No. 1-11-3658

In the Appellate Court of Illinois
First Judicial District

Unifund CCR Partners LLC,
Plaintiff-Appellant

v.

Mohammed S. Shah,
Defendant-Appellee

Appeal from the Circuit Court of Cook County, Municipal Division,
First Municipal District, NO. 08 M1 162091

The Honorable Dennis McGuire Presiding

MOTION OF THE

National Association of Retail Collection Attorneys

FOR LEAVE TO APPEAR AS AMICUS CURIAE AND TO FILE A BRIEF INSTANTER

IN SUPPORT OF PLAINTIFF-APPELLANT

UNIFUND CCR PARTNERS

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THE NATIONAL ASSOCIATION OF RETAIL COLLECTION ATTORNEYS' MOTION FOR LEAVE TO APPEAR AS AMICI CURIAE AND TO FILE A BRIEF INSTANTER IN SUPPORT OF PLAINTIFF-APPELLEE

INTRODUCTION

The National Association of Retail Collection Attorneys (NARCA), pursuant to Illinois Supreme Court Rule 345(a) respectfully moves this court for leave to file instanter their brief as *amicus curiae* in support of the brief of Unifund CCR Partners.

Statement of Interest of Amicus

The National Association of Retail Collection Attorneys (NARCA) is a member supported trade association dedicated to serving law firms engaged in the business of consumer debt collection. NARCA's mission is to preserve and protect the integrity and viability of legal collections with professionalism, ethical actions and a service oriented approach. One of its core principles is the duty of its members to maintain the public's confidence and properly carry out the unique responsibilities associated with consumer collections. Founded in 1992 in New York with 20 members, NARCA is a truly national entity with over 700 member law firms located in all 50 states. NARCA's last three presidents and its current president are Illinois attorneys. NARCA has previously participated as *amicus curiae* in other cases involving collection laws, most notably two United States Supreme Court cases (*Jerman v. Carlisle*, 130 S.Ct. 1605 (2010); *Heintz v. Jenkins*, 514 U.S. 291 (1995)). Finally, the chosen authors of this brief are co-authors of the 2011 IICLE publication *Small Claims Credit Collections* whose content deals extensively with matters of assignment and the *Illinois Collection Agency Act, 225 ILCS 425, et seq (hereinafter "CAA")*.

NARCA believes the proposed brief will assist the Court because NARCA is uniquely

situated to provide a broad historical perspective on matters of assignment and assignment for collection, not only on a local scale but nationally as well. Additionally, this brief will highlight how the court's decision in this matter will not simply have a local effect, but can produce legal disparities within the state, treating the same plaintiffs differently due to confusion in pleading standards.

Third party debt collection plays an important role, returning $39.3 billion to creditors in 2005, lessening the costs to consumers by reducing liabilities held by major banks and other lenders. (PricewaterhouseCoopers, *Value of Third-Party Debt Collection to the U.S. Economy in 2007: Survey and Analysis* (prepared for ACA International) (2006)). Debt purchasers returned $2.3 billion according to the same survey. Because debt purchasers provide an outlet to original creditors, the credit issuers are able to recoup some value on past due accounts. To burden litigation in this area would only harm consumers by increasing interest rates, and make it more difficult to obtain credit in the first place. Due to the sheer size of the Illinois' population and economic importance, any decision creating barriers to litigating assigned accounts would not only affect the decisions of debt purchasers to sue, it could also effect the decisions of original creditors to lend.

Additionally, NARCA intends to present arguments on the effect of this ruling from a policy perspective. The current ruling serves only to increase the costs of litigation on what ought to be relatively simple matters to prosecute and defend. This application of the CAA leads to overly complicated, cost-prohibitive litigation for purchasers of the debt, despite the modern Illinois trend to follow the common law in holding assignees have the same rights as the original creditor as successors-in-interest.

With NARCA's broader view, it can demonstrate how Shah's ruling is leading to differential standards when applied in different circuits within the state as well as on the Federal level. As a result, debt purchasers are not assured of a clear pleading standard, regardless if one is a purchaser of debt or an assignee for collection. Lack of clarity potentially creates unnecessary exposure to lawsuits by consumer advocates for both collection attorneys and their clients when, based on the plain language of the statutes, their conduct was proper. The proposed brief is attached.

WHEREFORE, *Amicus* respectively requests this Honorable Court to grant its Motion for Leave to Appear as *Amicus Curiae* and to File a Brief Instanter in Support of the Plaintiff, Unifund CCR Partners.

DATED: October 9, 2012

RESPECTFULLY SUBMITTED,

By: _____

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EXHIBIT A

PROPOSED AMICUS BRIEF

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BRIEF OF AMICUS IN SUPPORT OF PLAINTIFF-APPELLANT

UNIFUND CCR PARTNERS

ON BEHALF OF

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INDEX

POINTS AND AUTHORITIES

PREAMBLE

In the initial *Unifund v. Shah* decision, the court said its analysis is free from precedent, believing the issues of assignments for collection were issues of first impression. 407 Ill. App. 3d 737 (1st Dist. 2011). However, for over 150 years, Illinois courts have recognized the right to assign obligations for collection to third parties to collect on debts for the beneficial owner. While the players may have changed with the passing of time, the mechanism and the rights of the partners remain unchanged.

Shah would place courts in an oversight role over purchasers of indebtedness when the legislature clearly intended to vest oversight in the Department of Professional Regulation through licensing. In the same vein, the inference of a pleading requirement outside the Code of Civil Procedure finds no support in the text of the Collection Agency Act (225 ILCS 425/1, *et seq.*, hereinafter "CAA"), relying, instead on the "precedent" of *Business Services Bureau v. Webster*, which spoke not to pleading standards, but addressed issues of proof at trial. 298 Ill. App. 3d 257 (4th Dist. 1998).

ASSIGNMENTS FOR COLLECTION

Assignments for collection have been a feature of Illinois law from the founding of the state and they have been a feature of American jurisprudence from before the founding of the country. *Samuel v. Coles*, 203 Ill.App. 358, 360 (1st Dist. 1917); *Sprint Communication Co. v. APCC Services, Inc.,* 554 U.S. 269, 277 (2008). Formerly a regular feature in Illinois decisions, (See, e.g., *Kyle v. Thompson ex rel. Warburton & King,* 3 Ill. (2 Scam.) 432, 434 (1840); *Parks v. Brown,* 16 Ill. 454 (1855); *Best v.*

Nokomis National Bank, 76 Ill. 608, 610 (1875); *Gallagher v. Schmidt* 313 Ill. 40 (1924); *Williams v. Frederick's Estate,* 289 Ill.App. 410 (3d Dist. 1937)), the caselaw grew silent sometime in the first half of the 20th Century. That is not because assignments for collection ceased to be utilized, but because they had become a well established area of the law: attorneys and judges knew what they were, understood how they worked, thus the issue was no longer litigated. As early as 1917, the First District found, in its discussion of assignments, "certain fundamental principles of law, so well established as to require few citations." *Samuel v. Coles*, 203 Ill.App. 358, 360 (1st Dist. 1917). The parties did not brief the issue, yet the court was well aware of the evolution of assignment law. *Id.*

When the CAA became law in 1974, it referenced assignments for collection. While the statute did not define the term, it is clear from the statutory context that the legislature understood the traditional legal meaning and function of such assignments. It was not until the 2008 amendments to the CAA, requiring debt buyers to register as collection agencies, that assignments for collection came to prominence again. By that time, because the caselaw had been largely silent on assignments for collection for the better part of a century, practitioners outside the specialty collection industry had apparently forgotten what they were. Some practitioners applied a plain English meaning to assignments for collection, believing it meant any assignment where the assignee attempted to collect on a chose in action. This approach disregarded whether the assignee owned all rights, title, and interest (which never applied to assignments for collection), or merely held legal title, itself a kind of legal fiction (which always applied to assignments for collection). The recent amendment to the CAA clarifies the legislative

intent with respect to debt buyers holding unity of title (*See* PA 97-1070, effective January 1, 2013).

