

## **Creditor Causes of Action**

Mark P. Blenden  
David W. Roth  
The Blenden Roth Law Firm  
P.O. Box 560326  
Dallas, TX 75356  
888-799-3000  
[mark@blendenlawfirm.com](mailto:mark@blendenlawfirm.com)  
[david@blendenlawfirm.com](mailto:david@blendenlawfirm.com)

Copyright 2010; all rights  
reserved except as to forms.

The University of Texas School of Law  
Mastering The Art of Collecting Debts and Judgments  
Austin, September 2-3, 2010

## **THE BLENDEEN ROTH LAW FIRM**

Mark P. Blenden received his Juris Doctor degree with honors from Washburn Law School of Topeka, Kansas in 1973. After four years in the United States Air Force - Judge Advocate General Corp., he joined Houston's Lapin, Totz and Mayer law firm, becoming a partner and the senior litigator in the commercial collection section. In 1987 he founded the Blenden Law Firm in Dallas. The firm's practice is primarily commercial collection, commercial litigation, and collection of judgments.

Mr. Blenden is a frequent author and lecturer for seminars sponsored by the State Bar of Texas and University of Houston Law Foundation. Topics include service of process and default judgments; creditor's claims; trial techniques. Mr. Blenden is a former chairman of the state bar's Advanced Creditor's Rights Course. He was appointed by the Texas Supreme Court to the Process Service Review Board.

David W. Roth received his Doctor of Jurisprudence from the University of Houston Law Center in December, 2002. Prior to joining the Blenden Law Firm, Mr. Roth interned for the Texas First District Court of Appeals and ExxonMobil Chemical Company. Mr. Roth joined the Blenden Law Firm as an associate attorney in 2003. Mr. Roth lectured at several University of Houston Law Foundation seminars, including *Collecting Debts & Judgments* and *Advising Businesses in a Troubled Economy*. He is a current member and past president of Southlake Toastmasters.

## SUMMARY OF CONTENTS

### CAUSES OF ACTION:

Rule 185 (Sworn Account) .....	1
Account Stated .....	15
Quantum Meruit .....	19
Money Had and Received .....	22
Promissory Note .....	25
Guaranty .....	36

### TRIAL TECHNIQUES:

Business Records Affidavit .....	10
Services Affidavit .....	10
Payment .....	11

### APPENDICES:

Sworn Account Suit Affidavit .....	Appendix A
Form Discovery (Sworn Account) .....	Appendix B
Form Discovery (Guaranty) .....	Appendix C

## TABLE OF CONTENTS

<b>PART ONE: SWORN ACCOUNTS</b> .....	1
I. Rule 185 .....	1
A. Broad Rule .....	1
B. Allows Judgment on the Pleadings .....	1
C. Fallacies As to Scope and Required Specificity of Rule 185 Sworn Account .....	2
1. Fallacy One: That Sale of Personal Property is Required. ....	2
2. Sale of Personal Property is Not Required; Cases .....	3
a. Generally .....	3
b. Texas Supreme Court Cases .....	3
c. Insurance Premiums .....	3
d. Electrical Utility Service .....	4
e. Freight Services .....	4
f. Telephone Services .....	4
g. Mailing Services .....	4
h. Staffing Services .....	4
i. Advertising .....	4
j. Attorney’s Fees .....	4
k. Equipment Repairs .....	4
l. Personal Property Lease .....	5
m. Credit Cards - - Conflicting Cases .....	5
3. Fallacy Two: Sworn Account Requires Specific Account Description .....	5
4. 1984 Amendment to Rule 185 Negating Specificity .....	5
5. Troublesome Cases Ignoring “No Particularization” Amendment .....	6
II. Pleadings .....	6
A. Petition .....	6
B. The Affidavit .....	7
C. Attachments to Petition (Caution) .....	7
D. The Answer .....	8
1. Requirements of Sworn Denial .....	8
2. Affirmative Defenses - - Allowed Without Sworn Denial .....	8
III. Elements .....	9
A. Generally .....	9
B. Order as Additional Element .....	9
C. Price .....	9
D. Amount Due .....	10
IV. Proof .....	10
A. Business Records Affidavit .....	10

