

June 29, 2016

How to Fight Debt Collectors in State Court

San Francisco Law Library

Program Outline with Materials

Introduction

How I got here - (from civil litigation to consumer bankruptcy ... and back)

Reasons to fight in state court as opposed to discharge in bankruptcy

The Debt is student loan - presumption against discharge

Consumer has assets larger than exemptions

Recently filed Ch. 7 within 8 years

Income too high - don't need Ch. 13

Consumer doesn't want BK (not much debt)

potential for consumer lawsuit against debt collectors ("How to Get Paid" Dept.)- can be too much hassle with bankruptcy petition ... consumer debt is "personal, family or household purposes"

Unless you are confident all consumer's assets fit easily within exemptions, including FD CPA case

Even then, all debt collector activity must be pre-petition or you deal with *Walls v. Wells Fargo* (2002) 276 F.3d 502

Current State of Debt Collection Industry

mostly debt buyers for credit card debts but also HOA fees, auto deficiency and student loans ... mostly consumer debts: debts for personal household or family use.

(How to Get Paid Dept.) → be careful for commercial debt b/c FDCPA & Rosenthal do not apply)

Now there are 2 or 3 big debt buyer companies (Portfolio, Encore (Midland) Unifund...) but there are still a few little ones left ...

Average purchase is 4 cents on dollar

Bad Paper by Jake Halpern - Oct 2014

John Oliver 20-minute piece 6/5/2016

Exceptions: original creditors AmEx & Discover; Cap One
... see CFPB consent decrees on originating creditors

must file lawsuits in state court (no more private arbitration since 2009 - Minnesota Attorney General consent decree with NAF)

Debt Collector Law Firms file in BULK

a CA debt collector lawyer once bragged to me he filed 20,000+ cases per month

Bock v. Pressler & Pressler, L.L.P., 30 F. Supp. 3d 283 (D.N.J. 6/30/2014) Midland (now Encore) debt -

From the decision:

“The process by which Pressler prepares complaints almost entirely involves automation and non-attorney personnel. There is nothing wrong

with that; the FDCPA does not mandate drudgery or enshrine outmoded business methods. **The state court complaint filed in the state action here, however, was reviewed by an attorney for approximately four seconds.** The case law is sparse, and it is possible for reasonable people to disagree as to what constitutes reasonable attorney review. But whatever reasonable attorney review may be, a four-second scan is not it.”

From the CFPB amicus brief:

At this point, the results of this process were sent to an attorney. An “automatic feed process” displayed the draft complaint on one computer screen, with the electronic data from the client displayed on a second monitor. Appx. 135. The sole attorney responsible for filing the firm’s New Jersey lawsuits, Ralph Gulko, compared the two screens. Appx. 70, 135, 221. Gulko attested that his review consisted of ensuring that the information in the summons and complaint was “the same information that was received from the client,” and checking whether there had been any post-referral credits or address changes. Appx. 70.

For the complaint against Bock, the firm’s computer records show that Gulko’s review lasted four seconds. Appx. 193. That same day, Gulko also reviewed 672 other complaints, approving all but 10 of them. Appx. 193. That volume was not unusual. Gulko reviews an average of 300 to 400 complaints per day, and some days reviews as many as 1,000. Appx. 221.

Based on his review, Gulko approved the complaint for filing. Appx. 137-38. Other than Gulko’s four-second scan, no other attorney ever reviewed the case against Bock before the complaint was filed.

Defaults & Default Judgments

Suits Are Largely Uncontested

Most people don't fight, even when they know about suit

- Denial
- don't think they can afford a lawyer
 - Can't even "afford to file bankruptcy," so how could they afford an attorney who will fight case head-on?

don't allow default even if intend to file BK - may need more time to file BK and judgment will remain of record

Many people find out late: look out for "sewer service" cases - potential suit against process server corporation ("How to Get Paid" Dept.)

You May Need to Stop Collection Efforts

Use Claim of Exemption procedure - use Judicial Council Forms WG-006 for wage garnishment or EJ-160 for bank levies, etc.

Many consumers will argue that the proposed wage garnishment does not leave enough money for ongoing household expenses to support the consumer & household (CCP § 706.051 ... watch out for debt collector argument that debt was for consumer's "common necessities of life;" essentials commonly required by all persons for the sustenance of life... and includes medical care." *J.J. MacIntyre Co. v. Duren* (1981) 118 Cal.App.3d Supp. 16, 19; (what can debt collector prove about nature of the underlying debt?)

When filing Claim of Exemption in State Court (because you're not filing BK), be sure to NOT use 703, which is the set of CA Bankruptcy-Only Exemptions!

California has two sets of exemptions: CCP §§ 703 and 704. Section 703.140(b) is only for bankruptcy cases!

The JC form EJ-156 may make it appear to be optional and that anyone may use the exemptions in either 703 or 704. However, the Ninth Circuit Bankruptcy Appellate Panel explains otherwise in *In re Applebaum*, BAP No. OR-09-1134-MkHPa (Bk. No. 08-63391) (Appeal from USBC, D. Or.):

<http://cdn.ca9.uscourts.gov/datastore/bap/2013/10/04/Applebaum-09-1134.pdf>

See footnote 2 on page 3:

" We refer to the exemptions available under C.C.P. § 703.140(b) as California's bankruptcy-only exemptions, because they only are available to debtors "in a case under Title 11 of the United States Code." C.C.P. § 703.140(a). California has another set of exemptions, C.C.P. §§ 704.010, et seq., that is *not* restricted to debtors in bankruptcy cases and may be applicable in bankruptcy if the debtor does not make an election contemplated by C.C.P. § 703.140(a)."

see JC forms related to Claim of Exemption at end of document:

How to Get Default & Judgment Vacated

CCP § 473 - Mistake, Inadvertence, Excusable Neglect, Surprise - tell client's story. Must get to know client

Must file within *six months* (not 180 days) of default *but can be only 90 days if **personal** service of order or judgment* - explain time lapse in client's declaration

CCP § 473.5 - no actual notice following sub-service

Must file within two years, or 180 days after written notice is served (by mail?), but always explain time lapse

CCP §473(d) - void judgment

No time limit

Heidary v. Yadollahi, (2002) 99 Cal. App. 4th 857

See also U.S. Supreme Court - *Peralta v. Heights Med. Ctr* (1988) 485 US 80, 84-85; judgment violating due process is void and may be set aside at any time)

Other types of VOID judgments;

De Facto Amendment to Complaint in default proceedings creates new opportunity for defendant to respond - *Jackson v. Bank of America* (1986) 188 Cal.App.3d 375, 387; *see Lubarsky v. Richardson* (1933) 218 Cal. 27, 31)

Does introduction of new documents for default proceedings act as de facto amendment? Is plaintiff

required to prove things for default that are not pled in complaint, and should that create a new opportunity for defendant to respond?

