not Supercede Prior Law

Simien provides one method for the admission of third-party documents. It does not replace prior case law.

There is No Magic Language

Simien does not create, per se, some set of magic words which must be utilized when testifying regarding third-party-originated documents. While it is certainly possible to satisfy the *Simien* requirements by having the corporate representative testify that (1) the documents are incorporated and kept in the course of the testifying witness's business, and (2) the business typically relies upon the accuracy of the contents of the document, you are still required to meet the trustworthiness requirement. Since this issue goes to the document's reliability, it is easy to also incorporate testimony regarding reliance. It is good practice to include some testimony about the originator of the account, the acquisition of the account, how the company relied upon the information it obtained from the originator and how the account pertains to the continuation of a transaction initiated by that originator.

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[26] *See, for example, Cockrell v. Republic Mortg. Ins. Co.*, 817 SW 2d 106 (Dallas 1991).