

ORIGINAL

IN THE SUPREME COURT OF OHIO

SANDRA J. TAYLOR JARVIS,	:	Case No: 2013-0118
Plaintiff-Appellee,	:	On Appeal from the
v.	:	Summit County Court of Appeals,
FIRST RESOLUTION INVESTMENT	:	Ninth Appellate District
CORP., et al.	:	Court of Appeals
Defendants-Appellants	:	Case No. CA26042

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**SANDRA J. TAYLOR JARVIS' MERIT BRIEF**

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## STATEMENT OF THE CASE

First Resolution Investment Corp., (“FRIC”) sued Sandra J. Taylor Jarvis (“Sandra”) on Mar. 9, 2010.<sup>1</sup> On May 5, 2010 FRIC moved for<sup>2</sup> and, on May 12, the trial court granted FRIC, a default judgment.<sup>3</sup> On June 28, 2010 Sandra moved to vacate.<sup>4</sup> On July 26, 2010 the trial court vacated the judgment.<sup>5</sup> On Aug. 6, 2010, Sandra filed a class action counterclaim.<sup>6</sup> On Aug. 26, 2010, Sandra filed her First Amended Class Action Counterclaim (“FACACC”) identifying FRIC, First Resolution Management Corp. (“FRMC”), Cheek Law Offices, LLC (“Cheek”) and Attorney Pari Hockenberry (“Hockenberry”) as counterclaimants.<sup>7</sup> On Sept. 10, 2010, FRIC, FRMC, (collectively, “F&F”) Cheek, and Hockenberry (collectively, “C&H) filed a joint reply.<sup>8</sup> Six months after starting this litigation FRIC dismissed its claim, without prejudice.<sup>9</sup> On Oct. 27, 2010, F&F and C&H filed a joint motion to realign the parties,<sup>10</sup> which the trial court granted on Feb. 4, 2011,<sup>11</sup> thereby realigning Sandra as plaintiff and F&F, and C&H as defendants. Pursuant to the trial court’s order of Oct. 21, 2010,<sup>12</sup> all parties filed motions for summary judgment (“MSJ”) on Feb. 25, 2011. Sandra’s MSJ is contained at Doc.

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<sup>1</sup> Transcript of Docket and Journal Entries for the Summit Cty. Common Pleas Ct., bearing certification dates of May 21, 2013 and Aug. 30, 2011, (“Doc.”) No. 1, FRIC’s complaint. (Supplement 37 – 41) (“S.”)

<sup>2</sup> Doc. No. 6, FRIC’s motion for default judgment (S. 239 – 245).

<sup>3</sup> Doc. No. 4, journal entry granting FRIC a default judgment (S. 246).

<sup>4</sup> Doc. No. 8, Sandra’s motion to vacate (S. 247 – 299).

<sup>5</sup> Doc. No. 9, journal entry vacating default judgment (S. 300).

<sup>6</sup> Doc. No. 11, Sandra’s answer and class action counterclaim.

<sup>7</sup> Doc. No. 19, FACACC (S. 43 – 98)

<sup>8</sup> Doc. No. 21, joint reply of F&F and C&H (S. 99 – 113).

<sup>9</sup> Doc. No. 21, FRIC’s notice of dismissal.

<sup>10</sup> Doc. No. 28, F&F and C&H’s joint motion to realign.

<sup>11</sup> Doc. No. 46, journal entry granting motion to realign.

<sup>12</sup> Doc. No. 27, journal entry establishing filing dates for motions.

No. 56 (S. 171 – 231).<sup>13</sup> FRIC<sup>14</sup> and FRMC<sup>15</sup> each filed separate MSJs. C&H filed a joint MSJ.<sup>16</sup> On Mar. 25, 2011, all defendants filed a joint response to Sandra’s MSJ,<sup>17</sup> and Sandra filed her reply to the MSJs filed by defendants.<sup>18</sup> On June 22, 2011 the trial court granted summary judgment to defendants and denied summary judgment to Sandra.<sup>19</sup> Sandra appealed. In Jarvis v. First Resolution Mgt. Corp., 2012-Ohio-5653, 983 N.E.2d 380 (9<sup>th</sup> Dist.) (“Jarvis”), the Court of Appeals reversed and remanded holding, “the trial court erred by granting summary judgment to the defendants upon finding that Ohio’s borrowing statute was not applicable and that [FRIC’s] cause of action was not time-barred.”<sup>20</sup> Jarvis also held Sandra “established a *prima facie* claim against the defendants under the FDCPA,<sup>21</sup> and consequently the OCSPA,<sup>22</sup> as those claims relate to the request for interest in excess of the statutory rate.”<sup>23</sup> On Jan. 22, 2013 defendants filed a joint notice of appeal. On April 24, 2013 this Court accepted this appeal.<sup>24</sup>

## STATEMENT OF FACTS

### **Introduction**

As a result of mergers Chase acquired Sandra’s credit card account. Per the contract, Sandra sent her payments on the account to Delaware. Sandra’s last payment

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<sup>13</sup> Sandra’s evidentiary material is contained at Doc. Nos. 55 (S. 302-316), 57 (S. 317-430), 58 (S. 431-525) and 65 (S. 898-914).

<sup>14</sup> Doc. No. 59, FRIC’s MSJ (S. 526-628).

<sup>15</sup> Doc. No. 60, FRMC’s MSJ (S. 629-727).

<sup>16</sup> Doc. No. 61, C&H’s MSJ (S. 728-834).

<sup>17</sup> Doc. No. 66, joint response of defendants to Sandra’s MSJ (S. 835-866).

<sup>18</sup> Doc. No. 65, Sandra’s reply to all defendants’ MSJs (S. 867-914).

<sup>19</sup> Doc. No. 68, Journal Entry dated, June 22, 2011, (“JE”) at p. 17 (S. 170)

<sup>20</sup> Jarvis, ¶36.

<sup>21</sup> The Fair Debt Collection Practices Act, 15 U.S.C. 1692, *et seq.*

<sup>22</sup> The Ohio Consumer Sales Practices Act, R.C. 1345.01, *et seq.*

<sup>23</sup> Jarvis, ¶41.

<sup>24</sup> 135 Ohio St.3d 1412, 2013-Ohio-1622, 986 N.E.2d 29.

was June 28 2006. Delaware has a 3-year statute of limitations. In 2008 Chase sold its then existing claim to Unifund, and months later Unifund sold its claim to FRIC. More than 3-years after Sandra's last payment, FRMC and Cheek each threatened to sue. Thereafter, FRIC sued and sought post-judgment interest at 24%, knowing it was not possible to produce a written agreement authorizing 24% interest. FRIC took a default judgment awarding it 24% interest. After the judgment was vacated, FRIC dismissed. This case involves the conduct of the defendants in attempting to collect Sandra's account and R.C. 2305.03(B), R.C. 1343.03(A), the FDCPA and OCSPA.

#### **Sandra**

Sandra used her Chase credit card account exclusively for personal, family, and household purposes.<sup>25</sup> Neither FRMC nor FRIC knows how Sandra used her account.<sup>26</sup>

#### **FRMC**

FRMC is a Canadian corporation,<sup>27</sup> with its principal place of business in Vancouver.<sup>28</sup> FRMC is the ultimate parent of FRIC.<sup>29</sup> FRMC's principal business is the collection of defaulted or charged-off consumer debt<sup>30</sup> and it is a "Debt Collector" as defined in the FDCPA.<sup>31</sup> FRMC is also FRIC's agent<sup>32</sup> and works with FRIC to collect

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<sup>25</sup> Doc. No. 56, Sandra's Feb. 25, 2011 affidavit ("Sandra's affidavit") at ¶10 (S. 225). FRMC has no evidence to the contrary; Doc. No. 57, Ex. 1, FRMC's response to Sandra's Requests for Admission ("RFA") Nos. 100, 102 & 104 (S. 342-343); this exhibit is incorporated in Doc. No. 56, John J. Horrigan's Feb. 25, 2011 affidavit ("Horrigan's affidavit") at ¶2 (S. 222).

<sup>26</sup> Admitted. Doc. No. 57, Ex. 1, response to RFA No. 102 (S. 343); Doc. No. 57, Ex. 2, FRIC's response to Sandra's Interrogatories, Nos. 21 – 23 (S. 377); this exhibit is incorporated in Doc. No. 56, Horrigan's affidavit at ¶3 (S. 222).

<sup>27</sup> Admitted. Doc. No. 57, Ex. 1, response to RFA No. 35 (S. 324).

<sup>28</sup> Admitted. Doc. No. 23, Joint Reply at ¶¶ 10, 27 (S. 100, 101). Canadian citizens own all of FRMC's outstanding capital stock. Admitted. Doc. No. 57, Ex. 1, response to RFA No. 12 (S. 319).

<sup>29</sup> Admitted. Doc. No. 57, Ex. 1, response to RFA at Nos. 2 & 3 (S. 317-318).