Failure to state cause of action - *Martin v. Lawrence* (1909) 156 Cal. 191 - defaulting defendant admits only the well-pleaded allegations of the complaint

alternative ways to vacate default for debt buyer who purchased debt after Jan. 1, 2014 - Civ Code § 1788.60 *et seq.*

Must be filed within 6 years of entry or 180 days after actual notice, whichever is earlier

special rule if lawsuit filed in incorrect county
- Civ Code § 585.5(d) - suit for consumer debt must be filed in county of defendant's residence or county in which contract "signed"

Best practice: always file proposed answer (as exhibit to defendant's declaration) to show meritorious defenses and argue that consumer defenses

Exception: motion to quash service of summons for bad service, but there one must be ready to file the answer if motion to quash denied

Causes of Action for Collection Cases

Breach of Contract - especially used in student loan cases

Does plaintiff allege a date of breach? Verify with discovery ... DC attorneys sometimes do not allege date or pick an incorrect date and an examination of payment history may yield earlier date of breach or of charge-off

Is agreement alleged as promissory note or installment payments?

If alleged as “installment payments,” may be able to argue that installment payments due more than four years prior to filing of complaint are barred by statute of limitations (CCP § 337)

The Cal. Comm. Code contains a six-year SOL for “negotiable promissory note,” but that does not apply to all written loan agreements, and ambiguity in complaint drafting may lead court to rule that four year period applies (your mileage on this may vary).

How will plaintiff present evidence of debt, assignment to current plaintiff, and breach? If witness does not have firsthand knowledge of mode of preparation of documents, plaintiff may not satisfy requirements for Evid. Code § 1271 (business records exception to hearsay rule) and documents may not be admitted

see sample JC form for complaint with breach of contract allegations

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State bar number, and address):

FOR COURT USE ONLY

LAW OFFICES OF PATENAUE & FELIX, A.P.C.

FILED 12052036 012040515:50 PATENAUE & FELIX (858) 836-0318 Page 5 of 12

Raymond A. Patenaue, (#128855) / Michael R. Boulanger, (#226294)

Michael D. Kahn, (#236898) / Tara Natarajan, (#263333) / Kevin S. Landrith, (#125739)

4545 Murphy Canyon Road, 3rd Floor, San Diego, CA 92123

TELEPHONE NO.: (858) 244-7600

FAX NO. (Optional): (858) 836-0318

E-MAIL ADDRESS (Optional):

ATTORNEY FOR (Name): PLAINTIFF

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN FRANCISCO

STREET ADDRESS: 400 MCALLISTER STREET

MAILING ADDRESS: SAN FRANCISCO CA 94102

CITY STATE AND ZIP CODE: SAN FRANCISCO CA 94102

BRANCH NAME: SAN FRANCISCO CIVIL DIVISION

PLAINTIFF: NATIONAL COLLEGIATE STUDENT LOAN TRUST
2007-3, A DELAWARE STATUTORY TRUST(S)

DEFENDANT(S):

☒ and DOES 1 through 15, inclusive**CONTRACT**☒ COMPLAINT ☐ AMENDED COMPLAINT (Number):☐ CROSS-COMPLAINT ☐ AMENDED CROSS-COMPLAINT (Number)

Jurisdiction (check all that apply):

☒ ACTION IS A LIMITED CIVIL CASEAmount demanded ☐ does not exceed \$10,000☒ exceeds \$10,000 but does not exceed \$25,000☐ ACTION IS AN UNLIMITED CIVIL CASE (exceeds \$25,000)☐ ACTION IS RECLASSIFIED by this amended complaint or cross-complaint☐ from limited to unlimited☐ from unlimited to limited

CASE NUMBER:

CGC-12-1

**SUMMONS ISSUED
FILED**Superior Court of California
County of San Francisco

MAY 21 2012

CLERK OF THE COURT

dr. [Signature] Deputy Clerk

1. Plaintiff* (name or names): NATIONAL COLLEGIATE STUDENT LOAN TRUST 2007-3, A DELAWARE
STATUTORY TRUST(S)

alleges causes of action against defendant(s)* (name or names):

2. This pleading, including attachments and exhibits, consists of the following number of pages: 4

3. a. Each plaintiff named above is a competent adult

☒ except plaintiff (name): NATIONAL COLLEGIATE STUDENT LOAN TRUST 2007-3, A DELAWARE
STATUTORY TRUST(S)(1) ☐ a corporation qualified to do business in California(2) ☐ an unincorporated entity (describe):(3) ☒ other (specify): a Delaware Statutory Trust(s)b. ☐ Plaintiff (name):a. ☐ has complied with the fictitious business name laws and is doing business under the fictitious name (specify):b. ☐ has complied with all licensing requirements as a licensed (specify):c. ☐ Information about additional plaintiffs who are not competent adults is shown in Attachment 3c.

4. a. Each defendant(s) named above is a natural person

☐ except defendant (name):(1) ☐ a business organization, form unknown(2) ☐ a corporation(3) ☐ an unincorporated entity (describe):(4) ☐ a public entity (describe):(5) ☐ other (specify):☐ except defendant (name):(1) ☐ a business organization, form unknown(2) ☐ a corporation(3) ☐ an unincorporated entity (describe):(4) ☐ a public entity (describe):(5) ☐ other (specify):

Page 1 of 2

*If this form is used as a cross-complaint, plaintiff means cross-complainant and defendant means cross-defendant.

5 of 12 Code of Civil Procedure, § 425.12

Form Approved for Optional Use

Judicial Council of California

PLD-C-001(20) [Rev. January 1, 2007]

COMPLAINT—Contract

4. (Continued)

b. The true names of defendant(s) sued as Does are unknown to plaintiff.