The separation of legal and equitable title is not peculiar to collection law. It also exists in real estate law (*In re Estate of Martinek,* 140 Ill.App.3d 621, 628 (2d Dist. 1986)), and especially in trust law. In a trustee-beneficiary relationship, the trustee holds legal title, which empowers him to administer trust assets, but he does so for the beneficiary, who retains beneficial interest, or equitable title, in those assets. The trustee receives no direct benefit or interest in the trust property itself, but serves as custodian of the assets. The trustee is generally chosen for an innocent reason, based on his ability to manage a certain class of assets, whether real property, stocks and bonds, or mixed portfolios.

Assignments for collection function in the same manner. The assignee holds legal title, but not beneficial interest, which remains with the assignor. The assignee for collection is also chosen for an innocent reason, based on his ability to make the asset perform, in this case, to collect upon it. *Olvera v. Blitt and Gaines, P.C.*, 431 F.3d 285, 288. He owes a custodial duty to the assignor.

At common law, equitable title could not be assigned in law, but it was recognized in equity. *Samuel v. Coles*, 203 Ill.App. 358, 360 (1st Dist. 1917). Courts disapproved of a practice whereby a party injured in fact could assign its rights to a nonparty who had not been damaged. To proceed at law, a plaintiff needed legal title, but legal title did not confer beneficial ownership. Legal title was an apparent right, allowing someone to proceed at law for the benefit of the equitable owner. *Cf., Sprint Communication Co. v. APCC Services, Inc.,* 554 U.S. 269, 275-77 (2008).

Assignees with legal title have always been able to sue on behalf of the beneficial owner in Illinois. Initially, the assignee had to sue in the name of the beneficial owner. If he sued in his own name, the case would be dismissed. *Kyle v. Thompson ex rel. Warburton & King,* 3 Ill. (2 Scam.) 432, 434 (1840).

In 1845, the law changed when Illinois enacted a statute allowing an assignee for collection to sue in its own name. Ill. Rev. Stat. (1845), c. 73, §§4, 5, cited in *Parks v. Brown,* 16 Ill. 454 (1855). The law was challenged and confirmed in 1855 in *Parks v. Brown*, an Illinois Supreme Court case that still is good law today. 16 Ill. 454. Thus, whether an assignee for collection could sue in its own name was a question of first impression for the Illinois Supreme Court in 1855; it was not a question of first impression in 2011. *Parks v. Brown* was followed by a string of subsequent cases which made assignments for collection an established area of law in Illinois. (See, e.g., *Rodriguez v. Merriman,* 133 Ill.App. 372 (1st Dist. 1907))

CHOSES IN ACTION

Another issue arising with assignments is whether the chose in action being assigned is negotiable or nonnegotiable. A "chose in action" is "an interest in property not immediately reducible to possession." *Sprint Communication Co. v. APCC Services, Inc.,* 554 U.S. 269, 275 (2008). In other words, it is personal property, and it is assignable. *Saltzberg v. Fishman*, 123 Ill. App.3d 447 (1st Dist. 1984). Negotiable choses have always been assignable in Illinois and, at one time, were governed by the Negotiable Instrument Act. *Williams v. Frederick's Estate,* 289 Ill. App. 410, 415 (3d Dist. 1937). Today, they are governed by the UCC. The ambulatory nature of a negotiable chose has long been recognized at law as an instrument of trade and

commerce, as well as a vehicle for speculation. Thus, even before the Negotiable Instruments Act, Illinois common law recognized assignments of negotiable choses.

CHAMPERTY

Nonnegotiable choses originally were not assignable in Illinois. The prohibition against their assignment was one of public policy designed to prevent champerty. Champerty is the maintenance, by a stranger, of a party's interest in a lawsuit. The maintainor would pay the party's litigation expenses in exchange for a share in the outcome of the suit. In particular, the law prohibited the assignment of two types of nonnegotiable choses: tort and legal malpractice claims. *Brocato v. Prairie State Farmers Insurance Ass'n,* 166 Ill. App. 3d 986, 989 (4th Dist. 1988), quoting *Goodley v. Wank & Wank, Inc.,* 62 Cal.App. 3d 389, 396 (1976).

In 1907, Illinois law first permitted the assignment of nonnegotiable choses. §18 of the Practice Act of 1907 as cited in *Allis-Chalmers Mfg. Co. v. City of Chicago,* 297 Ill. 444, 449 (1921). This evolution recognized new types of nonnegotiable choses. *Allis-Chalmers*, for example, was a suit for recovery of a deposit paid to, but not returned by, the City of Chicago. *Gallagher v. Schmidt* addressed the assignment for collection of a judgment. 313 Ill. 40 (1924). *National Rose Co. v. Mundet Cork Corp.* saw the assignment of a service contract. 291 Ill. App. 464 (3d Dist. 1937). *Business Service Bureau, Inc. v. Webster* considered the assignment of an outstanding medical bill. 298 Ill. App. 3d 257 (4th Dist. 1998). Some of these nonnegotiable choses did not exist at common law, such as credit card accounts. The emerging variety nonnegotiable choses were clearly commercial in nature, and easily ascribed a fixed monetary value. They were divorced from other types of nonnegotiable choses such as tort and legal malpractice, which are not easily reduced to a fixed dollar amount. That the divorce is

complete is demonstrated by the fact that Illinois law still prohibits assignment of personal injury tort and legal malpractice claims while it permits assignment of almost all other nonnegotiable choses.

Business Service Bureau, Inc. v. Webster was correct that champerty had once been a concern with assignments of nonnegotiable choses, but the language of 225 ILCS 425/8(b), dealing with commercial assignments of licensed collection agencies, had nothing to do with the prohibitions against assignment of legal malpractice claims. *Id.* Rather, §425/8(b) recognizes, in longstanding Illinois tradition, that

> [t]he defendant has a right to require that there shall be such a plaintiff as will make the recovery a bar to any other action by another for the same debt. When this is done, he is protected and has no cause of complaint or right of objection, as to the true or equitable ownership of the moneys recovered. *Parks v. Brown*, 16 Ill. 454, 455 (1855).

THE PURPOSES OF A WRITTEN ASSIGNMENT

The legislative policy underlying the Collection Agency Act is to protect consumers against debt collection abuse. 225 ILCS 425/1a. The focus of the Act is improper collecting practices of the collection agency. *People v. Datacom Systems Corp.*, 146 Ill. 2d 1, 17 (1st Dist. 1991). The requirement of a written assignment is to assure debtors if they are paying a debt, they are paying the actual party in interest. *Id; Parks v. Brown,* 16 Ill. 454, 455 (1855). However, such a bar is traditionally an affirmative defense and, if a debtor proves the affirmative matter, it is an absolute bar against other plaintiffs. Nevertheless, by Illinois' definition of "affirmative defense," the *onus probandi* is the debtor's, and the court may not arbitrarily shift the burden to a plaintiff who has properly alleged an assignment.

Notwithstanding that purpose, failing to attach an assignment for collection to the complaint does not frustrate the legislature's purpose. If there is doubt on the issue, a motion to dismiss under §2-619 would entail a response by the Plaintiff where the assignments would presumably be produced. Alternatively, assignments might also be provided in response to discovery or a bill of particulars. Even if neither avenue is taken by the defendant, the plaintiff ultimately has the burden to prove the nature of its ownership at trial in order to prevail.

As can be seen in the recent case of *LVNV v. Trice*, this court amended its earlier ruling which criminalized the act of purchasing a debt and suing without a license. 352 Ill. Dec. 6 (2011). This was likely a reflection of the purpose of the Act which was to prevent harassment, not to preclude lawsuits.

THE MODERN TREND TREATS ASSIGNEES AS THE ORIGINAL CREDITOR

While assignments of non-negotiable choses in action were a creature of statute, Illinois courts have treated assignees of credit card debt as they would at common law. The first case to consider the rights of debt purchasers as assignees was *Olvera v. Blitt and Gaines, P.C.*, 431 F.3d 285 (7th Cir. 2005). In that matter, the question before the court was whether an assignee had the right to charge the same interest rate as the assignor. *Id.* at 286. The plaintiff asserted defendant had violated a provision of the Fair Debt Collection Practices Act, *15 U.S.C. §1692e(2)(A)*, by charging interest rates allowable to the original creditor when, as assignees, they were limited by the provisions of the Illinois Interest Act. *815 ILCS 205/5. Id.* at 288. That provision capped interest rates no more than 5 or 9 percent for non-exempt and licensed entities.