<sup>30</sup> Admitted. Doc. No. 57, Ex. 1, response to RFA Nos. 186-190 (S. 365-190).

<sup>31</sup> Admitted. Doc. No. 57, Ex. 1, response to RFA No. 92 (S. 340).

debt that FRIC buys.<sup>33</sup> On Sept. 16, 2009 FRMC sent a letter threatening to sue Sandra<sup>34</sup> 38-months after she made her last payment on the Chase credit card account.<sup>35</sup>

## FRIC

FRIC is a Nevada corporation<sup>36</sup> and a third tier subsidiary of FRMC.<sup>37</sup> FRIC's "principal business is the collection of consumer debts"<sup>38</sup> and it regularly attempts to collect debt that is in default or has been charged-off.<sup>39</sup> FRIC purchased Chase credit card debt in each year from 2008 to 2010.<sup>40</sup> FRIC, as a debt buyer,<sup>41</sup> purchases defaulted consumer credit card debt for pennies on a dollar of debt.<sup>42</sup> The price FRIC pays reflects FRIC's knowledge that legal actions on some of the defaulted debts are barred by the statute of limitations.<sup>43</sup> Once FRIC has acquired defaulted consumer credit card debt it

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<sup>32</sup> Admitted. Doc. No. 23, Joint Reply at ¶31 (S. 101); Doc. No. 57, Ex. 3, FRIC's response to Sandra's Second Request for Admission ("2<sup>nd</sup> RFA") Nos. 203, and 204 (S. 398-399); this exhibit is incorporated in Doc. No. 56, Horrigan's affidavit ¶4 (S. 222); Doc. No. 57, Ex. 1, response to RFA No. 33 (S. 324).

<sup>33</sup> Admitted. Doc. No. 23, Joint Reply at ¶33 (S. 101).

<sup>34</sup> Doc. No. 19, FACACC Exhibit 4, FRMC's letter to Sandra (S. 92).

<sup>35</sup> Admitted. Doc. No. 57, Ex. 1, response to RFA No. 137 (S. 352).

<sup>36</sup> Admitted. Doc. No. 23, Joint Reply, at ¶¶8 and 9 (S. 100); Doc. No. 57, Ex. 2, response to Sandra's Interrogatory No. 31 (S. 380).

<sup>37</sup> Admitted. Doc. No. 57, Ex. 4, FRMC's answer to Interrogatory No. 18 (S. 424). This exhibit is identified at Doc. No. 56, Horrigan's affidavit ¶5 (S. 222).

<sup>38</sup> Admitted. Doc. No. 57, Ex. 3, response to 2<sup>nd</sup> RFA, No. 254 (S. 411).

<sup>39</sup> Admitted. Doc. No. 57, Ex. 3, response to 2<sup>nd</sup> RFA Nos. 256 – 258 (S. 412).

<sup>40</sup> Admitted. Doc. No. 57, Ex. 3, response to 2<sup>nd</sup> RFA Nos. 238 – 240 (S. 408).

<sup>41</sup> See the comments of the Ohio State Bar Assn. regarding debt buying.

<https://www.ohiobar.org/ForPublic/Resources/LawYouCanUse/Pages/LawYouCanUse-681.aspx> (accessed July 31, 2013).

<sup>42</sup> The Federal Trade Commission ("FTC") has found that debt buyers purchase credit card debt for an "average price [of] 4.0 cents per dollar of debt face value." The Structure and Practices of the Debt Buying Industry" (Jan. 2013) ("*Debt Buying Report*") p. 23, available at <http://www.ftc.gov/os/2013/01/debtbuyingreport.pdf> (accessed July 31, 2013).

<sup>43</sup> Doc. No. 55, Exhibit XXX, p. 31, (S. 305) filed under seal, acknowledges that Chase debt in Ohio is barred 3 years after the consumer makes her last payment.

routinely sues.<sup>44</sup> FRIC employs various agents, e.g., FRMC,<sup>45</sup> Cheek,<sup>46</sup> and Hockenberry,<sup>47</sup> to accomplish its ends. Most of the consumers that debt buyers sue are unrepresented.<sup>48</sup> Most of the suits FRIC files in Ohio are brought in Municipal and County Courts.<sup>49</sup> Most suits filed by debt buyers result in default judgments,<sup>50</sup> which are taken against unsophisticated consumers.<sup>51</sup> Consumers sued are usually unaware of their rights.<sup>52</sup> In the 12-month period ending Aug. 6, 2010, FRIC filed more than 500 complaints in Ohio seeking to collect Chase credit card debt more than 3 years after a consumer made her last payment on the account.<sup>53</sup> FRIC filed its complaint against Sandra, more than 3 years after Sandra made her last payment on the Chase account, and

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<sup>44</sup> Admitted. Doc. No. 57, Ex. 2, response to Sandra's RFA at No. 9 (S. 371).

<sup>45</sup> Admitted. Doc. No. 57, Ex. 3, response to 2<sup>nd</sup> RFA, No. 203 (S. 398).

<sup>46</sup> Admitted. Doc. No. 57, Ex. 3, response to 2<sup>nd</sup> RFA, No. 219 (S. 403).

<sup>47</sup> Admitted. Doc. No. 23, Joint Reply of defendants, at ¶24 (S. 101).

<sup>48</sup> *Debt Buying Report* at p. 45 states, "As the [FTC] has noted, because 90% or more of consumers sued in these actions [debt collection actions brought by debt buyers] do not appear in court to defend, filing these actions creates a risk that consumers will be subject to a default judgment on a time-barred debt."

<sup>49</sup> Admitted. Doc. No. 57, Ex. 2, Response to 1<sup>st</sup> RFA No. 10 (S. 384).

<sup>50</sup> Consider the experience of Ohio Municipal Courts. Statewide, the largest component of contract case terminations in 2012 consisted of default hearings by judges and magistrates. 2012 Ohio Courts Statistical Reports at p. 215, available at <http://www.supremecourt.ohio.gov/Publications/annrep/12OCS/2012OCS.pdf> (accessed July 31, 2013).

<sup>51</sup> The FTC in a 2010 Report, "Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration" ("*Broken System*") available on-line at, <http://ftc.gov/os/2010/07/debtcollectionreport.pdf> (accessed July 31, 2013), observed at p. iii, "Very few consumers defend or otherwise participate in debt collection litigation, resulting in courts entering default judgment against them. . . . Consumers are not aware that collectors cannot lawfully sue to recover on time-barred debt." Accord, <http://online.wsj.com/article/SB10001424052702304510704575562212919179410.html> (accessed July 31, 2013)

<sup>52</sup> *Debt Buying Report*, p. 47, "'most consumers do not know or understand their legal rights with respect to the collection of time-barred debt,' so attempts to collect on stale debt in many circumstances may create a misleading impression that the consumer could be sued, violating Section 5 of the FTC act and Section 807 [15 U.S.C. 1692e] of the FDCPA."

<sup>53</sup> Admitted. Doc. No. 57, Ex. 3, Responses to 2<sup>nd</sup> RFA, No. 16 (S. 396).

also asserted a right to collect 24% post-judgment interest.<sup>54</sup> FRIC sought<sup>55</sup> and obtained a default judgment awarding it 24% post-judgment interest.<sup>56</sup> After Sandra secured the vacation of FRIC's default judgment and filed her FACACC, FRIC dismissed its case.<sup>57</sup>

### **Hockenberry**

Hockenberry is an attorney<sup>58</sup> employed by Cheek.<sup>59</sup> Hockenberry signed FRIC's Complaint<sup>60</sup> without possessing a copy of the Card Member Agreement ("CMA") containing the terms and conditions of the account. Hockenberry signed and filed a motion for default judgment seeking 24% post-judgment interest, drafted and approved the default judgment document awarding FRIC 24% interest, which was granted, all without possessing or producing evidence that FRIC was entitled to 24% interest.

### **Cheek**

Cheek is a law firm, claiming to specialize in debt collection,<sup>61</sup> retained as counsel on behalf of FRIC.<sup>62</sup> Cheek sent Sandra a letter threatening to sue her on the Chase account more than 3 years after Sandra had made her last payment.<sup>63</sup> Through Hockenberry, Cheek participated in the filing of FRIC's complaint, FRIC's motion for default judgment, and the award of a default judgment to FRIC. After Sandra obtained

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<sup>54</sup> Doc. No. 1, FRIC's complaint ¶3, (S. 37) and "Wherefore" clause (S. 38).

<sup>55</sup> Doc. No. 6, FRIC's motion for default judgment (S. 239-245).

<sup>56</sup> Doc. No. 4, judgment awarding FRIC 24% post-judgment interest (S. 246).

<sup>57</sup> Doc. No. 21, FRIC's notice of dismissal. Interestingly, F&F's Merit Brief p. 1, declares, "they properly brought their claims". If true, why did they dismiss?