(1) ☐ Doe defendant(s) (specify Doe numbers): _____ were the agents or employees of the named defendant(s) and acted within the scope of that agency or employment.

(2) ☒ Doe defendant(s) (specify Doe numbers): 1 through 15 are persons whose capacities are unknown to plaintiff.

c. ☐ Information about additional defendants who are not natural persons is contained in Attachment 4c.

d. ☐ Defendant(s) who are joined under Code of Civil Procedure section 382 are (names):

5. ☐ Plaintiff is required to comply with a claims statute, and

a. ☐ has complied with applicable claims statutes, or

b. ☐ is excused from complying because (specify):

6. ☐ This action is subject to ☐ Civil Code section 1812.10 ☐ Civil Code section 2984.4.

7. This court is the proper court because

a. ☐ a defendant(s) entered into the contract here.

b. ☐ a defendant(s) lived here when the contract was entered into.

c. ☒ a defendant(s) lives here now.

d. ☐ the contract was to be performed here.

e. ☐ a defendant(s) is a corporation or unincorporated association and its principal place of business is here.

f. ☐ real property that is the subject of this action is located here.

g. ☐ other (specify):

8. The following causes of action are attached and the statements above apply to each (each complaint must have one or more causes of action attached):

☒ Breach of Contract

☒ Common Counts

☒ Other (specify): Refer to Other allegations in number 9.

9. ☒ Other allegations: Before commencement of this action, in those cases where recovery of costs is dependent on such notices, Plaintiff informed the defendant(s) in writing it intended to file this action and that this action could result in a judgment against defendant(s) that would include court costs and necessary disbursements allowed by CCP Section 1033(b)(2).

10. Plaintiff prays for judgment for costs of suit; for such relief as is fair, just, and equitable; and for

a. ☒ damages of: \$11,979.88

b. ☐ interest on the damages

(1) ☐ according to proof

(2) ☐ at the rate of (specify): _____ percent per year from (date):

c. ☐ attorney's fees

(1) ☐ of:

(2) ☐ according to proof.

d. ☒ other (specify): For such other relief as the Court deems just and fair.

11. ☐ The paragraphs of this pleading alleged on information and belief are as follows (specify paragraph numbers):

Date: April 03, 2012

MICHAEL BOULANGER, ESQ.
(TYPE OR PRINT NAME)


(SIGNATURE OF PLAINTIFF OR ATTORNEY)

(If you wish to verify this pleading, affix a verification.)

SHORT TITLE: NATIONAL COLLEGIATE STUDENT LOAN TRUST 2007-3, A DELAWARE STATUTORY TRUST(S) vs. NATIONAL COLLEGIATE STUDENT LOAN TRUST 2007-3, A DELAWARE STATUTORY TRUST(S) Page 3 of 12

FIRST

(number)

CAUSE OF ACTION—Breach of Contract

ATTACHMENT TO ☒ Complaint ☐ Cross-Complaint

(Use a separate cause of action form for each cause of action.)

BC-1. Plaintiff (name): NATIONAL COLLEGIATE STUDENT LOAN TRUST 2007-3, A DELAWARE STATUTORY TRUST(S)

alleges that on or about (date): August 30, 2006

a ☒ written ☐ oral ☐ other (specify):

agreement was made between (name parties to agreement): NATIONAL COLLEGIATE STUDENT LOAN TRUST 2007-3, A DELAWARE STATUTORY TRUST(S) and

☐ A copy of the agreement is attached as Exhibit A, or☒ The essential terms of the agreement ☐ are stated in Attachment BC-1 ☒ are as follows (specify):

Defendant(s) entered into a written contract with Plaintiff, whereby Plaintiff loaned money to Defendant(s) for the financing of Education expenses. Plaintiff is the assignee for consideration of this contract. The terms and conditions under which Defendant(s) agreed to repay Plaintiff for the monies loaned are set forth in a written contract and /or loan agreement between the parties. Defendant(s) indicated his/her/their consent to be bound by these terms either by an authorizing signature on the agreement or by Defendant(s) taking possession of and using the monies provided by Plaintiff.

BC-2. On or about (date): June 03, 2009

Defendant breached the agreement by ☐ the acts specified in Attachment BC-2 ☒ the following acts

(specify): Defendant(s) failed to make payments on the contract as agreed and, despite Plaintiff demand Defendant(s) continues to refuse to pay Plaintiff the amount owed under the contract. Defendant(s) is in default and, such under the terms of the contract Plaintiff is entitled to the unpaid balance, attorney's fees and costs.

BC-3. Plaintiff has performed all obligations to Defendant(s) except those obligations Plaintiff was prevented or excused from performing.

BC-4. Plaintiff suffered damages legally (proximately) caused by Defendant's breach of the agreement

☐ as stated in Attachment BC-4 ☒ As follows :

1. The principal sum of \$11,979.88;
2. Costs of suit;
3. For such other and further relief as the Court deems just and fair.

BC-5. ☒ Plaintiff is entitled to attorney fees by an agreement or a statute☐ of \$☒ according to proof:BC-6. ☐ Other:Page 3
Page Total

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SHORT TITLE:

NATIONAL COLLEGIATE STUDENT LOAN TRUST 2007-3, A DELAWARE STATUTORY TRUST(S) VS. PATENAUDE & FELIX (858) 836-0318

CASE NUMBER:

Page 8 of 12

SECOND

(number)

CAUSE OF ACTION—Common Counts

ATTACHMENT TO ☒ Complaint ☐ Cross-Complaint

(Use a separate cause of action form for each cause of action.)