The Appellate court discounted Olvera's argument. The Illinois Interest Act permitted interest to be charged at a higher rate if it was allowed "by other laws of the state", a provision added in 1960. *Id.* Relying on *Erie R.R. v Tompkins,* 304 U.S. 64, 78 (1938), the court held common law, enforced at the state court level, can be read to include the common law of assignments whereby the assignee steps into the shoes of the assignor, assuming his rights as well as his duties. *Id.* As result, the court held debt purchasers had the right to charge the same interest rate as the original creditor. Illinois state courts reached the same holding in *PRA III v. Hund.* 364 Ill. App. 3d 378 (3d Dist. 2005). Although the state court took note of *Olvera v. Blitt & Gaines*, it explicitly stated that its decision was not reliant upon the federal court's reasoning.

The rights of debt purchasers were also recognized in the presentation of the records of the original creditors at trial. In *Krawczyk v. Centurion Capital Corp.,* 2009 U.S. Dist LEXIS 12204, Krawczyk also sued for violations of the Fair Debt Collection Practices Act against both an assignee of consumer debt and their law firm, Blatt, Hasenmiller, Leibsker & Moore. *Krawczyk, 6-7.* In response, defendants filed a motion for summary judgment, supported by officers of the debt purchasers and Blatt. The plaintiff moved to strike those affidavits on the ground the declarations contained therein were hearsay, not admissible under the business records exception because the records which formed the basis of their declarations were the records of another entity, Capital One, the assignor, whose records were based on yet another credit card issuer's records, Providian National Bank. *Id.* at 8-9.

The *Krawczyk* court ruled the records of the debt purchasers fell under the business records exception to the hearsay rule, meaning they could be offered to prove

the truth of matters asserted, presumed reliable pursuant to *Fed. R. Evid 803(6). Id at 10.* Recognizing the buying and selling of loans is a common practice, it likened the defendant's situation to the facts found in the Massachusetts Supreme Judicial Court decision of *Beal Bank SSB. v. Eurich.* In *Beal,* the court found the sale of accounts was commonplace so that a seller's normal business practice *required* maintenance of accurate business records as they would be necessary not only for the loan originator but to any subsequent purchaser of the loan. *Krawczyk* at 11, relying on 831 N.E. 2d 909, 914 (Mass. 2005). Importantly, the *Beal* court rejected the contention that a subsequent owner of an account must provide testimony from a witness with personal knowledge of its predecessor's records. Beal's reliance on its predecessor's recordkeeping rendered those records the equivalent of the bank's own records. *Krawczyk*, 11-12.

Because the purchasers in *Krawczyk* s integrated the records of the original creditor into their database without alteration and relied upon the records in their daily operations, the court found the same factors which made Beal's records reliable were also present when an account is bought by debt purchasers. *Id* at 15. Finally, the *Krawczyk* court found Centurion was subject to significant penalties for improperly collecting debt. *Id.* According to the court, these additional penalties made record accuracy even more vitally important to debt purchasers than to subsequent loan servicers.

Assignees have long been considered successors-in-interest. *American Nat'l Trust v. Kentucky Fried Chicken of Southern California, Inc.*, 308 Ill.App. 3d 106, 117-18 (1999). Accordingly, the First Appellate District found the purchaser of a credit card debt need prove nothing more than use of the card to apply the provisions of a cardmember agreement to a defendant. *Asset Acceptance v. Tyler,* 2012 Ill. App. LEXIS

139, 24 (March 2, 2012). In *Asset*, the debt purchaser attempted to enforce an arbitration provision contained in the card holder agreement issued by the original creditor, MBNA. In reviewing the clause, the court concluded it meant disputes between MBNA (hence Asset) and Tyler were subject to arbitration. *Id.* However, use of the clause was conditioned upon the terms and conditions being sent to the cardholder. Acceptance could be inferred if the cardholder made at least one purchase after the effective date of the terms. *Id.* However, Asset did not have credit card statements showing whether Tyler made purchases. For that reason alone, the court concluded Asset could not enforce the arbitration clause.

This decision is meaningful because in reaching this conclusion, the Appellate court applied the same standards to Asset as the court in *FIA Card Services, NA v. Weaver*, applied to FIA, an original creditor. 2010-1372, at 15 (LA 3/15/11) 62 So. 3d 709, 718). In so doing, an Illinois court once again placed a debt buyer in the same position as the original creditor. These decisions demonstrate Illinois courts, on both the state and federal level, consistently and without reservation afford the same rights, while imposing the same duties, as the original creditor. With this perspective, it becomes clear Shah, not Unifund, is moving this court to create and impose duties inconsistent with common law and modern jurisprudence.

EQUAL PROTECTION

The peril of creating a heightened standard for a select class of litigants is that it potentially denies them equal access to the courts, and is thus unconstitutional. Illinois Const., Art 1 § 2; *Ashton v. Board of Education*, 83 Ill. App. 3d 938, 942. The First District has already established that the Illinois Collection Agency Act may

not be read to make it impossible for collection agencies to function as viable businesses. *National Account Systems v. Anderson*, 82 Ill. App. 3d 233 (1st Dist., 1980). Such is the result when courts minutely scrutinize assignments, even though no particular wording is necessary to create an assignment. *Department of Transportation of State of Illinois v. Heritage-Pullman Bank & Trust Co.,* 254 Ill. App. 3d 823, 826 (1st Dist. 1993). Moreover, if the FDCPA does not govern the content of legal pleadings, neither should the CAA. See, e.g., *Beler v. Blatt, Hasenmiller, Leibsker & Moore*, 480 F. 3d. 470, 473 (7th Cir. 2007)

The Purposes of the Illinois Collection Agency Act is to prevent harassment, abuse and threatening conduct. *Sherman v. Field Clinic* (74 Ill.App.3d 21), *225 ILCS 425/9-9.4.* Thus, the CAA specifically amended the Criminal Code to criminalize such conduct (e.g., § 14b, which makes certain violations a Class 4 felony). The purpose was not to create hyper-technical pleading requirements that make it impossible for collection agencies to function as viable businesses. Neither is it to make the mere act of filing a collection suit a *per se* violation of the Act. As discussed in *Sherman v. Field Clinic*, that is why the CAA specifically amended the Criminal Code: to stop abuse. *Id.* It did not amend the Civil Code to hinder the ability to bring actions through technical gamesmanship that makes litigation more complex while increasing costs.

Illinois may have a valid interest in regulating abusive conduct but it does not have a valid interest in regulating internal transactions within business entities nor creating differential pleading standards for assignees of debt. There is no state interest in regulation of debt buyers unless they are engaging in activities specifically

prohibited by §9, which *Sherman v. Field Clinic* recognized as the heart of the act. 74 Ill. App. 3d 21, 28. Failing to attach proof of assignment is not contemplated as a prohibited activity.

Credit card debt is assigned for the innocent reason that specialists in debt collection are likely to be better at it than specialists in creating credit card debt in the first place. *Olvera v. Blitt and Gaines, P.C.*, 431 F.3d 285, 288. Collection agencies were originally covered under the act, with passive debt buyers largely exempted. The 2008 amendment to the Collection Agency Act to include debt buyers required them to register, but it does not abrogate their rights under the common law, nor operate to limit their access to the courts. Provisions of the Collection Agency Act directed to collection agencies who actively attempt collection do not apply to passive debt buyers any more than they apply to the law firms who collect on their behalf. The Collection Agency Act may not be read to limit the constitutional right of debt buyers to equal protection under the law by limiting their access to the courts through impracticable pleading standards that do not appear in the statute itself.

SHAH I

Due to the nature of the appeal, the first opinion issued in *Unifund v. Shah* was necessarily limited in its analysis of the Illinois Collection Agency Act and 735 ILCS 5/2-403. 407 Ill. App. 3d 737. Despite the focus of the questions, the uniqueness of the facts presented and the carefully constrained ruling issued, *Shah I* has been misinterpreted by both courts and litigants in a broad manner believing it addresses itself to all purchasers of debt, whether a traditional collection agency or a passive purchaser of consumer debt. Consequently, varying applications of *Shah*

have led to differential standards within the state and a new cottage industry of litigation against purchasers of debt. In effect, purchasers of debt are being required to attach assignments and other evidences of ownership even though their requirements are limited to those found at 2-403. Nowhere is this clearer than in the trial court's decision to dismiss the underlying complaint, with prejudice, for failure to attach assignments.