B. Services Affidavit . . . . .	10
C. Discovery with Petition . . . . .	11
V. Defenses . . . . .	11
A. Negating Elements . . . . .	11
B. Stranger to the Transaction . . . . .	11
C. Payment . . . . .	11
VI. Motions for Summary Judgment . . . . .	12
A. Generally . . . . .	12
B. Specificity of Motion . . . . .	12
C. Obtain Ruling on Objections . . . . .	13
D. Affidavit As Summary Judgment Evidence . . . . .	13
1. Personal Knowledge Requirement . . . . .	13
2. Readily Controverted Requirement . . . . .	13
3. Avoid Conclusory Statement . . . . .	14
E. Other Summary Judgment Cases . . . . .	14
<b>PART TWO: ACCOUNT STATED . . . . .</b>	<b>15</b>
I. Definition of Account Stated . . . . .	15
II. Elements . . . . .	15
III. Pleading . . . . .	15
IV. Proof . . . . .	16
V. Defenses . . . . .	18
A. Attack Elements . . . . .	18
B. The “Forgotten Offset” . . . . .	18
<b>PART THREE: UNJUST ENRICHMENT CLAIMS . . . . .</b>	<b>19</b>
I. Quantum Meruit . . . . .	19
A. Definition and Elements . . . . .	19
B. Expectation of Payment or Deal as Element . . . . .	20
C. Reasonable Notification To the Person Sought To be Charged . . . . .	20
D. Other Restrictions . . . . .	20
E. Limitations . . . . .	21
F. Attorney’s Fees . . . . .	22

II	Money Had and Received	22
	A. Definition and Elements	22
	B. Pleading	22
	C. Cases	23
	1. Improper Fees	23
	2. Transferred Assets	23
	3. Retained Money, Realty	23
	4. Retained Money, Goods	23
	5. Escrowed Funds	23
	6. Expert's Services	23
	7. Remodeling Services	23
	8. Legal Services	23
	9. Wrongful Credit Card Charges	23
	10. Child Support Overpayment	24
	11. Misapplication of Mortgage Payment	24
	12. Not Bank Account; Failure to Prove Control	24
	13. Not Improper Payment of Check	24
	14. Not Defective Product Claim	24
	15. Not Freight Overcharges Where Contract Controlled	24
	D. Attorney's Fees	24
	E. Limitations	24
	<b>PART FOUR: PROMISSORY NOTE</b>	<b>25</b>
I.	Definitions and Terms	25
	A. Promissory Note	25
	B. Maker	25
	C. Holder	25
	D. Bearer	25
II.	Elements of Suit on Note	25
III.	Pleadings	25
	A. Petition	25
	1. Promissory Note As A Sworn Account Claim	26
	2. Conditions Precedent (Rule 54)	26
	B. Answer	26
	1. General Denial	26
	2. Denial of Signature	26
	3. Payment	27
	4. Conditions Precedent	27
IV.	Evidentiary Issues	27

A.	Summary Judgment .....	27
B.	Proof of the Note .....	27
C.	Proof of Ownership .....	28
D.	Lost Note .....	28
E.	Proof of the Balance Due .....	29
F.	Variable Interest Rates .....	29
V.	Acceleration & Notice .....	30
A.	Generally .....	30
B.	Presentment .....	30
C.	Notice of Intent to Accelerate .....	30
D.	Notice of Acceleration .....	31
E.	Waiver .....	31
VI.	Defenses .....	31
A.	Limitations .....	31
B.	Payment .....	32
C.	Agency .....	32
D.	Fraud in the Inducement .....	34
1.	Generally .....	34
2.	Cases Holding No Fraud in the Inducement .....	34
3.	Cases Holding Fraud in the Inducement .....	34
E.	Release .....	35
	<b>PART FIVE: GUARANTY</b> .....	<b>36</b>
I.	Strict Construction .....	36
A.	Contra to Strict Construction .....	36
II.	Guaranty of Payment Versus Collection .....	37
III.	Continuing Versus Specific Guaranty .....	37
IV.	Pleading .....	37
A.	Petition .....	37
B.	Answer .....	38
V.	Elements .....	38
A.	Generally .....	38
B.	Prove Underlying Debt; Performance by Holder .....	38
C.	Consideration .....	38

- VI. Defenses ..... 39
  - A. Guarantor’s Assertion of Obligor’s Defenses ..... 39
  - B. Statute of Frauds ..... 39
  - C. Change of Obligor ..... 39
  - D. Agency Signature ..... 39
  - E. Enhancement of Risk (Material Alteration) ..... 40
  - F. Limitations ..... 40
  - G. Payment ..... 41
  - H. Release ..... 41
  
- VII. Other Guaranty Matters ..... 41
  - A. Waiver ..... 41
  - B. Contribution ..... 41
  
- PART SIX: OTHER MATTERS ..... 42**
  
- I. Cases ..... 42
  - A. Attorney’s Fees ..... 42
  - B. Discovery Responses in Defendant’s Answer ..... 42
  
- II. Statutes ..... 42
  - A. Justice Court Jurisdiction ..... 42
  - B. Pleadings Must Contain Partial Identification Information ..... 42
  - C. Provision of Current Address of Party in Civil Action ..... 43
  - D. Signing of Pleadings - Further Address Requirement ..... 43

## POP QUIZ

- 1) Probably the most difficult defense to plead. Defendant must “file with his plea an account.” What is the defense? \_\_\_\_\_
- 2) Plaintiff serves affidavit as to the amount and necessity of attorney services, and attaches detailed invoices. What must Defendant do to contest fees? \_\_\_\_\_
- 3) Creditor sues Debtor and Guarantor on sworn account and guaranty. Debtor defaults. At trial against Guarantor, what must Creditor prove? \_\_\_\_\_
- 4) (True or False) A creditor threatened with a usury claim should consider curing the alleged usury violation.