CC-1. Plaintiff (name): NATIONAL COLLEGIATE STUDENT LOAN TRUST 2007-3, A DELAWARE STATUTORY TRUST(S)

alleges that Defendant(s) (name):

became indebted to ☒ plaintiff ☐ other (name):a. ☒ within the last four years

- (1) ☐ on an open book account for money due.
 (2) ☒ because an account was stated in writing by and between plaintiff and defendant in which it was agreed that defendant was indebted to plaintiff.

b. ☒ within the last ☐ two years ☒ four years

- (1) ☐ for money had and received by defendant for the use and benefit of plaintiff.
 (2) ☐ for work, labor, services and materials rendered at the special instance and request of defendant and for which defendant promised to pay plaintiff
☐ the sum of \$
☐ the reasonable value.
 (3) ☐ for goods, wares, and merchandise sold and delivered to defendant and for which defendant promised to pay plaintiff
☐ the sum of \$
☐ the reasonable value.
 (4) ☐ for money lent by plaintiff to defendant at defendant's request.
 (5) ☐ for money paid, laid out, and expended to or for defendant at defendant's special instance and request.
 (6) ☒ other (specify): This cause of action is based upon account number XXXXX6109/001-001000 for the sum by which Defendant has been unjustly enriched by virtue of Defendant receiving monetary or other benefit, by Defendant knowingly requesting the funds at issue and/or accepting the benefits bestowed. It is inequitable for Defendant to retain said benefits without repaying Plaintiff the value thereof.

CC-2. \$11,979.88, which is the reasonable value, is due and unpaid despite plaintiff's demand, plus prejudgment interest ☐ according to proof ☐ at the rate of _____ percent per year from (date):CC-3. ☐ Plaintiff is entitled to attorney fees by an agreement or a statute
☐ of \$
☐ according to proof.CC-4. ☒ Other: For such other and further relief as the Court deems just and fair.Page 4
Page Total

PATENAUDE & FELIX, A.P.C.

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Attorneys for Plaintiff

NATIONAL COLLEGIATE STUDENT LOAN TRUST 2007-3, A DELAWARE STATUTORY TRUST(S)

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO, SAN FRANCISCO CIVIL DIVISION

**NATIONAL COLLEGIATE STUDENT
LOAN TRUST 2007-3, A DELAWARE
STATUTORY TRUST(S)**

Case No. **CGC-12-**

DECLARATION RE: VENUE

Plaintiff,

v.

et al.,

Defendant(s).

I, Michael Boulanger, do hereby declare:

1. That I am the attorney at law, duly licensed to practice before all Courts in the state of California.

2. I am an associate with the Law Offices of Patenaude & Felix, APC, counsel of record for Plaintiff herein.

3. I make this Declaration based on my personal knowledge, except for those items which are stated to be based on my information and belief. If called to testify I could, and would, competently testify to the matters contained herein, based upon my personal knowledge, except for that which is stated to be based on my information and belief, and with the respect to those items, I believe them to be true.

///

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1

DECLARATION RE: VENUE

1 4. Based on the information in this office's file, this is the proper Judicial District
2 because at least one Defendant resides in this Judicial District.

3 5. This Action is not subject to California Civil Code section 2984.4 or California Civil
4 Code section 1812.10.

5 I declare under the penalty of perjury under the laws of the State of California that the
6 foregoing is true and correct. Executed on April 03, 2012, San Diego, California.

7
8 

9
10 MICHAEL BOULANGER, ESQ.

PATENAUE & FELIX, APC
ATTORNEYS AT LAW
4545 MURPHY CANYON ROAD, 3RD FLOOR
SAN DIEGO, CA 92123
TELE: (858) 244-7600 FAX: (858) 836-0318

“Common Counts”

Subject to four-year SOL of CCP § 337(2)

Open Book Account

This is an open, unsettled account resulting from an ongoing relationship.

CCP § 337a. The term "book account" means a detailed statement which constitutes the principal record of one or more transactions between a debtor and a creditor arising out of a contract or some fiduciary relation, and shows the debits and credits in connection therewith, and against whom and in favor of whom entries are made, is entered in the regular course of business as conducted by such creditor or fiduciary, and is kept in a reasonably permanent form and manner and is (1) in a bound book, or (2) on a sheet or sheets fastened in a book or to backing but detachable therefrom, or (3) on a card or cards of a permanent character, or is kept in any other reasonably permanent form and manner.

A creditor or debt buyer will typically furnish the last credit card statement, and only sometimes come up with the rest of them if asked in a Demand for Bill of Particulars. (*Auzerais v. Naglee* (1887) 74 Cal. 60.)

No interest allowed unless creditor proves up contract saying so [citation?]

Open book account is NOT the same as an “account receivable” *Durkin v. Durkin* (1955) 133 Cal.App.2d 283, 291 (your mileage may vary)

“Money Had & Received”

“Goods Sold & Delivered,” etc.

Account Stated

Account stated was originally used by merchants to resolve business disputes 75-100+ years ago. Particularly with account stated, it isn't so clear it should be applicable to suits by creditors or assignees against consumers today (see *Account States [sic] Resurrected: The Fiction of Implied Assent in Consumer Debt Collection* Vermont Law Review, Turnbull, Emanwel J., 38 Vt. L. Rev. 339, (2013-2014))

Remember “ plaintiff waives the tort and sues in *assumpsit*” ? “Special *assumpsit*” gave a new legal right to parties who could not sue on a debt. Gradually, it became possible to sue in *assumpsit* if the defendant owed a debt and then violated a fresh promise to pay it. This action came to be known as *indebitatus assumpsit*, which means "being indebted, he promised."

“The *account* was *stated* in writing, and both parties agreed it to be [some amount, for example \$8473.19.]”

This is a “closed account,” where both parties have *agreed* to compromise to a stated amount.

In discovery, **nail down exactly which document** plaintiff is claiming serves as the account stated in writing and confirm it would have been received by consumer ... the writing cannot be the 1692g notice (see below).

Another case debt collectors rely on is *Zinn v. Fred R. Bright Co., Inc.* (1969) 271 Cal.App.2d 597, however in

that case it was only observed that a question of fact may be resolved one way or the other whether the nonresponding party consented to the amount. In *Zinn* the deceased creditor was assumed to have agreed because he never objected but never cashed or deposited the check. The decedent's estate was enforcing the agreement based on the existence of the check and that no one could prove that the decedent disagreed with the amount in the check. The question of fact still remains to be resolved in each case, and an inference can be drawn differently in the context of a consumer who does not respond to a creditor letter demanding an amount of money as due and payable.

Do not serve a Demand for Bill of Particulars because an Account Stated is a new agreement, not a list of account statements or transactions & credits. (Read *Auzerais v. Naglee* (1887) 74 Cal. 60.)