In the original decision, the court was asked to resolve whether a collection agency can establish an assignment through documents attached as Exhibits to the complaint where the information required under 225 ILCS 425/8b(a)(i),(ii) & (b), consideration, the effective date of the assignment, and the identity of accounts, were disclosed in multiple incorporated documents or affidavits. It was also asked to answer whether a collection agency may use 2-403 to assert standing where it pleads and proves it has legal title to accounts receivable for collection purposes only.

In *Shah*, the court acknowledged an appeal under S.Ct. Rule 308 limits analysis to 'the certified question[s] before the court.' *Unifund v. Shah,* 407 Ill. App. 3d 737, 740 (1st Dist. 2011) (citing *Long v. Elborno*, 397 Ill. App. 3d 982, 988 (2010). Unlike *Shah I*, in *Shah II*, the court is not bound by the premises of certified questions. Both certified questions presumed a plaintiff filed a complaint and attached the documents as a means of proving its allegations. As such, the certified questions asked the court to analyze the facts in that context. However, each certified question implies a pleading requirement that may not exist in many or most cases involving a debt purchaser who is suing as owner of legal and equitable title with all rights, title, and interest.

PLAIN LANGUAGE OF THE STATUTE

The plain language of a statute is the most reliable indication of legislative intent. *JP Morgan Chase Bank N.A. v. Earth Foods, Inc.*, 238 Ill. 2d 455, 461. Using that standard, the court in *Shah I* properly found the legislature did not intend to allow assignments for collection to be proven by affidavit, only by written assignment. This conclusion was reached by referring to the language of 225 ILCS 425/8b(a). According to that section, an account may be assigned to a collection agency for collection with title passing to the collection agency to enable collection of the account in the agency's name as assignee for the creditor provided the assignment is a written agreement, separate from the listing agreement, stating the effective date of the assignment and the consideration given. 225 ILCS 425/8b(a).

Hence, the applicability of this section is to a *collection agency* suing on behalf of another, in the agency's name. There can be no other reason for section 8b to be entitled "assignment for collection." Regardless of the definition provided in § 425/2, § 425/8b describes a specific action, i.e., where title passes to collect as *assignee for the creditor*. By its plain meaning, it would not apply where there is ownership of both legal and equitable title.

Where there is a union of legal and equitable title, we must look to 735 ILCS 5/2-403 which addresses how one must allege standing as the assignee and owner. The statute's language asserts:

> Who may be plaintiff–Assignments–Subrogation (a) The assignee and owner of a non-negotiable chose in action may sue thereon in his or her own name. Such person shall in his or her pleading on oath allege that he or she is the actual bona fide owner thereof, and set forth how when he or she acquired title.

Therefore, the assignee who owns legal and equitable title may simply attach an affidavit. In *Shah I*, the question was whether 2-403 was applicable to assignees for collection, taking the place of an actual assignment required under 8b. The court correctly rejected this interpretation. In so doing, the court recognized the distinction between assignment for collection and an assignment of legal and equitable ownership. When considered together, the only aspect 2-403 and the CAA have in common is that neither requires attachment of the assignment.

The first successful claimant under the statutory predecessor to modern 2-403, §22 of the Practice Act of 1907, is found in *National Rose Co. v. Mundet Cork Corp.*, 291 Ill. App. 464 (3d Dist. 1937). Mundet took assignment of a contract for installation of an ice box and refrigeration equipment for which money was due and owing from National Rose. Mundet filed a counterclaim whose allegations alone did not fully comply with §22, but it attached the assignment in question as an exhibit. National Rose filed a motion to dismiss Mundet's claim on the basis that it failed to comply with the requirements of section 22 of the Civil Practice Act because the complaint itself "did not state that the said appellee was the actual bona fide owner of said claim and did not set forth how and when it acquired title thereto." *Id.* The trial court denied National Rose's motion to dismiss, finding that attaching the assignment was sufficient.

However, in *Walter E. Heller & Co. v. Convalescent Home of First Church of Deliverance* 49 Ill. App. 3d, 213 (1st Dist. 1977), the court took the contrapostive position. The Defendant appealed a judgment contending, among other reasons, that the complaint failed to comply with Ill. Rev. Stat. 1975, ch 110, par. 22(a) of the Civil

Practice Act. Defendant claimed the verified allegation that "on or about June 1, 1972, Mutual Leasing Associates, Inc., assigned to plaintiff all of its right, title and interest in the aforesaid lease..." was insufficient to comply with the requirement that an assignee of a non-negotiable chose in action shall allege that he is the actual bona fide purchaser thereof, and set forth how and when he acquired title. *Heller* at 218. In addition to the allegation, the plaintiff incorporated the lease which allowed assignment as well as the assignment. The court held the complaint's allegation and the attached documentation "more than satisfied the requirements of section 22(1)." *Id.* Consequently, the *Heller* court held attaching proof of the assignment, when one is the assignee and owner, *surpassed* the requirements of what is now §2-403.

These are not isolated holdings. Historically, where the plaintiff is the assignee and owner of the account, an allegation of bona fide ownership was all that was required. In *Dembski v. Lynwood Development Corp.* 23 Ill. 2d. 395 (1961), the court dismissed both the original and an amended complaint because neither set forth "how nor when plaintiffs acquired any interest in the installment land contracts as required under the statute." *Dembski* at 397. Lack of an attachment of an assignment was not alleged as a failing nor was it noted by the court.

Likewise, in *Ray v. Moll*, 336 Ill. App. 360 (4th Dist. 1949) the court found a complaint failed to comply with § 22 when it did not 'set out the facts showing in what manner he obtained possession and ownership thereof [as] [i]t is not a sufficient allegation in such a case to allege that the plaintiff is the bona fide owner for value'. *Ray* at 363. The plaintiff had merely stated he was "the owner and holder of said note." *Id* at 364. Citing *Blanke v. Hammel*, 256 Ill. App. 251, the *Ray* court relied on

Illinois Supreme Court's language in *Gallagher v. Schmidt*, 313 Ill. 40, which found an assignee of a chose in action does not state a cause of action unless it *contains allegations* setting forth how and when he acquired title. *Ray* at 363-4.

As *Shah I* showed, the affidavit of Bobby Carnes, explaining the chain of assignments, was insufficient to meet § 8b's requirement that an assignment be manifested in writing. *Shah*, 744-745. However, under 2-403 an affidavit attached to the complaint would have met the pleading requirements, provided it detailed the information required in the statute. *Shah I's* ruling was necessarily limited to the unusual certified question attempting to marry 735 ILCS 5/2-403 with 425 ILCS 225/8b. As an unintended result, litigants are experiencing the non-felicitous union the court was trying to avoid: rendering 2-403 inoperative while creating the fiction that the legislature intended the statutes to interact. This is exactly the issue which confounded the Second District in the very recent matter of *Razor Capital v. Antaal,* wherein the court mistook assignments as being a requirement under 2-606, ignoring both the Collection Agency Act and 5/2-403. 2012 IL App (2d) 110904, 13 (2d Dist 2012). The assignment simply gives the assignee the right to stand in the shoes of the creditor. In other words, the assignee is considered the successor-in-interest. *American Nat'l Trust v. Kentucky Fried Chicken of Southern California, Inc.*, 308 Ill.App. 3d 106, 117-18 (1999). Once it has been pled, it essentially becomes a non-issue, because it is the same as if the original creditor were suing.

From the foregoing, it is clear Illinois courts have found attachment of an assignment exceeds the requirements of 2-403. Likewise, in examining the plain language of 8/b, there is no pleading requirement. Hence, to the extent *Shah I*,

discounts use of affidavits, it does so only for assignees for collection, not for assignee owners holding unity of title with both legal and equitable interests.

NO IMPLIED PLEADING REQUIREMENT

When one reads §425/8b(a), it states:

> The assignment is manifested by a written agreement, separate and in addition to any document intended for the purpose of listing a debt with a collection agency. The document manifesting the assignment shall specifically state and include (I) the effective date of the assignment; and (ii) the consideration for the assignment.

