

Account Stated

Frequently Pled
Rarely Understood

By James Daher

Debt Collector's Bar is wising up (sort of):

Used to plead:

Suit On Account.

Dropped when they realized they couldn't substantiate each charge that makes up the account balance.

Quantum Meruit.

Dropped when they realized it made the amount they paid for the debt indisputably relevant, as that's all they can collect on it.

Money Had and Received.

Still pled by a few debt collection law firms.
Can NOT apply to credit card debt.

Now:

Breach of K.

They usually don't have a K, and even if they did, they rarely can show a meeting of the minds.

Account Stated. Used to be the theory of last resort.

Now, they think it's their savior.

Elements of the Account Stated, according to the debt collector's bar:

1. We sent the consumer a bill.
2. He retained it for a while without objection.
3. Therefore, implicitly agreed that the balance was correct and promised to pay.
4. Pat myself on the back. I'm such a smart lawyer.

Real Elements of Account Stated:

1. An agreement between the parties;
2. having had prior financial dealings (an open account);
3. that the balance is correct and due as a final adjustment or statement;
4. and an unconditional promise by the debtor to pay the balance.

Whelan's, Inc., v Bob Eldridge Const. Co., Inc., 668 S.W.2d 244 (Mo.App. 1984).

First Element: An agreement between the parties.

“It is a new cause of action arising from the prior monetary transactions...”

Chisler v. Staats, 502 S.W.2d 424 (Mo.App.1973).

In other words, it’s a new deal arising from the old deal.

If your client is claiming that it was not his account, then you can argue both parts of this element.

Otherwise, just argue that he never agreed to a new deal, and move on to the third element (skipping the second).

Second Element: Prior Financial Dealings, an open account.

Attacking this element is a sucker’s bet, and will most likely sour the judge on your other arguments. You always want to appear to be the most reasonable person in the room. This argument is not reasonable.

Do not make it UNLESS your client is claiming that it was not his account.

Third Element: Both parties agree that the balance is correct and due as a final adjustment.

“One essential element of an account stated is an agreement by both parties that the amount set forth in the account is correct and is understood as a final adjustment or statement.”
Whelan’s, Inc. v. Bob Eldrige Const. Co., Inc., 668 S.W.2d 244 (Mo. App. W.D., 1984), citing *Perbal v. Dazor Manufacturing Corp.*, 436 S.W.2d 677, 684 (Mo., 1968).

3 types of “last monthly statements” in credit card debt collection cases:

1. Clearly looks like a final balance, and keeps the dollar amount in the amount due.
This is the only one of the three types that is a danger to us, and it is rare.
2. Looks like every other statement (and probably is just another statement).
Cannot be understood as “final”.
3. Charges off the balance and says, “Current Balance Due: \$0.00”
 - a. Is this agreed as correct?
 - b. Unsophisticated consumer standard (for counterclaims & policy).
 - c. And great argument for next element.

No evidence that it was ever sent to your client, or that your client ever received it.

Debt collector’s witness cannot testify that the original creditor sent the statement to the consumer (hearsay).

“Other Qualified Witness” v. Designated Corporate Representative
Original Creditor cannot testify to that by affidavit (hearsay).

They will VERY rarely ever bring Original Creditor as a live witness.

Fourth Element: buyer acknowledges this obligation and makes an unconditional promise, either expressed or implied, to pay that balance.

"If the debtor makes no express promise to pay, the retention of the account rendered for a reasonable time without objection admits to the account and implies a promise to pay. The circumstances of a particular case determine the reasonable period of time that an account may be retained without objection." *Rice's Feed Service, Inc. v. Dodson*, 904 S.W.2d 475 (Mo. App. S.D., 1995).

TILA 1666 = 60 days on credit card accounts.

"Mere failure to object [to the bill] is not conclusive but raises a rebuttable presumption of an account stated." *Chisler v. Staats*, 502 S.W.2d 424 (Mo. App., 1973).

Arguments:

1. The debt buyer usually has no evidence that the bill was ever sent to the consumer.
2. No evidence the bill was ever received by the consumer.

Therefore, no evidence that he "retained" it for any length of time.

1. Did the consumer implicitly agree to a "\$0.00 balance"? Ok, fine by us.

This leads us to the issue of Damages...

Damages Under an Account Stated Theory:

“I do not think it mean, what you think it mean.” – Inigo Montoya, *Princess Bride*

R.S.Mo 408.020:

No interest above simple 9%

No Fees

Without a written K

R.S.Mo 408.080:

No Compound Interest

No interest on Fees

Without a written K

REGARDLESS OF THEORY OF RECOVERY

Nothing about an Account Stated theory allows for interest above simple 9%, fees, compound interest, or interest on fees.

"An account stated need not be evidenced or proved by a writing." *Rice's Feed Service, Inc. v. Dodson*, 904 S.W.2d 475 (Mo. App. S.D., 1995) (internal cites removed).