Creditors and Debt Buyers like to argue that they are suing for both or either ... “open book account” and or “account stated” ... read

Maggio, Inc. v. Neal (1987) 196 Cal.App.3d 745 for great discussion of open book account and account stated; in that case, the alleged debt was found to be neither.

Also read *H. Russell Taylor Fire Prevention Svc, Inc. v. Coca-Cola Bottling Corp.* (1979) 99 Cal.App.3d 711 for great discussion of both.

“Unjust enrichment” - there is no such cause of action in CA - see *Durell v. Sharp Healthcare* (2010) 183 Cal.App.4th 1350, 1370)

see sample JC-form for “Common Counts” causes of action

SHORT TITLE: Kelstin Group, Inc. vs.

et al.,

CASE NUMBER:

First CAUSE OF ACTION—Common Counts

(number)

ATTACHMENT TO ☒ Complaint ☐ Cross - Complaint

(Use a separate cause of action form for each cause of action.)

CC-1. Plaintiff (name): Kelstin Group, Inc. dba Credit Bureau Associates

alleges that defendant (name).

and Does 1 To

5

became indebted to ☐ plaintiff ☒ other (name): Blackhawk Homeowners Association c/o
ASAP Collection Servicea. ☒ within the last four years

- (1) ☒ on an open book account for money due.
 (2) ☒ because an account was stated in writing by and between plaintiff and defendant in which it was agreed that defendant was indebted to plaintiff.

b. ☒ within the last ☒ two years ☒ four years

- (1) ☒ for money had and received by defendant for the use and benefit of plaintiff.
 (2) ☒ for work, labor, services and materials rendered at the special instance and request of defendant and for which defendant promised to pay plaintiff
☒ the sum of \$ 5,263.33
☐ the reasonable value.
 (3) ☒ for goods, wares, and merchandise sold and delivered to defendant and for which defendant promised to pay plaintiff
☐ the sum of \$
☐ the reasonable value.
 (4) ☒ for money lent by plaintiff to defendant at defendant's request.
 (5) ☒ for money paid, laid out, and expended to or for defendant at defendant's special instance and request.
 (6) ☒ other (specify): The account sued upon herein arose subsequent to January 1, 1987 and is subject to the provisions of California Civil Code 1717.5

CC-2. \$ 5,263.33, which is the reasonable value, is due and unpaid despite plaintiff's demand,
 plus prejudgment interest ☐ according to proof ☒ at the rate of 10 percent per year
 from (date):

CC-3. ☒ Plaintiff is entitled to attorney fees by an agreement or a statute
☐ of \$
☒ according to proof.

CC-4. ☒ Other: \$822.37 of interest through 7/30/2015.

Page _____

Page 1 of 1

Debt Collector Prerequisites to Filing Suit

§ 1692g letter aka “g notice” to give consumer right to request verification of debt cannot be used for account stated because cannot be used as admission of liability (15 U.S.C. § 1692g(c). *See Dunn v. Premier Capital, Inc.*, 2013 WL 3466826 (D.N.J. July 9, 2013))

Demand for Payment for Common Counts

CCP § 1033.5 entitlement to costs & attorney fees if case in limited jurisdiction

Help client dispute letter sent by debt collector?

Discovery

Demand for Bill of Particulars for Open Book Account

Demand for Documents

Interrogatories - Form and Special

Responding to Discovery - dispute agreement to account stated

Request for Admissions

Notice of Deposition of Pltf's PMK

Co-Signer Issues

Must be served special notices or liability prevented AND creates opportunities for the “How to Get Paid” Dept.:

Cal. Civ Code § 1799.91 requires warning language in English and Spanish, in 10-point type, before co-signer liability attaches

Code of Fed. Regulations § 444.3 requires certain language provided to co-signer in separate document or it is an “unfair or deceptive practice (FDCPA)”

Incorrect county, if borrower and co-signer live in different counties (FDCPA)?

Elder Abuse (if co-signer is over 65 - Welf & Inst Code “Financial Abuse”) §§ 15610.30, 15657.5 and 15657.6

Read Bounds v. Superior Court (KMA Group), 229 Cal.App.4th 468, 478-480 (2014 - 2d Dist.)

Treble damages pursuant to Civil Code § 3345?

Law & Motion - ***bring a court reporter***

Pre-Trial

Declaration in Lieu of Live Testimony Pursuant to CCP § 98

CCP § 98:

A party may, in lieu of presenting direct testimony, offer the prepared testimony of relevant witnesses in the form of affidavits or declarations under penalty of perjury. The

prepared testimony may include, but need not be limited to, the opinions of expert witnesses, and testimony which authenticates documentary evidence. To the extent the contents of the prepared testimony would have been admissible were the witness to testify orally thereto, the prepared testimony shall be received as evidence in the case, provided that either of the following applies:

(a) A copy has been served on the party against whom it is offered at least 30 days prior to the trial, together with a current address of the affiant that is within 150 miles of the place of trial, and the affiant is available for service of process at that place for a reasonable period of time, during the 20 days immediately prior to trial.

(b) The statement is in the form of all or part of a deposition in the case, and the party against whom it is offered had an opportunity to participate in the deposition.

The court shall determine whether the affidavit or declaration shall be read into the record in lieu of oral testimony or admitted as a documentary exhibit.

Send process server to serve declarant with trial subpoena at address within 150 miles of courthouse, and instruct process server to specifically ask for declarant, not to the designated authorized recipient ... if plaintiff does not produce live witness, then declaration is hearsay; judgment for defendant. *CACH LLC v. Rodgers* (2014) 229 Cal.App.4th Supp. 1, 6; *Target National Bank v. Rocha* (2013) 216 Cal.App.4th Supp. 1.)