It goes on to require in (f) that:

> If a collection agency takes assignments of accounts from 2 or more creditors against the same debtor and commences litigation against that debtor in a single action, in the name of the collection agency, then (i) the complaint must be stated in separate counts for each assignment and (ii) the debtor has the specific right to have any account severed from the rest of the action.

Under the plain language analysis, it is clear the legislature did not seek to imply a pleading requirement of attaching the assignment to a complaint because section (f) shows the legislature was willing to explicitly create a pleading requirement where multiple debts from different creditors were assigned to the same collection agency. In failing to draft 8b(a) with similar language, the legislature did not intend it as a pleading standard.

Additionally, it is well established in Illinois that lack of consideration does not defeat an assignment. *Beach v. Derby*, 19 Ill. 616, 622 (1858); *Miers v. Charles H. Fuller Co.*, 167 Ill.App. 49, 58 (1st Dist.1911). Thus, the requirement of consideration in §425/8b(a)(iii) cannot create a pleading requirement. It favors the notion that this section is for regulatory purposes by the regulatory authority designated by the legislature, in this case, the Department of Professional Regulation.

Failure to plead consideration is not for courts to use in striking or otherwise policing complaints because the legislature has placed that authority in the Department. Moreover, because it is not available as an affirmative defense to defeat an assignment, it should not be part of a motion to dismiss.

Because we must read the statute as a whole, not simply look at assignment requirements, it is proper to conclude if a pleading requirement appears in (f), the lack of same in (a) was intentional.

BECAUSE THE CERTIFIED QUESTIONS WERE PHRASED AS TO BOTH PLEAD AND PROVE, DISHARMONY BETWEEN 2-403 AND CAA RESULT

When interpreting a statute, the court is to "ascertain and give effect to the overall intent of the drafters." *Knolls Condominium Ass'n v. Harms,* 202 Ill. 2d 450, 458 (2002). Where two or more statutes relate to the same subject, they are "to be read harmoniously." *Id.* However, only statutes which are *in pari materia* should be construed together, meaning they must relate to the same thing, the same subject or the same object. *People v. Datacom Systems Corp.*, 146 Ill. 2d 1, 16 (1st Dist. 1991).

Undoubtedly, 2-403 is a pleading requirement so that, as noted above, failing to properly allege ownership would be fatal to the complaint. However, it is equally clear that attaching proofs is not required to allow a complaint to stand. *Claire Associates v. Pontikes;* 151 Ill. App 3d. 116, 123 (1st Dist. 1986); *Chandler v. Central Railroad Co.*; 207 Ill. 2s 331, 348 (2003). In fact, § 8b(a) does not require attachment: it requires an assignment be manifested by a written agreement. Therefore, § 8b(a) and § 2-403 can be read harmoniously to require an assignment exist but not that it necessarily be attached to the pleading. *Shah I* claims that 2-403 can encompass assignments for collection because both statutes address assignments.

Therefore, it stands to reason that if both statutes eschew a pleading requirement, then it would clearly give effect to the overall intent of the drafters *not* to require an attachment to allege ownership.

It is here the harmony the ends, however. Sections 2-403 and 225/8(b) cannot be read together, because 2-403 speaks only to *non*-negotiable choses, whereas assignments for collection may encompass negotiable choses, as well. (*See*, Kyle *v. Thompson ex rel. Warburton & King,* 3 Ill. (2 Scam.) 432, 434 (1840) (Note assigned for collection); *Parks v. Brown,* 16 Ill. 454 (1855) (Promissory note assigned for collection); *First National Bank of Canton v. McCann,* 4 Ill.App. 250, 251 (3d Dist. 1879) (Note indorsed for collection only "was a *bona fide* assignment for a valuable consideration" at 252); *Rodriguez v. Merriman,* 133 Ill.App. 372 (1st Dist. 1907) (Note assigned for collection). The assignee of a nonnegotiable chose in action, whether an assignee and owner or an assignee for collection, was not allowed to sue until adoption of §18 of the Practice Act of 1907, 1907 Ill. Laws, p. 443, so the statutes must be construed separately.

Shah I merely states the affidavit of Bobby Carnes was insufficient to meet § 8b's requirement that an assignment be manifested in writing. However, *Shah I* did not ask, nor did it answer, whether a copy of the assignment must be attached in all instances, whether the plaintiff is an assignee with legal and equitable title or an assignee for collection. In spite this obvious limitation, *Shah* is being interpreted to create a pleading requirement.

These interpretations are being made even when no particular wording is necessary to create an assignment. *Department of Transportation of State of Illinois v. Heritage-Pullman Bank & Trust Co.,* 254 Ill. App. 3d 823 (1st Dist. 1993). Analyzing

an assignment for collection, the court in *Heritage-Pullman* found the assignment was sufficiently "reflected by a letter to Lorenzetti, Inc.'s counsel dated June 14, 1989, indicating that Heritage-Olympia was assigning its right to collect . . . to Carlo Lorenzetti, the sole shareholder." The court went on to state:

> An assignment operates to transfer some identifiable property right, interest or claim from assignor to assignee. . . . No particular words are necessary to demonstrate the existence of an assignment. . . . Rather, any document which sufficiently evidences the intent of the assignor to vest ownership of the subject matter of the assignment in the assignee is sufficient to effect an assignment. . . .
>
> It is plain that the June 14, 1989, letter evinces the intent of Heritage-Olympia to vest ownership . . . to Carlo Lorenzetti. [Citations omitted.]

A final point worth mentioning is that, under the common law, an assignee for collection may still bring suit in the name of the equitable owner. This right has not been superseded by statute. "The statute is directory, permissive, and not mandatory, that assignees shall sue in their own names, but may, as we think, use the name of the payee to their own use, as sufficiently descriptive of the real interest." *Parks v. Brown,* 16 Ill. at 455. "Any holder of a note, although he may have written on it an indorsement or an assignment of it, may maintain an action in his own name, and strike out the indorsement before offering the note in evidence." *Rodriguez v. Merriman,* 133 Ill.App. 372, 379 (1st Dist. 1907), following *Best v. Nokomis,* 76 Ill. at 610, and *Parks.* In the event an original creditor (who maintains equitable title) ultimately provides the documentation and a witness (if its assignee takes the matter to trial or the court permits discovery), suing in the name of the original creditor may not only avoid confusion, but also much headache in avoiding superfluous motions to dismiss.

It is clear that at common law there was a difference between an assignee with legal title and an assignee and owner with equitable title and beneficial interest. Assignments for collection, once popular at common law, have become increasingly rare, particularly as the debt collection industry has become more specialized and the apparent right of legal title has less and less application. These arrangements exist presumably because the assignor is not a specialist in collections and essentially hires the assignee to collect.

> There is an innocent reason that creditors [assign] collection to other firms rather than doing it themselves. It is the same reason that most manufacturers sell to consumers through independent distributors and dealers rather than doing their own distribution.... Specialists in debt collection are likely to be better at it than specialists in creating credit card debt in the first place. *Olvera v. Blitt & Gaines, P.C.,* 431 F.3d 285, 288 (7th Cir. 2005).

SHAH I HAS CREATED DIFFERENTIAL STANDARDS FROM CASE TO CASE

In the recent opinion of *Grant-Hall v. Cavalry Portfolio Services, LLC*, both the court and plaintiff's counsel agreed there is no pleading requirement contained in the CAA. 2012 U.S. Dist. LEXIS 23526. In the first footnote, the court explained

> Defendants read the amended complaint as alleging that they violated §8b by failing to attach all the required documentation to the state court complaints [internal citations omitted]. Plaintiff's disclaim that theory [internal citation omitted] and wisely so; §8b does not govern the documents that must be attached to an initial pleading but merely requires that certain documentation *exist* before a debt collection agency files a collection action. (*Grant-Hall, at 13-14*)

This conclusion is entirely different from the one reached by the trial court in this appeal. While it is not unusual to have courts disagree, what is unusual is that the counsel in *Grant-Hall* is also Shah's counsel. Since the disagreement involves

essentially the same issues, it is paramount the court clarify whether *Shah I* is confined to its facts or if it actually found a pleading requirement in 425 ILCS §8b(a).