<sup>58</sup> Admitted. Doc. No. 23, Joint reply, ¶41 (S. 102).

<sup>59</sup> Admitted. Doc. No. 23, Joint reply, ¶42 (S. 102).

<sup>60</sup> Admitted. Doc. No. 23, Joint reply, ¶53 (S. 103).

<sup>61</sup> Doc. No. 65, Sandra's Reply to defendants MSJ, Exhibit ZZZ (S. 914).

<sup>62</sup> Admitted. Doc. No. 23, Joint reply, ¶43 (S. 102).

<sup>63</sup> Doc. No. 19, FACACC, Ex.5 (S. 93).

the vacation of FRIC's default judgment and filed her FACACC, Cheek, acting through non-defendant, attorney Jackson T. Moyer, dismissed FRIC's lawsuit against Sandra.<sup>64</sup>

### **Chase Credit Card Account**

Sandra received a credit card application. She executed the 1<sup>st</sup> page of the application and mailed her offer for a First USA ("1<sup>st</sup> USA") credit card to Delaware where her application was accepted and the credit card contract was formed.<sup>65</sup> 1<sup>st</sup> USA became Bank One and then Chase.<sup>66</sup> Chase's headquarters are in Delaware.<sup>67</sup>

### **Chase Credit Cardmember Agreement ("CMA"): Terms and Conditions**

No one has a copy of the terms and conditions referred to in the application.<sup>68</sup> Only the 1<sup>st</sup> page of the application has been produced in this case.<sup>69</sup> While FRIC's Complaint, ¶1 claims that Sandra is, "bound by the Terms and Conditions or Cardholder Agreement issued" to her, it declares the CMA is not attached because FRIC, "is not the original creditor and does not have possession, custody or control"<sup>70</sup> thereof, or "said records are not available to [FRIC] and/or may have been destroyed."<sup>71</sup> Defendants concede that a CMA could not be authenticated and was not admissible for MSJ purposes.<sup>72</sup> Both lower courts concurred that the CMA was not cognizable.<sup>73</sup>

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<sup>64</sup> Doc. No. 21, FRIC's notice of dismissal.

<sup>65</sup> Doc. No. 56, Sandra's affidavit. ¶8 (S. 225). Defendants have no evidence to the contrary; Doc. No. 57 Ex. 1, response to RFA No. 113 (S. 345). Both lower courts found that the contract was made in Delaware: JE, p.3 (S. 156) and Jarvis, ¶27.

<sup>66</sup> Doc. No. 56, Sandra's affidavit ¶9 (S. 225).

<sup>67</sup> Federal Deposit Ins. Corp.'s Bank Finder at <http://research.fdic.gov/bankfind/results.html?name=Chas+Bank+USA&fdic=&address=&city=&state=&zip=> (accessed Aug. 3, 2013).

<sup>68</sup> Doc. No. 56, Sandra's affidavit ¶8 (S. 225), and Doc. No. 57, Ex. 1, response to RFA Nos. 58, 60, 61, 110, and 111 (S. 331, 332, 345).

<sup>69</sup> Doc. No. 58, Exhibit A, (S. 431).

<sup>70</sup> Doc. No. 1, FRIC's Complaint ¶4(a) (S. 37).

<sup>71</sup> Doc. No. 1, FRIC's Complaint ¶4(d) (S. 37).

<sup>72</sup> Doc. 40, defendants' memorandum *contra* to Sandra's motion to certify, at p. 3-4.

<sup>73</sup> JE p. 4, 9, and 15 (S. 157, 162, and 168); Jarvis, ¶¶31, 38.

**Sandra's Use of the Chase Credit Card Account; Chase Invoices**

Sandra last used the credit card on May 5, 2004,<sup>74</sup> when stroke forced Sandra to retire on disability.<sup>75</sup> Chase wrote off the account on Jan. 31, 2006.<sup>76</sup> Sandra made her last payment on the account on June 28 2006.<sup>77</sup> Doc. No. 58 at Ex. C<sup>78</sup> contains the following 8 monthly billing invoices Chase issued to Sandra in 2005-2006, which were all the invoices Chase was able to locate<sup>79</sup> relating to 2005-2006:

Doc. No. 56, Sandra's affidavit ¶ No.	Pay- ment Date	<u>Payment Address</u>	Past Due Amount	Minimum Payment Due	New Balance	Pay- ment Amount (Date)	Available Credit/ Available for Cash...
¶16	Feb. 1, 2006	<u>Wilmington, Del.</u>	\$1,481	\$1,707 <sup>80</sup>	\$9,065.37 <sup>81</sup>	\$100 (Dec. 16, 2005)	\$1,434 <sup>82</sup> / \$1,434
¶15	Jan. 1, 2006	<u>Wilmington, Del.</u>	\$1,358	\$1,581	\$8,940.06	\$0	\$1,559/ \$1,559
¶14	June 1, 2005	<u>Wilmington, Del.</u>	\$532	\$734	\$8,099.38	\$100 (April 20, 2005)	\$2,400/ \$2,100
¶13	May 2, 2005 <sup>83</sup>	<u>Wilmington, Del.</u>	\$433	\$632 <sup>84</sup>	\$7,999.51 <sup>85</sup>	\$50 (Mar. 21, 2005)	\$2,500 <sup>86</sup> / \$2,100 <sup>87</sup>

<sup>74</sup> Admitted. Doc. No. 57, Ex. 1, response to RFA No. 47 (S. 328), Doc. No. 56, Sandra's affidavit ¶10 (S. 225); JE p. 11 (S. 164); Jarvis, ¶32.

<sup>75</sup> Doc. No. 8, Sandra's June 10, 2010 affidavit ¶5 (S. 289).

<sup>76</sup> Admitted. Doc. No. 57, Ex. 1, response to RFA No. 87 (S. 339); Jarvis, ¶32.

<sup>77</sup> Admitted. Doc. No. 1, FRIC's Complaint ¶1 (S. 37) and Doc. No. 57, Ex. 1, response to RFA No. 56 (S. 330); Jarvis, ¶32.

<sup>78</sup> The invoices contained in Doc. No. 58, Ex. C, were identified and incorporated in Doc. No. 56, Sandra's affidavit, at ¶¶ 11, 12, 13, 14, 15, 16 (S. 226, 227).

<sup>79</sup> Doc. No. 58, Ex. B, Becky Kelshaw's letter identifies the documents produced and notes that others are outside document retention periods (S. 432, 433).

<sup>80</sup> Admitted. Doc. No. 57 Ex. 1, response to RFA No. 82 (S. 337).

<sup>81</sup> Neither FRMC nor FRIC has evidence that Chase demanded full payment of Sandra's account: Doc. No. 57 Ex. 1, response to RFA Nos. 84 & 85 (S. 338).

<sup>82</sup> Admitted. Doc. No. 57 Ex. 1, response to RFA No. 81 (S. 337).

<sup>83</sup> This invoice covers the period ending April 7, 2005 (S. 23)

<sup>84</sup> Admitted. Doc. No. 57 Ex. 1, response to RFA No. 74 (S. 335).

¶12	April 1, 2005	<u>Wilmington, Del.</u>	\$287	\$483 <sup>88</sup>	\$7,846.68 <sup>89</sup>	\$100 (Feb. 18, 2005)	\$2,653 <sup>90</sup> / \$0 <sup>91</sup>
¶11	Mar. 4, 2005	<u>Wilmington, Del.</u>	\$193	\$387	\$7,762.61	\$188 (Jan. 13, 2005)	\$2,737/ \$0 <sup>92</sup>
¶11	Feb. 1, 2005	<u>Wilmington, Del.</u>	\$188	\$381	\$7,752.56	\$0	\$2,747/ \$0 <sup>93</sup>
¶11	Jan. 1, 2005	<u>Wilmington, Del.</u>	\$0	\$188	\$7,555.39 <sup>94</sup>	\$189 (Nov. 17, 2004)	\$2,944/ \$2,100 <sup>95</sup>

Evidence that the credit card contract mandated payment in Delaware consists of

(1) monthly invoices requiring payment in Delaware on specified dates<sup>96</sup> (2) Sandra's affidavit stating she "made all the payments on the credit card account in Delaware"<sup>97</sup> (3) Chase's monthly invoices disclosing its practice was to receive Sandra's payments at Delaware and credit them to her account<sup>98</sup> and (4) Chase's charges for "late payment fees" when Sandra's payments were not received in Delaware by the dates specified.

<sup>85</sup> Neither FRMC nor FRIC has evidence "indicating that Chase demanded full payment of [Sandra's] . . . balance of \$7,999.51 as of the payment due date of May 2, 2005." Admitted. Doc. No. 57 Ex. 1, response to RFA No. 76 (S. 336).

<sup>86</sup> Admitted. Doc. No. 57 Ex. 1, response to RFA No. 73 (S. 33).