File Motion for Judgment on Pleadings or Motion for Summary Judgment (if you have time - MSJ hearing must be 30 days before trial and advance notice of 75 days)

1 File No. 11-17170
2 Robert Scott Kennard
3 State Bar No. 117017
4 Jamie Allison Forbes
5 State Bar No. 249270
6 NELSON & KENNARD
7 2180 Harvard Street, Ste. 160 (95815)
8 P.O. Box 13807
9 Sacramento, CA 95853
10 Telephone: (916) 920-2295
11 Facsimile: (916) 920-0682

12 Attorneys for Plaintiff
13 ARROWOOD INDEMNITY COMPANY

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SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES
SOUTHEAST DISTRICT-NORWALK COURTHOUSE-LIMITED CIVIL

ARROWOOD INDEMNITY COMPANY,) Case No.
Plaintiff,)
vs.) [C.C.P. §98(a)]
Defendants)

I, , declare:

1. I am a competent adult over the age of eighteen years. I am the Custodian of Records for ARROWOOD INDEMNITY COMPANY. In my capacity as the Custodian of Records for ARROWOOD INDEMNITY COMPANY, I am responsible for the supervision and maintenance of the records referenced herein. I am authorized to testify in this matter as the custodian of records for ARROWOOD INDEMNITY COMPANY as assignee and successor in interest to THE STUDENT LOAN CORPORATION concerning the

1 within account. All the business records referenced herein are kept
2 in the ordinary course of business as a standard business practice
3 and procedure of ARROWOOD INDEMNITY COMPANY. As to each of the
4 matters set forth herein, I testify of my own personal knowledge
5 except as to those matters of which I testify as custodian of
6 records. If called as a witness, I would competently testify to
7 these facts as set forth below.
8

9 2. Plaintiff provided certain insurance to the THE STUDENT
10 LOAN CORPORATION on the subject student loan obligation that is the
11 subject of this action. Once the loan fell into default, pursuant to
12 the terms of Plaintiff and its assignor's insurance agreement,
13 Plaintiff paid the insurance claim and thereby acquired title to the
14 loan/outstanding obligation due and owing. The account which is the
15 subject of this action has been assigned to ARROWOOD INDEMNITY
16 COMPANY who is now the sole lawful owner and holder thereof. True
17 and accurate copies of the assignment and relevant Certificate of
18 Merger are attached hereto and collectively referred to as Exhibit
19 A.
20

21 3. On or about September 20, 2001, the Defendant and
22 Plaintiff's assignor, THE STUDENT LOAN CORPORATION, entered into a
23 student loan agreement/promissory note with the Defendant. True and
24 accurate copies of the signed application, promissory note, and
25 truth and lending disclosure statement are attached hereto and
26 collectively referred to as Exhibit B.
27
28

1 4. Since establishing the loan, the Defendant made various
2 payments and/or requested and was granted certain deferments, from
3 time to time, in accordance with the terms and conditions thereof.
4 The last payment/expiration of the last deferment made by/granted to
5 the Defendant on the account was on or about. The Defendant
6 defaulted and the Plaintiff charged off the account on or about
7 April 25, 2011. A true and accurate copy of the payment history
8 and/or the deferment history is/are attached hereto and
9 (collectively) referred to as Exhibit C.
10

11 5. The records of assignee reflect that it rendered and
12 mailed monthly statements/payment booklets containing monthly bills
13 to the Defendant. Plaintiff nor its assignor has no record of any
14 objection to any of the underlying loans extended, which make up the
15 monthly bills contained in the statements/payment booklets, nor has
16 Plaintiff or its assignor been so informed.
17

18 6. The principal and interest due as of the date the account
19 was charged off was \$18,773.68.
20

21 7. Plaintiff has made written demand upon the Defendant that
22 Defendant pay the outstanding balance due and owing. That written
23 demand further informed the Defendant that if an action were
24 commenced, the Defendant may become liable for costs of suit and
25 reasonable attorney's fees where allowed by law, in addition to the
26 principal and interest otherwise due and owing. A true and accurate
27 copy of that demand correspondence is attached hereto as Exhibit D.
28

1 8. To the extent the loan agreement attached hereto as
2 Exhibit 2 provides for a security interest in favor of Plaintiff,
3 Plaintiff expressly waives any and all right to or claim in any such
4 security.

5 9. ARROWOOD INDEMNITY COMPANY, as successor in interest to
6 THE STUDENT LOAN CORPORATION has performed all conditions and
7 covenants precedent on its part to be performed in accordance with
8 the terms and conditions of the account agreement.
9

10 10. The undersigned declarant is available for service of
11 process through counsel at the following address: ABC Legal, Inc.
12 316 W. 2nd Street, 3rd Floor, Los Angeles, CA 90012 and is available
13 for such service for a reasonable period of time, during the twenty
14 days immediately prior to trial.
15

16 I declare under penalty of perjury under the laws of the State
17 of California that the foregoing is true and correct and that this
18 declaration was executed on 5/10/16 (date) at Charlotte
19 (city), North Carolina (state).
20
21

22 (Signature)

23 Program Director
24 (Name) & Title (Please Print)
25
26
27
28

Trial

Bring a court reporter

File Trial Brief (?) and/ or prepare Motion for Judgment
pursuant to CCP § 631.8

Object to Hearsay

Business Records Exception to Hearsay Rule (Evid. Code
§ 1271)

Prepare Motion for Judgment (CCP § 631.8) prior to trial

CURRENT DOLLAR AMOUNTS OF EXEMPTIONS FROM ENFORCEMENT OF JUDGMENTS
Code of Civil Procedure sections 703.140(b) and 704.010 et seq.

EXEMPTIONS UNDER SECTION 703.140(b)

The following lists the current dollar amounts of exemptions from enforcement of judgment under Code of Civil Procedure section 703.140(b).

These amounts are effective April 1, 2016. Unless otherwise provided by statute after that date, they will be adjusted at each three-year interval, ending on March 31. The amount of the adjustment to the prior amounts is based on the change in the annual California Consumer Price Index for All Urban Consumers for the most recent three-year period ending on the preceding December 31, with each adjusted amount rounded to the nearest \$25. (See Code Civ. Proc., § 703.150(d).)