The *Grant-Hall* court concludes its review of the motion to dismiss stating:

> Although the requested documentation is not attached to Plaintiffs' amended complaint or to Defendants' motions to dismiss, Calvary [sic] maintains that it did in fact have those documents when the state court actions were filed. Because this case would end if Calvary is right, the court has invited Calvary to move without delay for summary judgment on that ground. *Id.*

However, the exact opposite interpretation is found in Circuit Court of the Nineteenth Judicial Circuit. In response to *Shah I*, on April 7th, 2011, Lake County entered a standing order creating burdensome prove-up requirements for both assignees for collection and debt purchasers, even in the case of default judgments.

As to assignees under 225 ILCS 425/8b, the order states the agency must produce proof of every assignment and each written contract of assignment for the court to determine if the assignment fulfills the statute's requirements. Hence, the court has turned a regulatory requirement, designed to prevent fraudulent conduct by collection agencies through Departmental oversight, into an element to be proven by the plaintiff. In practice, failure to meet the Lake County standard has led to the court dismissing the complaint *sua sponte*.

The order further requires assignees with legal and equitable title under 735 ILCS 5/2-403 to provide proofs for the entire chain of title, including the original creditor and all subsequent assignees and/or purchasers in the complaint. Therefore, the standing order seeks to supplant the legislature's pleading standards with its own, based on its singular interpretation of *Shah.* (See Lake County, Appendix A1-2.)

These requirements are being imposed in all collection matters, including small claims, even though small claims relaxed pleading standard applies to allegations of assignment. *Tannenbaum v. Fleming*, 234 Ill. App. 3d 1041 (2d Dist. 1992). In these actions, the complaint is already accompanied by an affidavit as to the balance and, in many cases, denotes the assignment of the account. As such, the order ignores the Supreme Court designation that small claims provide an expeditious, simple and inexpensive procedure for litigation. *Toth v. England,* 348 Ill.App. 3d 378 (5 Dist 2004). Even on simple defaults, assignees under 735 ILCS 5/2-403 are being forced to show more, do more and swear, under oath, as to assignments to which they were not a party.

In the Circuit Court of the Sixth Judicial Circuit (Champaign County, Appendix A 3-11), the court took the opposite view. Its Standing Order does not require the attachment of assignments, finding that *Shah* had no applicability to small claims actions. Thus, plaintiffs face a pleading minefield where the standards vary so widely as to render Supreme Court rules, statutes, and precedent applicable or inapplicable depending on where a complaint is filed. This is not to say assignees never have to establish standing; that is an issue for discovery and trial, not default proceedings.

CONCLUSION

Illinois has defined and respected the rights of assignees for over 150 years. While the nature of the obligations subject to collection has changed, the law has remained the same. Even as recent jurisprudence has clarified debt purchasers as assignees, stepping into the shoes of the original creditor, the defendant would have this court disregard decades of statutory and centuries of common law in imposing conditions on debt purchasers which are found neither in the intent of the legislature or the text of the statute.

DATED: October 9, 2012

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I, Michael L. Starzec, hereby certify that on October 9th, 2012, I caused to three (3) copies of the foregoing **Amicus Curiae Brief in Support of the Plaintiff-Appellant, Unifund CCR Partners, on behalf of the National Association of Retail Collection Attorneys** to be sent via UPS Next Day Air to:

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of 331(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) Statement of Points and Authorities, the Rule 341(c) Certificate of Compliance, the Certificate of Service, and those matters appended to the brief under Rule 342(a) is 25 pages.

By: _____
Michael L. Starzec
One of the Attorneys for *Amicus Curiae*

NO. 1-11-3658

IN THE

APPELLATE COURT OF ILLINOIS

FIRST JUDICIAL DISTRICT

UNIFUND CCR PARTNERS, LLC, Plaintiff-Appellant	Appeal from the Circuit Court of Cook County, Illinois Municipal Department, First District
vs.	No. 08 M1 162091
Mohammad Shah Defendant-Appellee	Honorable Dennis McGuire Presiding

APPELLANT'S APPENDIX

CONTENTS

Circuit Court
Nineteenth Judicial Circuit
Lake County, Illinois

Standing Order for Actions in Debt by Assignees

For All Assigned Debt

At prove-up, in all cases of assigned debt, *whether for collection or otherwise*, there must be an affirmative statement in the verified pleading or supporting affidavit as to whether or not the debt was assigned at any point to a collection agency for collection, within the meaning of the Collection Agency Act.

Any Actions by a Collection Agency

At prove-up, any actions by a collection agency, within the meaning of The Collection Agency Act, 225 ILCS 425/1 *et seq.*, must be supported by an affidavit attesting to the date of the licensure of the agency or agencies, and to the fact that the agency or agencies were licensed at the time of the assignment(s) and at the time the complaint was filed.

For Assigned Debt Other Than Debt Assigned to a Collection Agency for Collection.

- For assignees suing on debt [other than debt assigned to a collection agency for collection within the meaning of The Collection Agency Act, 225 ILCS 425/1 *et*

seq.], the Court requires that the complete chain of title, including the name of the original creditor and all subsequent assignees and/or purchasers, be pled in the complaint.

- For prove-ups of assigned debt [other than debt assigned to a collection agency for collection within the meaning of The Collection Agency Act], the Court requires sufficiently detailed affidavits, verified pleading, or documents sufficient to establish the Plaintiff's standing to sue on the specific debt or account of the Defendant.

For Debt Assigned to a Collection Agency for Collection

When the assignment is to a collection agency for collection, within the meaning of The Collection Agency Act, the court requires pleading and proof of every assignment, satisfying the requirements of 225 ILCS 425/8b(e), including:

- Each written contract of assignment (affidavits are insufficient), which specifically state the date of each assignment, the consideration paid and the identifying information for the account being collected for each assignment;
- Incorporation of multiple documents by the assignee is allowed, provided that the incorporated documents are attached to the Complaint along with each assignment.

Dated this 7th day of April, 2011.

John J. Scully
Judge, 19th Judicial Circuit

IN THE CIRCUIT COURT OF THE SIXTH JUDICICAL CIRCUIT
CHAMPAIGN COUNTY, ILLINOIS

DISCOVER CARD,		
	Plaintiff,	
v.		
		10-SC-2005
ANNETTE DAVIS,		
	Defendant;	
		MAY 23 2011
MIDLAND FUNDING, LLC		
	Plaintiff,	
v.		10-SC-2210
LORI DEMPSEY,		
	Defendant;	
CAPITAL ONE BANK (USA) N.A.		
	Plaintiff,	
v.		10-LM-1250
IRENE L. HIEROMNIMON,		
	Defendant;	
DISCOVER BANK,		
	Plaintiff,	
v.		10-LM-1403
DONNA GARDNER,		
	Defendant.	

FILED
SIXTH JUDICIAL CIRCUIT
MAY 23 2011
Linda S. Fuesler
CLERK OF THE CIRCUIT COURT
CHAMPAIGN COUNTY, ILLINOIS

MEMORANDUM OF OPINION AND ORDER

These cases are before the court on pending motions to dismiss brought pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615). Because each of the cases presents a claim based on section 2-606 of the Code of Civil Procedure (735 ILCS 5/2-606) the court has chosen to consolidate the cases for an omnibus resolution of the pending motions.

Before addressing the merits of the respective motions, the court has chosen to first set forth its understanding of certain matters of law that inform their resolution. First, the court is foremost mindful of proper limitations on its authority. This court thus has no authority to

establish rules of law or social policy. So also has the court no authority to extend the law beyond precedent. The court must therefore apply the law as it presently exists and may not dispositively consider what the applicable law might or could be.

Second, the court is of the view that resolution of the pending motions must be reached with reference to various sources of law. Those sources certainly include the reported decisions cited by the parties. Also to be considered are the pertinent provisions of the Code of Civil Procedure, the case law thereunder and, although cited by no party, Part I of the Supreme Court Rules relating to pleading in small claim cases.

Third, the court must set forth certain legal premises that in its judgment govern the disposition of the pending motions. As a threshold matter the court is of the view that section 2-606 is textually inapplicable to small claim proceedings. Nevertheless, such is not alone fatal to defendants' claims for dismissal in the consolidated small claim cases. This is because Supreme Court Rule 282 itself would impose an analogous requirement. Indeed, the very text of Rule 282(a) provides that if a small claim is "based upon a written instrument, a copy thereof or of so much of it as is relevant must be copied in or attached to the original and all copies of the complaint, unless the plaintiff attaches to the complaint an affidavit stating facts showing that the instrument is unavailable to him." Thus, although small claim pleading is by design truncated and relatively informal, Rule 282(a) does not excuse a plaintiff in a small claim case from the requirement of attaching or quoting pertinent passages of a written obligation sought to be enforced or accounting under oath for its absence.

