

# **Creditor Causes of Action: Pleadings and Proof**

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## POP QUIZ

- 1) (TRUE or FALSE) Debtor's summary judgment response includes an affidavit affirming that all offsets and credits have not been allowed. The affidavit raises a fact issue.
- 2) Probably the most difficult defense to plead. Defendant must "file with his plea an account." What is the defense?
- 3) How can an affidavit "deem facts admitted"? \_\_\_\_\_
- 4) (TRUE or FALSE) A sworn account claim requires the sale and transfer of title to personal property.

### Answers:

- 1) FALSE. Vague affidavit as to unspecified offsets is conclusory and insufficient. *See Life Ins. Co. of Virginia v. Gar-Dai, Inc.* 570 S.W.2d 378 (Tex. 1978), discussed at page 14.
- 2) Payment, Rule 95. See pages 11, 12.
- 3) Texas Civil Practice & Remedies Code, § 18.001, Affidavit Concerning Cost & Necessity of Services. If one serves the affidavit on the other parties, its contents are incontrovertible, unless a counter affidavit is served within 30 days of receiving the affidavit, and at least 14 days before trial. See pages 10 and 46.
- 4) Rule 185 does not require it, but case law is conflicting. See Fallacies As To Scope of Rule 185 Sworn Account, pages 2 -5.

## 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 selfproving and entitles creditor to judgment on the pleadings. See *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)(de fault judgment; sworn account is liquidated claim requiring no further proof of damages). A defendant who does not file a sworn denial to a properly filed suit on sworn account cannot dispute the accuracy of the stated charges. See Rule 93(10), and Rule 185; *Vance v. Holloway*, 689 S.W.2d 403, 404, 28 Tex. Sup. Ct. J. 343 (Tex. 1985); *Huddleston v. Case Power*

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*& 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 (Meaders v. Biskamp)**

Numerous cases purport to require the sale of personal property to constitute a sworn account. These cases generally rely on cases in which the issue is whether the transaction is a sworn account within former Tex. Rev. Civ. Stat. Ann. art. 2226. Article 2226 was the predecessor to Tex. Civ. Prac. & Rem. Code 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. UnifundCCR 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*); *Naan Props., LLC v. Affordable Power, LP*, No. 01-11-00027-CV (Tex. App.-Houston [1<sup>st</sup> Dist.], Jan. 12, 2012, n.p.h.) (2012 Tex. App. Lexis 271) (mem. op.) (early termination fee not proper sworn account claim); *Resurgence Fin. L.L.C. v. Lawrence*, No. 01-08-00341-CV (Tex. App.-Houston [1<sup>st</sup> Dist.], October 8, 2009, no pet.) (2009 Tex. App. Lexis 7927) (mem. op.) (credit card debt); *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); *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 refd n.r.e.) (sworn account includes services; properly

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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).

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