<u>Code Civ. Proc., § 703.140(b)</u>	<u>Type of Property</u>	<u>Amount of Exemption</u>
(1)	The debtor's aggregate interest in real property or personal property that the debtor or a dependent of the debtor uses as a residence, or in a cooperative that owns property that the debtor or a dependent of the debtor uses as a residence,	\$ 26,800
(2)	The debtor's interest in one or more motor vehicles	\$ 5,350
(3)	The debtor's interest in household furnishings, household goods, wearing apparel, appliances, books, animals, crops, or musical instruments, that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor (value is of any particular item)	\$ 675
(4)	The debtor's aggregate interest in jewelry held primarily for the personal, family, or household use of the debtor or a dependent of the debtor	\$ 1,600
(5)	The debtor's aggregate interest, plus any unused amount of the exemption provided under paragraph (1), in any property	\$ 1,425
(6)	The debtor's aggregate interest in any implements, professional books, or tools of the trade of the debtor or the trade of a dependent of the debtor	\$ 8,000
(8)	The debtor's aggregate interest in any accrued dividend or interest under, or loan value of, any unmaturing life insurance contract owned by the debtor under which the insured is the debtor or an individual of whom the debtor is a dependent	\$ 14,325
(11)(D)	The debtor's right to receive, or property traceable to, a payment on account of personal bodily injury of the debtor or an individual of whom the debtor is a dependent	\$ 26,800

CURRENT DOLLAR AMOUNTS OF EXEMPTIONS FROM ENFORCEMENT OF JUDGMENTS
Code of Civil Procedure sections 703.140(b) and 704.010 et seq.

EXEMPTIONS UNDER SECTION 704.010 et seq.

The following lists the current dollar amounts of exemptions from enforcement of judgment under title 9, division 2, chapter 4, article 3 (commencing with section 704.010) of the Code of Civil Procedure.

These amounts are effective April 1, 2016. Unless otherwise provided by statute after that date, they will be adjusted at each three-year interval, ending on March 31. The amount of the adjustment to the prior amounts is based on the change in the annual California Consumer Price Index for All Urban Consumers for the most recent three-year period ending on the preceding December 31, with each adjusted amount rounded to the nearest \$25. (See Code Civ. Proc., § 703.150(d).)

<u>Code Civ. Proc. Section</u>	<u>Type of Property</u>	<u>Amount of Exemption</u>
704.010	Motor vehicle (any combination of aggregate equity, proceeds of execution sale, and proceeds of insurance or other indemnification for loss, damage, or destruction)	\$ 3,050
704.030	Material to be applied to repair or maintenance of residence	\$ 3,200
704.040	Jewelry, heirlooms, art	\$ 8,000
704.060	Personal property used in debtor's or debtor's spouse's trade, business, or profession (amount of exemption for commercial motor vehicle not to exceed \$4,850)	\$ 8,000
704.060	Personal property used in debtor's and spouse's common trade, business, or profession (amount of exemption for commercial motor vehicle not to exceed \$9,700)	\$ 15,975
704.080	Deposit account with direct payment of social security or public benefits (exemption without claim, section 704.080(b)) ¹	
	• Public benefits, one depositor is designated payee	\$ 1,600
	• Social security benefits, one depositor is designated payee	\$ 3,200
	• Public benefits, two or more depositors are designated payees ²	\$ 2,375
	• Social security benefits, two or more depositors are designated payees ²	\$ 4,800
704.090	Inmate trust account	\$ 1,600
	Inmate trust account (restitution fine or order)	\$ 300 ³
704.100	Aggregate loan value of unmatured life insurance policies	\$ 12,800

¹ The amount of a deposit account that exceeds exemption amounts is also exempt to the extent it consists of payments of public benefits or social security benefits. (Code Civ. Proc., § 704.080(c).)

² If only one joint payee is a beneficiary of the payment, the exemption is in the amount available to a single designated payee. (Code Civ. Proc., § 704.080(b)(3) and (4).)

³ This amount is not subject to adjustments under Code Civ. Proc., § 703.150.

**[NOT FOR WAGE GARNISHMENT]
RETURN TO LEVYING OFFICER. DO NOT FILE WITH COURT**

EJ-160

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): TELEPHONE NO.: _____ FAX NO. (Optional): _____ E-MAIL ADDRESS (Optional): _____ ATTORNEY FOR (Name): _____	FOR LEVYING OFFICER USE ONLY (Levying Officer Name and Address) LEVYING OFFICER FILE NUMBER: _____
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: _____ MAILING ADDRESS: _____ CITY AND ZIP CODE: _____ BRANCH NAME: _____	FOR COURT USE ONLY CASE NUMBER: _____

CLAIM OF EXEMPTION
(Enforcement of Judgment)

Copy all the information required above (except the top left space) from the Notice of Levy. The top left space is for your name or your attorney's name and address. The original and one copy of this form must be filed with the levying officer. DO NOT FILE WITH THE COURT.

1. My name is: _____
2. Papers should be sent to:
 - ☐ me.
 - ☐ my attorney (I have filed with the court and served on the judgment creditor a request that papers be sent to my attorney and my attorney has consented in writing on the request to receive these papers.)
 at the address ☐ shown above ☐ following (specify): _____
3. ☐ I am not the judgment debtor named in the notice of levy. The name and last known address of the judgment debtor is (specify): _____
4. The property I claim to be exempt is (describe): _____
5. The property is claimed to be exempt under the following code and section (specify): _____
6. The facts which support this claim are (describe): _____
7. ☐ The claim is made pursuant to a provision exempting property to the extent necessary for the support of the judgment debtor and the spouse and dependents of the judgment debtor. **A Financial Statement form is attached to this claim.**
8. ☐ The property claimed to be exempt is
 - a. ☐ a motor vehicle, the proceeds of an execution sale of a motor vehicle, or the proceeds of insurance or other indemnification for the loss, damage, or destruction of a motor vehicle.
 - b. ☐ tools, implements, materials, uniforms, furnishings, books, equipment, a commercial motor vehicle, a vessel, or other personal property used in the trade, business or profession of the judgment debtor or spouse.
 - c. all other property of the same type owned by the judgment debtor, either alone or in combination with others, is (describe): _____
9. ☐ The property claimed to be exempt consists of the loan value of unmatured life insurance policies (including endowment and annuity policies) or benefits from matured life insurance policies (including endowment and annuity policies). All other property of the same type owned by the judgment debtor or the spouse of the judgment debtor, either alone or in combination with others, is (describe): _____

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _____

(TYPE OR PRINT NAME)

(SIGNATURE OF DECLARANT)