Fourth, these consolidated cases must be divided into two classes and, within those respective classes, addressed separately. The two classes, of course, are identified by their respective jurisdictional limits. The court thus recognizes the clear distinction between small claim cases and law magistrate ("LM") cases. Review of the pertinent law has led the court to conclude that the failure to comply with Rule 282(a) does not bring forth the same consequences as the failure to comply with section 2-606.

Fifth, the court accordingly underscores the importance of Supreme Court Rule 282 to the disposition of two of the consolidated cases. Rule 282(a) sets forth the requisite content of a

small claim complaint. The rule provides as follows:

> **(a) Commencement of Actions.** An action on a small claim may be commenced by paying to the clerk of the court the required filing fee and filing a short and simple complaint setting forth (1) plaintiff's name, residence address, and telephone number, (2) defendant's name and place of residence, or place of business or regular employment, and (3) the nature and amount of the plaintiff's claim, giving dates and other relevant information. If the claim is based upon a written instrument, a copy thereof or of so much of it as is relevant must be copied in or attached to the original and all copies of the complaint, unless the plaintiff attaches to the complaint an affidavit stating facts showing that the instrument is unavailable to him.

Supreme Court Rule 282(a).

Sixth, the court is of the view that Part I of the Supreme Court Rules, with specific reference to Rule 282, must govern scrutiny of the validity of a small claim complaint. Illinois law has long provided that, when a conflict arises between the application of the Supreme Court Rules and a statute, the rule prevails. See, generally, *Medow v. Flavin*, 336 Ill.App.3d 20 (2002).

Seventh, disposition of small claims cases is intended to be relatively simple and expedient. Motion practice is explicitly limited. Indeed, with the exception of motions for substitution of judge and a dispositive motion under section 2-619 of the Code of Civil Procedure, motion practice is presumptively forbidden and may be pursued only with leave of court. See Supreme Court Rule 287(b). The truncated procedural landscape of the small claims docket extends even to the very the process of litigation of the merits of a claim. See Supreme Court Rule 286(b). In that respect it is to be noted that Rule 286(b) permits a court "[i]n any small claims case" to "relax the rules of procedure and the rules of evidence." *Id.*

Accordingly, reading the provisions of Part I of the Supreme Court Rules as a whole, the court concludes that small claim procedures do not in the run of cases contemplate dismissal of a complaint for failure to comply with the requirement that an alleged written obligation be attached to or quoted in the complaint. The remedy for an aggrieved defendant in such a situation (if indeed the defendant does not himself have a copy of the alleged agreement) is a court order requiring the tender of the document in question. To dismiss a small claim complaint for the mere forbearance of a plaintiff to attach a copy of the written obligation would inject into small

claim litigation an element of technicality, gamesmanship and increased litigation that the Part I procedures were obviously designed to avoid.

In reaching this conclusion the court is at once informed and fortified by *Porter v. Urbana-Champaign Sanitary District*, 237 Ill.App.3d 296 (1992). The *Porter* court observed that

> [s]mall claims court is a somewhat less formal hall of justice. It is inconsistent with the simple and inexpensive procedures outlined in the supreme court rules for small claims proceedings (134 Ill.2d Rules 281 through 289) to allow attorneys to file numerous motions (including a request for a bill of particulars) in an attempt to discourage *pro se* litigants from utilizing the small claims court. In many of these cases, it is more efficient for the trial court to try the case and decide it on the merits than it is to consider motions of the parties attacking the opponent's pleadings, especially in light of the less formal pleading requirements in small claims cases.

237 Ill.App.3d at 303-304. While the procedural posture of the consolidated small claim cases is different from that in *Porter*, and there is surely no effort afoot on the present record "to discourage *pro se* litigants from utilizing the small claims court," *Porter* remains instructive in its recognition of the global purpose of Part I of the Supreme Court Rules to provide for simple and economical resolution of small claims. In all events the observation of the *Porter* court that "it is more efficient for the trial court to try the case and decide it on the merits than it is to consider motions of the parties attacking the opponent's pleadings" is of great import irrespective of the identity or posture of the parties to a small claim case.

For the foregoing reasons the court is of the view that motions to dismiss a small claim complaint for failure to comply with section 2-606 of the Code of Civil Procedure are facially meritless. The court so holds because the provisions of section 2-606 have been supplanted by the provisions of Supreme Court Rule 282(a). In addition, a motion *for dismissal* of a complaint for failure to comply with the "written instrument" provision of Supreme Court Rule 282(a) is also presumptively flawed. The proper remedy in the run of cases is instead the striking of the complaint or a request for production of the "written instrument" in question. *Porter, supra.*

Against the foregoing legal backdrop the court now addresses the respective merits of the pending motions to dismiss.

10-SC-2210, Midland Funding, LLC v. Dempsey

In this case plaintiff tenders a threshold argument that defendant's motion to dismiss, predicated in greatest measure on section 2-606 of the Code of Civil Procedure, is not justiciable because it was filed without leave of court. While such is true, the court has chosen to and does now grant defendant leave of court to file the motion *nunc pro tunc* to the date the motion was filed. Plaintiff's threshold claim in opposition to the motion to dismiss is thereby rendered moot.

Plaintiff's second contention in opposition to the motion to dismiss is that section 2-606 has no application to small claim cases. While perhaps textually accurate, plaintiff's argument is apparently devoid of recognition of the "written instrument" provision of Supreme Court Rule 282(a), a matter previously addressed by the court. The court accordingly rejects this contention on the basis of the foregoing observations.

A second theory of dismissal tendered by defendant is that the complaint fails to attach documents of assignment that would give plaintiff standing to pursue the claim against defendant or otherwise establish its validity. The basic legal premise of the claim is rooted in section 8(b) of the Collection Agency Act. See 225 ILCS 425/8(b). Defendant further augments her claim by citing *Unifund CCR Partners v. Shah*, 407 Ill.App.3d 737 (2011). Able counsel for the parties have tendered competing constructions of section 8(b) as well as competing interpretations of *Shah*.

The court need not address any questions relating to the interplay between the Collection Agency Act and the pleading requirements of the Code of Civil Procedure on the present record. The court is instead of the view that *Shah* is of no application when considering the validity of a small claim complaint. As the court has previously observed, the Illinois Supreme Court has exercised its constitutional rulemaking authority in the form of Part I of the Supreme Court Rules. Those rules, to the extent that they govern pleading in small claim cases, have constitutional hegemony over any conflicting enactment of the legislature. Rule 282 sets forth the requisites of a small claim complaint. The text of that provision is silent with respect to pleading an assignment. This court has no authority to rewrite the rule, just as it has no authority to engraft onto the rule the pleading requirements of the Code of Civil Procedure. Accordingly, defendant's alternative theory of dismissal is without merit and it is respectfully rejected.

Case 10-SC-2005, Discover Bank v. Annette Davis

In this case the complaint alleges that plaintiff issued a credit card to defendant; that defendant used the credit card in a series of transactions and that defendant subsequently failed to pay certain amounts of money charged to the account. Attached to the complaint is a thirteen page "cardmember agreement" that purportedly sets forth the terms of use of the card. Defendant seeks dismissal of the complaint under section 2-606. Defendant specifically claims that "[n]o written agreement indicating [d]efendant's consent to its terms is [a]ttached to [p]laintiff's complaint." This assertion is bolstered by a citation to 12 CFR 226.2(a)(1).

In response, plaintiff relies in the first instance on rules generally governing scrutiny of motions to dismiss and the sufficiency of a complaint under section 2-615. While each of those submissions is accurate, plaintiff and defendant alike state their positions without reference to Supreme Court Rule 282(b). Application of rules and modes of scrutiny rooted in the Code of Civil Procedure are at best difficult in the context of assessing the sufficiency of a small claim complaint. The court holds defendant's motion to dismiss to be meritless because section 2-606 simply is of no application to small claim complaints.