<sup>87</sup> Chase increased the Cash Access Line from \$0 to \$2,100 during the period ending April 7, 2005. Admitted. Doc. No. 57 Ex. 1, response to RFA Nos. 71 and 72 (S. 335).

<sup>88</sup> Admitted. Doc. No. 57 Ex. 1, response to RFA No. 66 (S. 333).

<sup>89</sup> FRMC admits that neither it nor FRIC have evidence showing that Chase accelerated the total balance due: Doc. No. 57 Ex. 1, response to RFA No. 68 (S. 334).

<sup>90</sup> Admitted. Doc. No. 57 Ex. 1, response to RFA No. 70 (S. 334).

<sup>91</sup> Admitted. Doc. No. 57 Ex. 1, response to RFA No. 65 (S. 333).

<sup>92</sup> Admitted. Doc. No. 57 Ex. 1, response to RFA No. 64 (S. 332).

<sup>93</sup> Admitted. Doc. No. 57 Ex. 1, response to RFA No. 63 (S. 332).

<sup>94</sup> The trial court held that FRIC's cause for the entire debt accrued Jan. 1, 2005: JE p. 10-11, (S. 163-64).

<sup>95</sup> Admitted. Doc. No. 57 Ex. 1, response to 1<sup>st</sup> RFA No. 62 (S. 332).

<sup>96</sup> Doc. No. 58, Sandra's Ex. C (S. 461-481).

<sup>97</sup> Doc. No. 56, Sandra's affidavit at ¶11 (S. 226).

<sup>98</sup> Doc. No. 58, Ex. C, which shows payments received by Chase (S. 461-481).

Sandra's principal obligation with respect to the Chase credit card account was to make payments to Chase.<sup>99</sup> The Chase billing invoices<sup>100</sup> instruct Sandra to make monthly installment payments on her total debt on the date and at the place specified, *i.e.*, Wilmington, Delaware. The back of Doc. No. 58, Exhibit C, payment due date Jan. 1, 2005 (S.467), at the caption "Crediting of Payments, declares:

For payments by regular U.S. mail, send at least your minimum payment due to our post office box designated for payments shown on this statement. Your payments by mail must comply with the instructions on this statement . . . Payments must be accompanied by the payment coupon in the envelope with our address visible through the envelope window. . . . If your payment is in accordance with our payment instructions, and is made available to us . . . by 1:00 p.m. local time at our post office box designated for payments on this statement, we will credit the payment to your account as of that day. If your payment is in accordance with our payment instructions, but is made available to us after 1:00 p.m. local time at our post office box designated for payments on this statement, we will credit your account as of next day. If you do not follow our payment instructions, or if your payment is not sent by regular U.S. mail to our post office box designated for payments, crediting of your payment may be delayed up to 5 days.<sup>101</sup>

F&F have no evidence that Sandra ever made any payment to Chase at a location in the state of Ohio.<sup>102</sup> No evidence suggests that Sandra could have made her payments at a Chase branch bank in Ohio.<sup>103</sup> Both lower courts found that Sandra was *required*<sup>104</sup> to make her payments in Delaware.

#### **Chase Did Not Accelerate Sandra's Credit Card Debt**

The credit card invoice with a due date of Jan. 1, 2005 indicates that Sandra's minimum payment due was \$188, there was no past due amount owed, and the total

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<sup>99</sup> Admitted. Doc. No. 57, Ex. 1, response to RFA No. 115 (S. 346).

<sup>100</sup> Doc. No. 58, Ex. C (S. 461-481).

<sup>101</sup> C&H's Merit B p. 14 claims, "no specific terms made [Sandra's] credit card account payable only in Delaware." *Cf. Jarvis*, ¶¶26, 27.

<sup>102</sup> Admitted. Doc. No. 57, response to RFA No. 114 (S. 346).

<sup>103</sup> *Jarvis*, ¶¶26, 27.

<sup>104</sup> JE p. 13, (S. 166); *Jarvis*, ¶27.

balance on her account was \$7,555.39.<sup>105</sup> When Sandra's payment was not received in Delaware on Jan. 1, 2005, the bank charged Sandra a late payment fee of \$35 on Jan. 2, 2005.<sup>106</sup> Sandra made a late \$188 minimum installment payment on Jan. 13, 2005.<sup>107</sup>

In the absence of an acceleration clause or any evidence that the bank actually accelerated the obligation and demanded payment in full, the trial court concluded the full balance on Sandra's account, i.e., \$7,555.39 became due and payable on Jan. 1, 2005 when Sandra did not timely make her minimum installment payment due on that date.<sup>108</sup>

Chase never accelerated the amount due on the credit card account at any time; and on April 7, 2005 while the total amount Sandra owed on the account was \$7,999.51, the minimum installment amount due was only \$632.<sup>109</sup> There is no evidence that Chase demanded full payment of Sandra's credit card balance of \$7,999.51 on the payment due date of May 2, 2005 which covers the period ending on April 7, 2005<sup>110</sup> or otherwise accelerated the total balance due with respect to Sandra's credit card account on or before April 7, 2005.<sup>111</sup> In fact, FRMC expressly denied that it had any knowledge as to what Chase would have done had Sandra made the minimum payment due of \$632 on May 2, 2005.<sup>112</sup> Chase didn't close Sandra's account before April 7, 2005.<sup>113</sup> Prior to April 7, 2005, Chase took no action requiring Sandra to pay her entire unpaid balance.<sup>114</sup>

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<sup>105</sup> Doc. No. 58, Ex. C, invoice with due date of Jan. 1, 2005 (S. 466).

<sup>106</sup> Doc. No. 58, Ex. C, invoice with a due date of Feb. 1, 2005 (S. 468).

<sup>107</sup> Doc. No. 58, Ex. C, invoice with a date of Mar. 4, 2005 (S. 470).

<sup>108</sup> JE p. 11, (S. 164); C&H's Merit B p. 26; F&F's Merit B p. 16.

<sup>109</sup> Doc. No. 58, Ex. C, due date of May 2, 2005 (S. 474).

<sup>110</sup> Admitted. Doc. No. 57, Ex. 1, response to RFA No. 76 (S. 336).

<sup>111</sup> Admitted. Doc. No. 57, Ex. 1, response to RFA No. 69 (S. 334).

<sup>112</sup> Admitted. Doc. No. 57, Ex. 1, response to RFA No. 75 (S. 336).

<sup>113</sup> Doc. No. 56, Sandra's affidavit ¶12 (S. 226); billing statements contained in Doc. No. 58, Ex. C, (S. 461-481); Doc. No. 57 Ex. 1, response to RFA Nos. 68 & 69 (S. 334).

<sup>114</sup> Doc. No. 56, Sandra's affidavit ¶12 (S. 226).

Moreover, Chase actually increased the cash available on Sandra's cash credit line as of April 7, 2005.<sup>115</sup> As late as the payment due date of Feb. 1, 2006,<sup>116</sup> Chase's invoice shows that the minimum installment payment due was \$1,707 while the total balance on the account was \$9,065.37. Neither FRMC nor FRIC have evidence indicating that Chase demanded full payment of the balance of Sandra's credit card account as of the payment due date of Feb. 1, 2006.<sup>117</sup>

Despite the lack of any evidence of (a) a CMA or (b) any indication that Chase demanded immediate payment of Sandra's account balance, defendants contend that Sandra's account was automatically due and payable in full on Jan. 1, 2005. The sole "evidentiary" basis for this contention consists of FRMC's response to Sandra's Interrogatory No. 23, (Supp. 600) which states:

The cause of action accrued on [Sandra's] account on January 1, 2005 when she first failed to make her minimum payment and defaulted on her obligation. [Sandra's] account was marked as delinquent on February 7, 2005 as indicated by the 'fcradate'<sup>118</sup> in the information provided with her account.

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<sup>115</sup> Admitted. Doc. No. 57 Ex. 1, response to RFA No. 72 (S. 335).

<sup>116</sup> Doc. No. 58, Exhibit C, due date Feb. 1 (S.480); Doc No. 1, Complaint (S. 41).

<sup>117</sup> Admitted. Doc. No. 57, Ex. 1, response to RFA No. 84 (S. 338).

<sup>118</sup> The Fair Credit Reporting Act, 15 U.S.C. 1681 et. seq., ("FCRA") regulates the contents of consumer credit reports. The FCRA, at 15 U.S.C. 1681c(a), prohibits a consumer reporting agency from making a consumer credit report which contains, "any of the following items of information . . . (4) Accounts placed for collection or charged to profit and loss which antedate the report by more than seven years." The FCRA, at 15 U.S.C. 1681c(c)(1), provides that "[t]he 7-year period referred to in paragraph[] (4) . . . of subsection (a) shall begin, with respect to any delinquent account that is placed for collection (internally or by referral to a third party, whichever is earlier), charged to profit and loss, or subjected to any similar action, upon the expiration of the 180-day period beginning on the date of the commencement of the delinquency which immediately preceded the collection activity, charge to profit and loss, or similar action." The FCRA date has nothing to do with the accrual of the cause of action and certainly doesn't imply that because a consumer's account may be delinquent, the whole amount automatically becomes due and payable, *i.e.*, accelerated.