Page 1 of 1

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): TELEPHONE NO.: _____ FAX NO. (Optional): _____ E-MAIL ADDRESS (Optional): _____ ATTORNEY FOR (Name): _____	FOR LEVYING OFFICER USE ONLY (Levying Officer Name and Address)
SUPERIOR COURT OF CALIFORNIA, COUNTY OF _____ STREET ADDRESS: _____ MAILING ADDRESS: _____ CITY AND ZIP CODE: _____ BRANCH NAME: _____	
PLAINTIFF/PETITIONER: _____ DEFENDANT/RESPONDENT: _____	LEVYING OFFICER FILE NUMBER: _____
CLAIM OF EXEMPTION (Wage Garnishment)	FOR COURT USE ONLY
<p align="center">READ EMPLOYEE INSTRUCTIONS (FORM WG-003) BEFORE COMPLETING THIS FORM</p> <p><i>Copy all the information required above (except the top left space) from the Earnings Withholding Order. The top left space is for your name or your attorney's name and address. The original and one copy of this form with the Financial Statement attached must be filed with the levying officer.</i></p> <p align="center">DO NOT FILE WITH THE COURT.</p>	
CASE NUMBER: _____	

- My name is :
- I need the following earnings to support myself or my family (check a or b):
 - ☐ All earnings.
 - ☐ \$ _____ each pay period.
- Please send all papers to
 - ☐ me.
 - ☐ my attorney
 at the address ☐ shown above ☐ following (specify): _____
- I am willing for the following amount to be withheld from my earnings **each pay period** during the withholding period. I understand that the judgment creditor can accept this offer by not opposing the Claim of Exemption, which will result in the following sum being withheld each pay period (check a or b):
 - ☐ None
 - ☐ Withhold \$ _____ each pay period.
- I am paid

<input type="checkbox"/> daily	<input type="checkbox"/> every two weeks	<input type="checkbox"/> monthly
<input type="checkbox"/> weekly	<input type="checkbox"/> twice a month	<input type="checkbox"/> other (specify): _____

NOTE: You must attach a properly completed Financial Statement form to this Claim of Exemption.

The Financial Statement form is available without charge from the levying officer.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: _____

 (TYPE OR PRINT NAME)

 (SIGNATURE OF DECLARANT)

Page 1 of 1

SHORT TITLE:	LEVYING OFFICER FILE NO.	COURT CASE NO.
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FINANCIAL STATEMENT

(Wage Garnishment—Enforcement of Judgment)

NOTE: If you are married, this form must be signed by your spouse unless you and your spouse are living separate and apart. If this form is not signed by your spouse, check the applicable box on the reverse in item 9.

1. The following persons other than myself depend, in whole or in part, on me or my spouse for support:

	NAME	AGE	RELATIONSHIP TO ME	MONTHLY TAKE-HOME INCOME & SOURCE
a.			Spouse	
b.				
c.				
d.				
e.				

2. My monthly income

a. My gross monthly pay is: 2a. \$ _____

b. My payroll deductions are (specify **purpose** and amount):

(1) Federal and state withholding, FICA, and SDI. \$ _____

(2) \$ _____

(3) \$ _____

(4) \$ _____

My TOTAL payroll deduction amount is (add (1) through (4)): b. \$ _____

c. My monthly take-home pay is (a minus b): c. \$ _____

d. Other money I get each month from (specify source):

_____ is d. \$ _____

e. TOTAL MONTHLY INCOME (c plus d) e. \$ _____

3. I, my spouse, and my other dependents own the following property:

a. Cash 3a. \$ _____

b. Checking, savings, and credit union accounts (list banks):

(1) \$ _____

(2) \$ _____

(3) \$ _____

b. \$ _____

c. Cars, other vehicles, and boat equity (list make, year of each):

(1) \$ _____

(2) \$ _____

(3) \$ _____

c. \$ _____

d. Real estate equity d. \$ _____

e. Other personal property (jewelry, furniture, furs, stocks, bonds, etc.) (list separately):

e. \$ _____

SHORT TITLE:	LEVYING OFFICER FILE NO.	COURT CASE NO.
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4. The monthly expenses for me, my spouse, and my other dependents

- | | | |
|--|---------|-------|
| a. Rent or house payment and maintenance | 4 a. \$ | _____ |
| b. Food and household supplies | b. \$ | _____ |
| c. Utilities and telephone | c. \$ | _____ |
| d. Clothing | d. \$ | _____ |
| e. Medical and dental payments | e. \$ | _____ |
| f. Insurance (life, health, accident, etc.) | f. \$ | _____ |
| g. School, child care | g. \$ | _____ |
| h. Child, spousal support (prior marriage) | h. \$ | _____ |
| i. Transportation & auto expenses (insurance, gas, repair) (list car payments in item 5) | i. \$ | _____ |
| j. Installment payments (insert total and itemize below in item 5) | j. \$ | _____ |
| k. Laundry and cleaning | k. \$ | _____ |
| l. Entertainment | l. \$ | _____ |
| m. Other (specify): | | |

m. \$ _____

n. TOTAL MONTHLY EXPENSES (add a through m):	n. \$	_____
--	-------	-------

5. I, my spouse, and my other dependents owe the following debts:

CREDITOR'S NAME	FOR	MO. PAYMENTS	BALANCE OWED	OWED BY (State person's name)
-----------------	-----	--------------	--------------	----------------------------------

6. Other facts which support this Claim of Exemption (i.e., unusual medical needs, school tuition, expenses for recent family emergencies, or other unusual expenses to help your creditor and the judge understand your budget) (describe): (If more space is needed, attach page labeled Attachment 6.)

7. ☐ An earnings withholding order is now in effect with respect to my earnings or those of my spouse or dependents named in item 1 (specify each person's name and monthly amount):

8. ☐ A wage assignment for support is now in effect with respect to my earnings or those of my spouse or dependents named in item 1 (specify each person's name and monthly amount):

9. ☐ My spouse has signed below.
☐ I have no spouse.
☐ My spouse and I are living separate and apart.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

_____ (TYPE OR PRINT NAME)	▶ _____ (SIGNATURE)
_____ (TYPE OR PRINT NAME OF SPOUSE)	▶ _____ (SIGNATURE OF SPOUSE)