### Answers:

- 1) Payment, Rule 95. See this article, page 11.
- 2) Promptly file and serve counter-affidavit. Otherwise, plaintiff’s affidavit is incontrovertible. Texas Civil Practice & Remedies Code, § 18.001, Affidavit Concerning Cost & Necessity of Services; See page 10.
- 3) The Guaranty, Guarantor’s signature, and the underlying account (order, delivery, reasonable/ agreed price, and balance due). See *Daredia v. Nat’l Distributions*, No. 05-04-00307-CV (Tex. App.–Dallas, April 28, 2005, pet. denied)(2005 Tex. App. Lexis 3168)(mem. op.). Reversed and rendered. See page 38.
- 4) TRUE. See Tex. Fin. Code §305.006(c)(pre-suit cure, correct the violation), §305.006(d)(post-suit cure, correct violation and pay obligor’s reasonable attorney’s fees as determined by court), and creditor’s waiver of cure opportunity in *Walker & Assocs. Surveying v. Roberts*, 306 S.W.3d 839, 853(Tex. App–Texarkana 2010, n.p.h.).

## **PART ONE:**

## **SWORN ACCOUNTS**

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

### **I. RULE 185**

#### **A. Broad Rule**

Rule 185, Suit On Account states:

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

(emphasis added)

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

#### **B. Allows Judgment on the Pleadings**

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

## **Sworn Account**

---

dispute the accuracy of the stated charges. See Rule 93(10), and Rule 185; *Vance v. Holloway*, 689 S.W.2d 403, 404, 28 Tex. Sup. Ct. J. 343 (Tex. 1985); *Huddleston v. Case Power & Equip. Co.* 748 S.W.2d 102, 103 (Tex. App.–Dallas 1988, no writ). It is a rare creditor's case that should not be pleaded, at least alternatively, as a sworn account. But sworn accounts are the subject of some questionable appellate decisions and fallacies.

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

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

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

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

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

## Sworn Account

---

distinguishes Meaders as an attorney's fee case).

### 2. Sale of Personal Property is Not Required; Cases

#### a. Generally

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

#### b. Texas Supreme Court Cases

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

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

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

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

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

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

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

#### c. Insurance Premiums

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

## Sworn Account

---

### d. Electrical Utility Service

*Andy's Sunmart # 352, Inc. v. Reliant Energy Retail Servs., L.L.C.*, No. 01-08-00890-CV (Tex. App.–Houston [1<sup>st</sup> Dist.] Nov. 5, 2009, n.p.h.)(2009 Tex. App. LEXIS 8559)(mem. op.).

### e. Freight Services

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

### f. Telephone Services

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

### g. Mailing Services

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

### h. Staffing Services

*Myan Mgmt. Group, L.L.C. v. Adam Sparks Family Revocable Trust*, 292 S.W.3d 750 (Tex. App.–Dallas 2009, n.p.h.).

### i. Advertising

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

### j. Attorney's Fees

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

### k. Equipment Repairs

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

## **Sworn Account**

---

### l. Personal Property Lease - - Conflicting Cases

The courts disagree as to whether personal property leases are sworn accounts, even though the broad language of Rule 185 appears to include such claims. *Baldwin v. Liberty Leasing Co.*, No. 05-99-00267-CV (Tex. App.–Dallas, June 20, 2000, pet. denied)(unpublished, 2000 Tex. App. Lexis 4097)(personal property lease is basis of sworn account). *But see AKIB Constr., Inc. v. Neff Rental, Inc.*, No. 14-07-00063-CV (Tex. App.–Houston [14<sup>th</sup> Dist.] April 3, 2008, no pet.)(2008 Tex. App. Lexis 2383)(mem. op.)(personal property lease is not basis for a suit on sworn account), citing *Schorer v. Box Service Co.*, 927 S.W.2d 132 (Tex. App.–Houston [1<sup>st</sup> Dist.]1997, writ denied).

### m. Credit Cards - - Conflicting Cases

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

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

### **3. Fallacy Two:** Sworn Account Requires Specific Account Description

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

### 4. 1984 Amendment to Rule 185 Negating Specificity

Rule 185 was revised in 1984 to include, "No particularization or description of the nature of the account or claim is necessary unless the trial court sustains special exceptions to the pleadings." *Huddleston v. Case Power & Equip. Co.*, 748 S.W.2d 102, 103 (Tex. App.–Dallas 1988, no writ)(no particularization required); *Enernational Corp. v. Exploitation Eng'rs, Inc.* 705 S.W.2d 749, 750