The record contradicts this *ipse dixit*; the monthly Chase invoices reveal that only the minimum installment payment was due, not the entire account balance.

**Sandra's Post-April 7, 2005 Payments**

After the effective date of R.C. §2305.03(B), and before Chase sold Sandra's account in 2008, Sandra had made the following payments totaling \$1,150:

Doc. 58, Exhibit	Date of Payment	Amount of Payment	Doc. No. 56, Sandra's Affidavit ¶	Doc. No. 57, Ex. 1, FRMC's response to RFA No.	Doc. No. 65, Sandra's Reply Exhibit
C, payment due date June 1, 2005; see also Exhibits D and H, page 1	April 20, 2005	\$100	¶¶17, 18, 19	RFA Nos. 77 & 78	D-1 and D-2, <sup>119</sup> Check Nos. 8704 and 8707
E and Exhibit H, page 9	June 2005	\$50	¶¶18, 20, 21		E-1, <sup>120</sup> Check No. 8739
F, Exhibit H, page 17	August 2005	\$500	¶¶18, 22, 23		F-1, <sup>121</sup> Check No. 8765
	Sept. 19, 2005	\$100			YYY, <sup>122</sup> Check No. 8781
G and Exhibit C, payment due date Feb. 1, 2006	Dec. 16, 2005	\$100	¶24	RFA Nos. 79 & 80	G-1, <sup>123</sup> Check No. 8229
I and Exhibit H, Page 25	January 2006	\$100	¶¶25, 26		I-1, <sup>124</sup> Check No. 8846
J, and Exhibits M and N, Check No. 8877	Mar. 18, 2006	\$50	¶27		

<sup>119</sup> Doc. No. 65, Sandra's Reply to the MSJs filed by defendants, at James F. Burke Jr.'s Mar. 25, 2011 affidavit ("Burke's affidavit") at ¶¶2 and 3 (S. 897, 898).

<sup>120</sup> Doc. No. 65, Burke's affidavit at ¶4, (S. 898).

<sup>121</sup> Doc. No. 65, Burke's affidavit at ¶5, (S. 898).

<sup>122</sup> Doc. No. 65, Burke's affidavit at ¶8, (S. 899).

<sup>123</sup> Doc. No. 65, Burke's affidavit at ¶6, (S. 898).

<sup>124</sup> Doc. No. 65, Burke's affidavit at ¶7, (S. 898).

K, Exhibit O, Check No. 8900	April 14, 2006	\$50	¢28		
L, Exhibit P, Check No. 8930	May 13, 2006	\$50	¢29		
Q, Check No. 8949	June 28, 2006	\$50	¢30	RFA No. 56	
<b>TOTAL</b>		<b>\$1,150</b>			

**Chase's Application of Sandra's Post-April 7, 2005 Payments**

Chase reserved the right to allocate Sandra's payments in a way that was most beneficial to Chase. See the back of Doc. No. 58, Exhibit C, payment due date Jan. 1, 2005 (Supp. 467), at the caption, "*Payment Allocation*".

FRMC admits that the two payments Sandra made after April 7, 2005 shown on Chase invoices, *i.e.*, Doc. No. 58, Exhibit C, payment due dates of June 1, 2005 (Supp. 476) and Feb. 1, 2006 (Supp. 480), were applied by Chase to past due amounts.<sup>125</sup>

Chase always applied Sandra's payments to the earliest past due amount. Doc. No. 58, Exhibit C, payment due date of Oct. 4, 2004 (Supp. 463) indicates that the minimum payment due on Oct. 4, 2004 was \$284 which included a past due amount of \$91. Doc. 58, Exhibit C, payment due date Nov. 2, 2004 (Supp. 462), shows that Sandra paid \$191 on Sept. 12, 2004. Chase applied the entire \$191 payment to the minimum amount due, which included \$91 past due, resulting in a new past due amount of  $\$284 - \$191 = \$93$ , which is reflected on Exhibit C, payment due date Nov. 2, 2004 (Sup. 462) as the new past due amount. Exhibit C, payment due date of Feb. 1, 2005, (Supp. 468) shows a minimum payment due on Feb. 1, 2005 of \$381, which includes a past due amount of \$188. Exhibit C, payment due date of Mar. 4, 2005 (Supp. 470), shows that on Jan. 13, 2005 Sandra paid \$188. Chase applied the payment as follows:  $\$381 - 188 = \$193$ ,

<sup>125</sup> Doc. No. 57, Exhibit 1, response to RFA Nos. 78 and 80 (S. 336, 337).

which is the new past due amount per Exhibit C, payment due date of Mar. 4, 2005 (Supp. 470). Exhibit C, payment due date Mar. 4, 2005, (Supp. 470) shows that the minimum payment due on Mar. 4, 2005 was \$387, which included a past due amount of \$193. Exhibit C, payment due date April 1, 2005 (Supp. 472), shows that Sandra paid \$100 on Feb. 18, 2005. Chase credited the full \$100 payment to the minimum payment due of \$387, which included the past due amount of \$193. In other words the new past due amount is  $\$387 - \$100 = \$287$ , which is reflected on Exhibit C, payment due date April 1, 2005 (Supp. 472). Exhibit C, payment due date of April 1, 2005 (Supp. 472), shows that the minimum payment due on April 1, 2005 is \$483 which includes a past due amount of \$287. Exhibit C, payment due date of May 2, 2005 (Supp. 474), establishes that Sandra paid \$50 on Mar. 21, 2005 and it shows that Chase applied the full \$50 to the past due amount leaving a new past due amount of \$433, *i.e.*,  $\$483 - \$50 = \$433$ . Exhibit C, payment due date May 2, 2005 (Supp. 474) reflects the fact that the past due amount is \$433. In short, every Chase invoice shows that Chase credited Sandra's payments to the earliest minimum payment due, which included past due amounts and they establish that it was Chase's consistent practice to apply Sandra's payments to the earliest minimum payment due.

**2008 Sale and Assignment of Sandra's Chase Credit Card Account To FRIC**

On Feb. 25, 2008, Chase sold Sandra's account to Unifund Portfolio A, LLC.<sup>126</sup>

FRIC's Complaint contains this Bill of Sale that indicates that Chase, as Seller, "hereby assigns effective as of the File Creation Date of February 13, 2008 all rights, title and

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<sup>126</sup> Doc. No. 1, FRIC's Complaint (S. 39). FRIC does not have a copy of the sales agreement, Doc 57, Ex. 2, response to 1<sup>st</sup> RFP, No. 11 (S. 388).

interest of Seller in and to those certain receivables”.<sup>127</sup> Approximately five months later, on June 19, 2008, an entity called Unifund CCR Partners sold “all of its good and marketable title free and clean [sic] of all liens, claims and encumbrances in and to” Sandra’s Chase credit card account “without recourse and without representation or warranty of collectibility, [sic] or otherwise” to FRIC as buyer.<sup>128</sup>

**FRIC’s Complaint and FRIC’s Default Judgment Against Sandra**

On Mar. 9, 2010, FRIC sued Sandra on the account, declaring that FRIC “is owed the charged off sum of \$8,765.37, plus accrued interest of \$7,738.99, for a total amount owed of \$16,504.36, plus future interest at 24.00% and [Sandra] is/are in default of his/her/their obligation to pay said balance.”<sup>129</sup> FRIC then demanded, “judgment against [Sandra] for the charged off sum of \$8,765.37, plus accrued interest of \$7,738.99, plus future interest at 24.00% after March 02, 2010 plus costs of this action.”<sup>130</sup>

Contract claims in Delaware are subject to a 3-year statute of limitations. See, 10 Del.C. §8106(a). Doc. No. 55, Exhibit XXX, p. 31 (S. 305), constitutes an admission that the statute of limitations is 3 years when a case is brought in Ohio if the original creditor is “Chase Manhattan”.<sup>131</sup> FRIC knows its claim against Sandra was stale.

FRIC knew that it was not entitled to 24% post-judgment interest on Sandra’s account. See, Doc. No. 59, FRIC’s MSJ at (S.604),<sup>132</sup> which indicates that the applicable

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<sup>127</sup> Doc. No. 1, FRIC’s Complaint (S. 39).

<sup>128</sup> Doc. No. 1, FRIC’s Complaint (S. 40).

<sup>129</sup> Doc. No. 1, FRIC’s Complaint ¶3 (S. 37).

<sup>130</sup> Doc. No. 1, FRIC’s Complaint, Wherefore Clause (S. 38).

<sup>131</sup> In the context of debt collection actions, what 3-year Ohio statute of limitations could apply? Doc. 55, Exhibit XXX, (S. 305) refers to Delaware’s statute.