A more substantial question is to be found in plaintiff's position that the instant complaint explicitly seeks to enforce an obligation stemming from use of a credit card. Citing *Garber v. Harris Trust & Savings Bank*, 104 Ill.App.3d 675 (1982), plaintiff asserts that section 2-606 is in any event of no application because it is the obligation arising from aggregate *use* of the credit card that is being enforced, rather than the original agreement for its *issuance*. Thus, plaintiff posits that "it is the credit card agreement that contains the relevant terms and conditions of the contract between the card member and the card company." The conclusion to be reached, then, is that section 2-606, not to mention Rule 282(b), has in any event been complied with.

It has been held that *Garber* would teach that "the issuance of a credit card and cardholder agreement is a standing offer to extend credit that may be revoked at any time. When the cardholder makes a purchase, the bank advances funds to the merchant and this arrangement constitutes a loan between the bank and cardholder. Therefore, each time the credit card is used, a separate contract is formed between the cardholder and bank." *Portfolio Acquisitions, L.L.C. v. Feltman*, 391 Ill.App.3d 642, 649 (2009).

This court has no authority to disregard the rule set forth in the *Garber-Feltman* line of cases. In addition, a plaintiff is possessed of the right to elect the legal theory under which to proceed. In this case plaintiff expressly predicates its claim on the *Garber* rule. Under that theory defendant's liability, if any, is to be predicated on violation of the "cardmember agreement" that is attached to the complaint. Accordingly, the requirements of Rule 282(a) have been complied with. The motion to dismiss is therefore without merit.

There remains to be addressed the question raised by defendant's citation of the Code of Federal Regulations; specifically, 12 CFR 226.2(a)(1). The citation and proposed application appears to be broadly rooted in the federal Truth in Lending Act and the so-called "Regulation Z" long extant thereunder. Defendant's claim, although perhaps artfully proffered, misses the fundamental point that a complaint in any context need only set forth the ultimate facts of a claim. The court is aware of no authority for the proposition that the essential allegations of a complaint to collect on a financial obligation – particularly in the context of a small claim under state law – must elementally allege compliance with the Truth in Lending Act, any state or federal variant thereof or, at last, "Regulation Z" itself. While defendant is certainly free to raise questions of state or federal law as an affirmative matter, the existence of any such issues is immaterial to the facial sufficiency of plaintiff's complaint.

10-LM-1250, Capital One Bank (USA) N.A. v. Hieromnimon

In this case plaintiff seeks the recovery of the principal sum of $10,977.41, allegedly stemming from defendant's use of a credit card and a subsequent failure to make payments according to the terms of an agreement governing that use. The complaint expressly alleges that defendant "opened a credit card account . . . and, by virtue of use of the card . . . agreed to the terms governing use of the card, said terms *(sic)* attached hereto and made a part hereof." (Complaint, filed 10/28/10, par. 1)

In *Velocity Investments, LLC v. Alston*, 396 Ill.App.3d 296 (2010), the appellate court held that the failure to comply with Section 2-606 warrants dismissal of a complaint. The court need not address the application of *Alston* to the instant record. In this case it is readily evident that plaintiff's theory of liability is based on the *Garber* line of cases. In addition, although the requisite "customer agreement" is not attached to plaintiff's complaint, the agreement is

nevertheless of record. The court has some difficulty seeing how the interests of justice would be served by the dismissal of a complaint based upon the failure to attach a document of which defendant is already in possession. The motion to dismiss for failure to comply with section 2-606 is accordingly without merit.

Defendant also seeks dismissal of the complaint pursuant to section 2-619 (735 ILCS 5/2-61) on the ground that the complaint was not filed within the pertinent statute of limitation. See 735 ILCS 5/2-619(a)(5). This theory of dismissal requires threshold resolution of a question of law; specifically, whether Illinois law or Virginia law is to be applied. The court need not address the question of law because the record is not amenable to requisite resolution of threshold questions of fact to which that law would be applied. That a claim is time-barred is an affirmative matter that a defendant must establish in the first instance. There is simply no evidence of record that would support any dispositive finding of when plaintiff's cause of action, or any part of it, might have accrued. Instead, the record consists almost exclusively of defendant's assertion that "[u]pon information and belief, [her] last payment to [p]laintiff was made in April 2007." Accordingly, defendant's motion to dismiss under section 2-619(a)(5) cannot be resolved on the present record. Defendant is, of course, free to raise the claim by way of answer. See 735 ILCS 5/2-619(d).

10-LM-1403, Discover Bank v. Gardner

In this case plaintiff seeks recovery of $18,033.13 stemming from defendant's alleged use of a credit card. Defendant's motion to dismiss is expressly and exclusively reliant on section 2-606. The difficulty with defendant's theory of dismissal, however, is that the complaint contains no allegation of a written agreement. Instead, the complaint alleges that defendant "utilized a charge account and/or line of credit issued by [p]laintiff . . . whereby [d]efendant could charge goods and services to their account and/or receive cash advances." (Complaint, par. 1) Defendant has not raised a claim regarding the form of the complaint. Yet the face of the complaint does not indeed allege that the alleged obligation is based on a written instrument. Although such may be likely, the court has no authority to assume such to be the case. On the face of the complaint the court holds that the *Garber* line of cases is fatal to defendant's claim and, accordingly, that the motion to dismiss is without merit. Defendant is, of course, entitled to seek elucidation of the

basis of the alleged obligation through discovery.

Conclusion

For the foregoing reasons the motions to dismiss in these consolidated cases are respectfully DENIED. In 10-LM-1250, Capital One Bank (USA) N.A. v. Hieromnimon and 10-LM-1403, Discover Bank v. Gardner the defendants are ordered to answer the complaint within 30 days. In Case 10-SC-2005, Discover Bank v. Annette Davis and 10-SC-2210, Midland Funding, LLC v. Dempsey no answer is required. Each of the cases is continued for a status hearing to August 11 at 11:00 in courtroom 'D.'

IT IS SO ORDERED.

DATE: MAY 23 2011

ENTER: Chase Leonhard

Chase Leonhard
Associate Judge

IN THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT
DOCKET NO: 1-11-3658

UNIFUND CCR PARTNERS
Plaintiff-Appellant

Appeal from Cook County
Circuit No. 2008 M1 162091
Trial Judge: Honorable Dennis McGuire

v.

MOHAMMAD SHAH
Defendant-Appellee

ORDER

This Motion, seeking leave of this honorable court to allow the National Association of Retail Collection Attorneys leave to appear as Amicus Curiae and to file a brief instanter in support of the Plaintiff-Appellant, Unifund CCR Partners, all parties having been duly notified and the Court being fully advised in the premises;

IT IS HEREBY ORDERED:

The Motion for leave to appear as Amicus Curiae and to file a brief instanter in support of the Plaintiff-Appellant, Unifund CCR Partners is

[ ] Granted.

[ ] Denied.

_____
Justice

_____
Justice

_____
Justice

IN THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

DOCKET NO: 1-11-3658

UNIFUND CCR PARTNERS
Plaintiff-Appellant

Appeal from Cook County
Circuit No. 2008 M1 162091
Trial Judge: Honorable Dennis McGuire

v.

MOHAMMAD SHAH
Defendant-Appellee

NOTICE OF FILING

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Daniel A. Edelman
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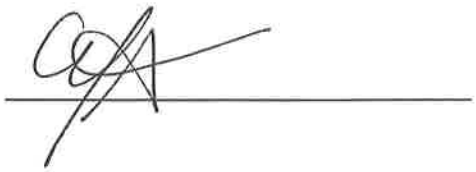
Chicago, L 60603

PLEASE TAKE NOTICE, that on October 9, 2012, I caused to be filed the with the Clerk of the Appellate Court of Illinois, First District, the following document, true copies of which is served upon you herewith:

MOTION OF THE NATIONAL ASSOCIATION OF RETAIL COLLECTION ATTORNEYS FOR LEAVE TO APPEAR AS AMICUS CURIAE AND TO FILE A BRIEF INSTANTER IN SUPPORT OF PLAINTIFF-APPELLANT UNIFUND CCR PARTNERS



Michael L. Starzec
661 Glenn Avenue
Wheeling, IL 60090
(847) 403-4900

CERTIFICATE OF SERVICE

I, the undersigned attorney, certify that I served this Notice by causing three copies to be hand delivered to each of the above-named parties at the addresses listed above on October 9, 2012