Shhhh! No debt collector's attorney has found this quote yet, but expect to defuse this eventually. Do NOT bring it up preemptively, and inadvertently hand it to them.

This quote applies to the elements of an Account Stated, and not to the issue of damages, but if they know about it, they will try to misapply it to damages.

When no rate of interest is agreed upon, nine percent allowed as legal interest.

408.020. Creditors shall be allowed to receive interest at the rate of nine percent per annum, when no other rate is agreed upon, for all moneys after they become due and payable, on written contracts, and on accounts after they become due and demand of payment is made; for money recovered for the use of another, and retained without the owner's knowledge of the receipt, and for all other money due or to become due for the forbearance of payment whereof an express promise to pay interest has been made.

Interest may be paid on interest--compounding limited to once a month--prohibited for certain loans.

408.080. Parties may contract, in writing, for the payment of interest upon interest; but the interest shall not be compounded more often than once a month. Where a different rate is not expressed, interest upon interest shall be at the same rate as interest on the principal debt. Loans governed by section 408.035 are not subject to the provisions of this section.

The *Boggs* case is a wonderful elaboration on 408.020 and 408.080. It's not an Account Stated case, but the analysis applies to the statutes generally, so it's applicable to all theories of recovery:

“"[E]ntitlement to collect a higher rate of interest than nine percent from the borrower depends on proof that the borrower has contracted in writing to pay the higher rate." *Addison v. Jester*, 758 S.W.2d 454, 458 (Mo.App.1988). In the absence of an agreed-upon rate in writing, §408.020 allows creditors to receive interest at the rate of nine percent per annum. Similarly, a writing is required for a lender to collect payments of interest upon interest. Section 408.080, RSMo 1986....

Without a specific written contract rate agreed to by the [Consumer], [the Debt Collector] may not recover interest on the notes at a rate of more than nine percent... Similarly, without a written agreement for the collection of compound interest, [the Debt Collector] is not entitled to collect interest on interest. ...

[The bill] further reveals that [the Debt Collector] may have charged interest on all fees it assessed against the [Consumer], since such fees were included in the 'debt balance'.... Unless there is evidence on retrial to support a finding that the parties had contracted in writing for a specific rate of interest in excess of nine percent, for the compounding of interest and for charging of interest on all fees, [the Debt Collector] will only be entitled to a judgment for the legal rate of nine percent simple interest on the balance owed." *Affiliated Acceptance Corp. v. Boggs*, 917 S.W.2d 652 (Mo. App. 1996) (emphasis added).

Stonebraker: Missouri's gift to the Consumer's Bar

“But where the account stated is based in part upon transactions which are illegal and void, and this is shown in defense to the action thereon, we regard it as clear that the consideration for the debtor's express or implied promise to pay the balance appearing to be due is then tainted with illegality, preventing a recovery in such action. We do not think that under such circumstances the taint of illegality may be removed by correcting the account stated, reducing it by the amount shown to be based upon such illegal transaction.

In 1 Corpus Juris, p. 701, § 311, it is said:

‘Since the statement of accounts must rest upon a subsisting indebtedness, it follows that a claim which is void by reason of illegality will not support an account stated, as where the account stated is with regard to claims founded on the illegal sale of liquors, or where it includes usurious interest; and the alleged debtor is not estopped from showing illegality in particular items of an account stated or by reason of his having retained the account rendered without objection. So an action upon a stated account will fall if one of several claims of indefinite amount included in it must be omitted for illegality.’

.. Consequently, if any substantial part of the account is illegal, the whole is infected thereby, preventing a recovery thereon.” *Elmore-Schultz Grain Co. v Stonebraker*, 214 S.W. 216 (Mo.App. 1919) (emphasis added).

In other words, they tried to collect compound interest, interest above 9% simple, & fees without a written contract providing for those charges, so they get NOTHING.

Policy Considerations: Fundamentally unjust to apply Account Stated to Credit Card debt.

Account Stated originated with open accounts at country stores, feed stores, etc.

No published higher court decision has ever applied an Account Stated to a credit card debt, but the *Mincks* court offers some insight:

“If we were to accept Citibank's argument, it would mean that a consumer who failed to utilize this billing error statute-through ignorance, inadvertence, or purposeful action-would completely forfeit his right to contest the debt owed in a collection lawsuit. ... In our view, this interpretation of the statute leads to an absurd result and turns topsy-turvy our duty to liberally construe the Truth-in-Lending-Act in a consumer's favor. Again, we decline to do so.” *Citibank v. Mincks*, 135 S.W.3d 545 (Mo.App. 2004) (emphasis added).

“The failure of a consumer to dispute the validity of a debt under this section may not be construed by any court as an admission of liability by the consumer.” FDCPA §1692g(d)