<sup>132</sup> This is the same document FRIC mentioned regarding the “fcradate”. (S. 604). This document is also contained in Doc. Nos. 60, FRMC’s MSJ (S. 727) and 61, C&H’s MSJ (831).

“i Rate” is “0.500.”<sup>133</sup> Moreover, Doc. 55, Exhibit XXX, p. 37 (S. 311) declares, respecting credit card debt in Ohio, at the caption “*Consequences of no documentation*”, “Without the [credit card] application the maximum interest is 10%<sup>134</sup> & no Attorney fees.” FRIC knew it wasn’t entitled to seek 24% post-judgment interest.

### **Trial Court Judgment on the MSJs**

The trial court granted summary judgment to defendants and denied summary judgment to Sandra.<sup>135</sup> The trial court concluded, “Defendants’ claims against [Sandra] arose before the effective date of Ohio’s Borrowing Statute”.<sup>136</sup> The trial court relied on three decisions in reaching this conclusion, viz., *Discover Bank v. Heinz*, 10<sup>th</sup> Dist. No. 08AP-1001, 2009-Ohio-2850 ¶17, *Siemientkowski v. Bank One Columbus, N.A.*, 8<sup>th</sup> Dist. No. 66531, 1994 Ohio App. LEXIS 5276 •9 (Nov. 23, 1994), and *Discover Bank v. Poling*, 10<sup>th</sup> Dist. No. 04AP-1117, 2005-Ohio-1543 ¶18.<sup>137</sup> Each case is a consumer *pro se* case in which the record, unlike the case at bar, contained a CMA.<sup>138</sup> *Heinz, supra*, ¶3 focuses on the significance of the CMA’s acceleration clause. None of these cases deals with retroactivity, installment payments, and/or a creditor’s application of payments.

The trial court also held, “Ohio’s Borrowing Statute does not apply and that, even if it did, the present case accrued in Ohio”.<sup>139</sup> The trial court based its conclusion on one

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<sup>133</sup> The Statutory Rate in 2009, when FRMC threatened Sandra with litigation, was 5%. [http://www.tax.ohio.gov/ohio\\_individual/individual/interest\\_rates.aspx](http://www.tax.ohio.gov/ohio_individual/individual/interest_rates.aspx). In 2010 the rate was 4%.

<sup>134</sup> Prior to June 6, 2004, R.C. 1343.03(A) provided that a creditor was entitled to “interest at the rate of ten per cent per annum, and no more.” 2004 Sub. H.B. 212, 150 Ohio Laws, Part III, 3417, amended the statute to its present form.

<sup>135</sup> JE p. 17, (S. 170).

<sup>136</sup> JE p. 10, (S. 163). Thereby leading the trial court to conclude that the borrowing statute would be applied retroactively. JE p. 12, (S. 165).

<sup>137</sup> JE p. 11 (S. 164).

<sup>138</sup> *Siemientkowski* \*2 and \*9; *Poling* ¶18

<sup>139</sup> JE p. 13, (S. 166).

case, which it found persuasive,<sup>140</sup> i.e., Combs v. International Ins. Co., 163 F.Supp.2d

686, noting, Combs “involved a breach of a written contract for the payment of

money.”<sup>141</sup> Declaring the credit card contract was breached in Ohio, the court observed:

Ohio, where Plaintiff resides, primarily used the credit card<sup>142</sup> and decided to stop making the minimum required payments<sup>143</sup> on her credit card, was where the breach of the agreement occurred. The fact that **Plaintiff was required to mail payments to Delaware** does not determine *where* the breach occurred - or where the action accrued. There is evidence that, for some period of time, the Plaintiff was mailing her payments to Illinois,<sup>144</sup> rather than Delaware.<sup>145</sup> She could have chosen to make her payments on the Internet, by telephone, or to a Chase bank branch.<sup>146</sup> The location where she sent her payments seems less significant to this case than the place where Plaintiff decided to stop making payments.<sup>147</sup> Doc. No. 68, JE p. 13, (S. 166) [Emphasis added.]

The trial court then invoked policy concerns to support its conclusion:

if this Court were to determine that the present case accrued in Delaware, credit card companies would be able to choose favorable statute of limitations or other differing state law by simply requiring their customer to make payments to the preferred state.

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<sup>140</sup> JE p. 5, 12, (S. 158, 165).

<sup>141</sup> JE p. 12, (S. 165).

<sup>142</sup> No evidence supports this assertion, Jarvis, ¶26. Defendants don't know how Sandra used the credit card, Doc. No. 57, Ex. 2, response to Interrogatories, Nos. 21 – 23 (S. 377).

<sup>143</sup> No evidence supports this assertion, Jarvis, ¶26.

<sup>144</sup> There is no evidence that Sandra mailed her payments anywhere but Delaware, Doc. No. 56, Sandra's affidavit ¶11 (S. 226).

<sup>145</sup> One invoice directed Sandra to make a payment at Palatine, Illinois; Doc. No. 58, Ex. B, due date of Feb. 3, 2004 (S. 435), which covers the period from Dec. 10, 2003 to Jan. 9, 2004. Each invoice thereafter requires payment in Wilmington, Delaware; Doc. No. 58, Ex. B, payment due date of Feb. 3, 2004 (S. 436), which requires payment in Delaware, as do all the other invoices contained in Doc. No. 58, Exs. B (S. 432-460) and C (S. 461-481). Moreover, the one invoice for the period ending Jan. 9, 2004, directing payment to Illinois, makes no part of FRIC's claim against Sandra. Defendants contend that the cause of action they sued upon accrued on Jan. 1, 2005.

<sup>146</sup> This is rank speculation. Jarvis, ¶27. No evidence indicates that Sandra had the right to make her payments anywhere but Delaware in 2005 and 2006 when Chase's cause of action arose. Like a payment by mail, payments by telephone or the internet are delivered to Chase in Delaware; the mail, telephone, and internet are just delivery methods. Invoices indicate that Chase's telephone area code is 301, which is Delaware. Sandra is living on social security disability; see Doc No. 8, Sandra's affidavit dated June 26, 2010 ¶5, (S. 289). Sandra has no internet access.

<sup>147</sup> There is no such evidence. Jarvis, ¶26.

The Court finds that such a determination could adversely affect Ohio residents who used credit cards. Thus, there are policy reasons<sup>148</sup> to overrule the Plaintiff's argument regarding the place where FRIC's claim accrued. Doc. No. 68, JE p. 13, (S. 166).

The trial court issued no ruling on the applicability of the FDCPA to either (1) filing of a time-barred complaint or (2) issuing threats to sue on a time-barred claim.<sup>149</sup>

The trial court found, "[Sandra] has failed to show that the Defendants violated the FDCPA or OCSPA by requesting post-judgment interest" at 24%.<sup>150</sup>

#### **Ninth Dist. Court of Appeals Judgment on the MSJs**

Sandra appealed. Jarvis reversed and remanded to resolve Sandra's statute of limitations "claims pursuant to the FDCPA and OCSPA and her claim for abuse of process, as this Court will not determine those issues in the first instance."<sup>151</sup> Because the trial court "did not consider" "the existence of a bona fide error defense", Jarvis remanded Sandra's excess interest claim to consider that "very limited exception to the strict liability imposed by the FDCPA".<sup>152</sup>

### **LAW AND ARGUMENT**

Proposition of law No. I: Absent an agreement otherwise, a cause of action against an Ohio consumer for breach of a credit card contract accrues in Ohio.

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<sup>148</sup> This analysis is flawed. Consider the following hypothetical: a bank elects to have a cause accrue in a state where the statute of limitations is 100 years. In that case, the Ohio statute of limitations would govern. Under the Ohio Borrowing statute the applicable statute of limitations will always be the shorter of the foreign limitation or the Ohio limitation. Empowering a credit card company to select the place the cause of action accrues cannot injure Ohioans or lengthen the otherwise applicable Ohio limitation period, it can only help consumers and shorten the statute. The reference to "other differing state law" is perplexing; banks routinely put "choice-of-law" clauses in CMAs.

<sup>149</sup> Doc. No. JE p. 14, (S. 167).

<sup>150</sup> Doc. No. JE p. 15, (S. 168).

<sup>151</sup> Jarvis, ¶36. Although no lower court ruled on the applicability of the FDCPA to time-barred claims, defendants contend that the FDCPA does not apply; C&H's Merit B p. 4 and FRIC & FRMC's Merit B p. 3-4. That issue is not before this Court.

<sup>152</sup> Jarvis, ¶42.

Counterproposition of law No. 1: Absent a written agreement, a cause of action on a credit card contract accrues in a foreign state where (a) invoices require the consumer to make her payment in the foreign state and (b) the parties' course of dealing establishes the foreign state as the place payments are made. *Alropa Corp. v. Kirchwehm*, 138 Ohio St. 30, 33 N.E.2d 655 (1941), paragraph four of the syllabus, *Payne v. Kirchwehm*, 141 Ohio St. 384, 48 N.E.2d 224, paragraph three of the syllabus, *Meekison v. Groschner*, 153 Ohio St. 301, 307, 91 N.E.2d 680, 683, 17 ALR2d 495 (1950), and *City of St. Marys v. Auglaize Cty. Bd. of Commrs.*, 115 Ohio St.3d 387, 2007-Ohio-5026, 875 N.E.2d 561, ¶39, approved and followed.

### 1. A The Borrowing Statute Should Be Applied, Not Interpreted.

Defendants theorize that the exclusive purpose of the borrowing statute is to prevent forum shopping and argue that since the FDCPA requires debt collectors to sue consumers only "in the judicial district . . . in which the consumer signed the contract sued upon or in which the consumer resides at the commencement of the action",<sup>153</sup> Ohio's borrowing statute should not apply to an action to collect on consumer debt.<sup>154</sup>

But borrowing statutes serve multiple purposes, e.g., (1) to apply the shortest statute of limitation to a cause of action,<sup>155</sup> (2) to prevent forum shopping,<sup>156</sup> (3) to respect the law of the jurisdiction where the cause of action accrued,<sup>157</sup> (4) to eliminate difficult choice of law questions,<sup>158</sup> and (5) to prevent perpetual tolling of limitation

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<sup>153</sup> 15 U.S.C. 1692i; C&H's Merit B p. 6, 16, 20; F&F's Merit B p. 11.

<sup>154</sup> C&H's Merit B p. 20-21.

<sup>155</sup> *Wenke v. Gehl Co.*, 274 Wis.2d 220, 249-50, 682 N.W.2d 405, 419-20 (2004); *Jenkins v. Rockwood*, 820 So.2d 425, 428 (Ct. App. Fla. 4<sup>th</sup> Dist. 2002); *Goldsmith v. Learjet, Inc.*, 200 Kan. 176, 188, 917 P.2d 810, 817 (1996); *Dahlberg v. Harris*, 916 F.2d 443, 445 (8<sup>th</sup> Cir. 1990).

<sup>156</sup> *Jasin v. Best*, 2007 Wisc. App. LEXIS 1031 \*9 (Ct. of App. of Wisc. Dist. II, Nov. 28, 2007); *RA Global Services, Inc. v. Avicenna Overseas Corp.*, 817 F.Supp.2d 274, 282 (S.D. N.Y. 2011).

<sup>157</sup> *Combs v. Internat'l Ins. Co.*, 354 F.3d 568, 591 (6<sup>th</sup> Cir. 2004); *Allen v. Greyhound Lines, Inc.*, 583 P.2d 613 (Utah 1978).

<sup>158</sup> *RA Global Services, Inc. v. Avicenna Overseas Corp.*, 817 F.Supp.2d 274, 282 (S.D. N.Y. 2011); *Ins. Co. of N. America v. ABB Power Generation, Inc.*, 91 N.Y.2d 180, 186-188, 668 N.Y.S.2d 143, 690 N.E.2d 1249, 1252-53 (1997); *Arnold v. Owens-Corning Fiberglass Corp.*, Ct. of App. of Mich. No. 180428, 1996 Mich. App. LEXIS 565 (Nov. 8, 1996).

periods.<sup>159</sup> CMACO Automotive Systems, Inc. v. Wanxiang America Corp., 589 F.3d 235, 242 (6<sup>th</sup> Cir. 2009) lists multiple reasons for the adoption of borrowing statutes.<sup>160</sup>

R.C. 2305.03(B) provides in pertinent part, “No civil action<sup>161</sup> that is based upon a cause of action<sup>162</sup> that accrued in any other state, \*\*\* may be commenced and maintained in this state if the period of limitation that applies to that action under the laws of that other state . . . has expired or the period of limitation . . . under the laws of this state has expired.”<sup>163</sup> Weaver v. Edwin Shaw Hospital, 104 Ohio St.3d 390, 2004-Ohio-6549, 819 N.E.2d 1079, ¶¶12-13 held that legislative intent is found in the words of a statute, and that those words should be given their common and ordinary meaning. A statute is only ambiguous if it is susceptible to more than one reasonable interpretation.<sup>164</sup> Accordingly, “inquiry into legislative intent, legislative history, public policy, the consequences of an interpretation, or any other factors identified in R.C. 1.49 is inappropriate absent an initial finding that the language of the statute is, itself, capable of bearing more than one meaning.”<sup>165</sup> Defendants’ contention that the sole and exclusive

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<sup>159</sup> Combs, 354 F.3d at 589-90.

<sup>160</sup> Accord. Gwaltney v. Stone, 387 Pa.Super. 492, 500, 564 A.2d 498, 503 (Pa.Super. 1989); Guertin v. Harbour Assurance Co., 141 Wis.2d 622, 631, 415 N.W.2d 831, 835 (1987); Schnabel v. Taft Broadcasting Co., Inc., 525 S.W.2d 819, 825-26 (Ct. of App., Mo., Kansas City Dist. 1975); Palmieri v. Ahart, 111 Ohio App. 195, 167 N.E.2d 353 (4<sup>th</sup> Dist. 1960).

<sup>161</sup> Estate of Johnson v. Randall Smith, Inc., 135 Ohio St.3d 440, 2013-Ohio-1507, \_\_\_ N.E.2d \_\_\_, ¶15.

<sup>162</sup> Id.

<sup>163</sup> F&F’s Merit B. p. 6 invites this Court to ignore the statute and quotes from 1 Restatement of the Law 2d, Conflict of Laws §142(2) (1971). But 1 Restatement of the Law 2d, Conflict of Laws §142(1) (1971), mandates the application of Delaware’s statute (“An action will not be maintained if it is barred by the statute of limitations of the forum, including a provision borrowing the statute of limitations of another state.”)

<sup>164</sup> Lang v. Dir., Ohio Dept. of Jobs & Family Services, 134 Ohio St.3d 296, 2012-Ohio-5366, 982 N.E.2d 636, ¶14.

<sup>165</sup> Dunbar v. State, \_\_\_ Ohio St.3d \_\_\_, 2013-Ohio-2163, \_\_\_ N.E.2d \_\_\_, ¶16.

purpose of the borrowing statute is to prevent forum shopping is not only inaccurate but also irrelevant because the borrowing statute is unambiguous and therefore is not subject to statutory construction; rather, it is to be applied.<sup>166</sup>

**1. B Ohio Precedent Supports Finding that the Cause Accrued in Delaware.**

As early as 1830<sup>167</sup> Ohio had a borrowing statute that was repealed Nov. 5

1965.<sup>168</sup> The older and current versions of Ohio’s Borrowing Statutes are:

G.C. 11234; former R.C. 2305.20 (Repealed effective Nov. 5, 1965)	R.C. 2305.03(B) (Effective April 7, 2005)
If the law of any state or country where the cause of action arose limits the time for the commencement of the action to a less number of years than do the statutes of this state in like causes of action then said causes of action shall be barred in this state at the expiration of said lesser number of years.	<b>No civil action that is based upon a cause of action that accrued in any other state, territory, district, or foreign jurisdiction may be commenced and maintained</b> in this state if the period of limitation that applies to that action under the laws of that other state, territory, district, or foreign jurisdiction has expired or the period of limitation that applies to that action under the laws of this state has expired. <sup>169</sup>

While the older version applied to causes of action that “arose”, and the current version applies to causes of action that “accrued”, those terms are synonymous.<sup>170</sup>

This Court has issued three decisions applying the older version of Ohio’s Borrowing Statute to contract actions, viz., *Alropa Corp. v. Kirchwehm*, 138 Ohio St. 30, 33 N.E.2d 655 (1941), paragraph 4 of the syllabus; *Payne v. Kirchwehm*, 141 Ohio St. 384, 48 N.E.2d 224

<sup>166</sup> *State ex rel. Moorehead v. Industrial Commission*, 112 Ohio St.3d 27, 2006-Ohio-6364, 857 N.E.2d 1203, ¶18; *Sears v. Weimer*, 143 Ohio St. 312, 55 N.E.2d 413 (1944), paragraph five of the syllabus.

<sup>167</sup> *Palmieri v. Ahart*, 111 Ohio App. at 197, 167 N.E.2d at 355.

<sup>168</sup> *D.A.N. Joint Venture III, L.P. v. Armstrong*, 11<sup>th</sup> Dist. Lake No. 2006-L-089, 2007-Ohio-898, ¶28.

<sup>169</sup> C&H’s Merit B p. 21 – 22 encourages this Court to interpret the statute to require “that both parties to an action reside outside the state at the time the cause of action accrued”. However, it is improper to add or delete words from a statute. *State v. Horner*, 126 Ohio St.3d 466, 2010-Ohio-3830, 935 N.E.2d 26, ¶22. Moreover, this argument was not presented to the lower courts. *State v. Williams*, 51 Ohio St.3d 112, 364 N.E.2d 1364 (1977), paragraph two of the syllabus.

<sup>170</sup> *Browning v. Burt*, 66 Ohio St.3d 544, 558, 613 N.E.2d 993 (1993).

(1943), paragraph 1 of the syllabus; and *Meekison v. Groschner*, 153 Ohio St. 301, 307, 91 N.E.2d 680, 683 (1950). Each decision addressed the place where a cause of action accrued. This Court held that each cause accrued at the place the contract was to be performed.

The question presented in *Payne* was whether Florida's 5-year or Ohio's 15-year statute applied to notes executed in Florida and payable in Florida.<sup>171</sup> In *Payne*, there was a strong dissent arguing that the cause accrued in Ohio, not Florida,<sup>172</sup> because the defendant could not be sued in Florida,<sup>173</sup> however the majority rejected that argument and held that the cause accrued in Florida because *it was payable in Florida*.<sup>174</sup> Accordingly, Ohio's borrowing statute resulted in Florida's 5-year statute governing. In *Meekison* a note executed in Michigan was payable in Ohio.<sup>175</sup> While residing in Michigan the makers decided not to pay the note.<sup>176</sup> The Ohio payee's assignee sued the makers in Ohio. The makers argued that pursuant to Ohio's Borrowing Statute, the cause was barred by Michigan's shorter statute of limitations. A unanimous Court held the action was governed by Ohio's limitation period, because the cause accrued at the place of injury, *i.e.*, the place where the note was payable.<sup>177</sup>

Justice Stewart, 153 Ohio St. at 306-307, 91 N.E.2d at 683, elaborated:

the better reasoned authority and certainly logic support the view that the cause of action upon the note arose in Ohio. When the note was executed in Michigan and made payable six months after date at Napoleon, Ohio, no cause of action had arisen on it. It must be assumed that it was expected that the note would be paid and therefore there could be no cause of action until there was a default. Where was that default? *The*

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<sup>171</sup> *Payne*, 141 Ohio St. at 384, 48 N.E.2d at 224.

<sup>172</sup> *Payne*, 141 Ohio St. at 394, 48 N.E.2d at 228 (dissent).

<sup>173</sup> *Payne*, 141 Ohio St. at 395-397, 48 N.E.2d at 229-230 (dissent).

<sup>174</sup> *Payne*, 141 Ohio St. at 384, 48 N.E.2d at 224, paragraph one of the syllabus.

Ohio is not alone in rejecting the dissent's argument; *Ins. Co. of N. America*, 91 N.Y.2d at 186-188, 668 N.Y.S.2d 143, 690 N.E.2d at 1252-53; *Arnold v. Owens-Corning Fiberglass Corp.*, 1996 Mich. App. LEXIS 565.

<sup>175</sup> *Meekison*, 153 Ohio St. at 302, 91 N.E.2d at 681.

<sup>176</sup> *Meekison*, 153 Ohio St. at 303, 91 N.E.2d at 681.

<sup>177</sup> *Meekison*, 153 Ohio St. at 301, 91 N.E.2d at 680, paragraph two of the syllabus.

*Heaths were obligated to pay the note at Napoleon, Ohio. If it was not paid at Napoleon on its due date, a default would occur at Napoleon and a cause of action would arise for the first time because of the default at Napoleon. It seems to us unassailable that the cause of action arose where the default occurred,* and therefore the Ohio statute, . . . governs the instant case and an action on the note must be bought within 15 years after the cause of action accrued. [Emphasis added].

Because the debt was supposed to be paid in Ohio, the cause accrued in Ohio on nonpayment.

Defendants attempt to distinguish Meekinson from the case *sub judice* on the grounds that Meekinson involved a promissory note.<sup>178</sup> But there is no talismanic quality to a note; it's a contract. Cranberry Financial, LLC v. S & V Partnership, 186 Ohio App.3d 275, 2010-Ohio-464, 927 N.E.2d 623, ¶9 (6<sup>th</sup> Dist.).<sup>179</sup> Defendants also attempt to distinguish the contractual credit card arrangement from Meekinson on the grounds that the contract in Meekinson expressly required that payment be made in Napoleon, Ohio whereas in our case the requirement that payments be made in Delaware is merely set forth in invoices.<sup>180</sup> This is a distinction without a difference. Both Meekinson and the case *sub judice* involve contracts. Both Meekinson and this case required that payments be made at a specified place. Moreover, Sandra made payments in Delaware and Chase accepted those payments and applied them to Sandra's account. To the extent that there is any doubt that Sandra was required to make her payments in Delaware, the course of dealing between Chase and Sandra resolves the question. 2 Restatement of the Law 2d, Contracts §202(4) (1979);<sup>181</sup> City of St. Marys v. Auglaize Cty. Bd. of Commrs., 115 Ohio St.3d 387, ¶39.

<sup>178</sup> C&H's Merit B p. 14; F&F's Merit B p. 10.

<sup>179</sup> Accord. Bank One, N.A. v. DWT Realty, Inc., 7<sup>th</sup> Dist. Mahoning No. 04 MA 206, 2006-Ohio-7271, ¶53 (May 23, 2006); Cornett v. Fryman, 12<sup>th</sup> Dist. Warren No. CA91-04-031, 1992 Ohio App. LEXIS 248, \*4 (Jan. 27, 1992).

<sup>180</sup> C&H's Merit Brief p. 13-14.

<sup>181</sup> FRIC was not a party to the contract. 1 Restatement of the Law 2d, Contracts §202, comment g (1979).

Defendants, who are debt collectors, risibly profess alarm and concern for the plight of Ohio consumers by conjuring up an imaginary parade of horrors.<sup>182</sup> If a bank's choice of law selection has adverse consequences for Ohio consumers, Ohio courts, without regard to the adverse effects on Ohio consumers, uphold the choice of law provision. In *Sekeres v Arbaugh*, 31 Ohio St.3d 24, 32-33, 508 N.E.2d 941 (1987) a majority of this Court gave short shrift to Justice Herbert Brown's dissent. Why would different concerns apply to a bank's selection of the place of payment? Assuming *arguendo*, that a bank reserved the right to change the place of payment and performance from time to time, this reserved power should not alter the result that when a consumer fails to pay on the date specified at the place designated, a cause of action accrues then and there.

**1. C Credit Card Cases Support Finding that the Cause Accrued in Delaware.**

Every case we could find dealing with *where* a cause of action on a credit card accrues for purposes of a borrowing statute holds that a cause of action accrues at the place the consumer was supposed to make his payments.<sup>183</sup> We found no credit card case holding that a cause of action accrued at the place where a consumer lived or decided not to pay the credit card. See, *Portfolio Recovery Associates v. King*, 14 N.Y.3d 410, 416, 901 N.Y.S.2d 575, 577, 927 N.E.2d 1059, 1061 (2010), [New York's borrowing statute required application of Delaware's statute]; *Martin v. Law Offices of Howard Lee Schiff*,

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<sup>182</sup> F&F's Merit B p. 11 – 12; C&H's Merit B p. 14-15, 20-21.

<sup>183</sup> *Matrix Acquisitions, LLC v. Hooks*, 5<sup>th</sup> Dist. Richland Cty. No. 10CA111, 2011-Ohio-3033 is not to the contrary. *Hooks*, ¶10, focused on (1) the place the invoices originated from, not the place payments were made, and (2) the assumed state of incorporation of the credit card issuer. *Hooks*, ¶15, straight-forwardly held that the debtor failed to adduce proper Civ. R. 56 evidence to establish his claim, "we find Appellant has not affirmatively demonstrated *via* the pleadings, written admissions and affidavits submitted in support thereof, how the laws of the State of Delaware govern the subject account." In short, *Hooks* did not turn on where the cause of action arose; lack of evidence was the key.

P.C., D.R.I. No. 11-484S, 2012 U.S. Dist. LEXIS 185752 \*13 - \*14 (Dec. 10, 2012)

[Rhode Island's borrowing statute required application of Virginia's statute];

Windsearch, Inc. v. Delafrange, 90 A.D.3d 1223, 1224, 934 N.Y.S.2d 576, 577 (Sup. Ct.

of N.Y. 3<sup>rd</sup> Dept. 2011) [New York's borrowing statute required application of

Delaware's statute]; Hamid v. Stock & Grimes, LLP, (E.D. Pa. No. 11-2349, 2011 U.S.

Dist. LEXIS 96245 \*4 - \*6 (Aug. 26, 2011) [Pennsylvania's borrowing statute required

application of Delaware's statute]:<sup>184</sup>

Hamid argues that the claim against her accrued in Delaware when Discover Bank did not receive the plaintiff's payment due August 12, 2006. Not surprisingly, S&G maintains that it accrued in Pennsylvania when she did not mail her payment. . . . As the Pennsylvania Supreme Court has explained, 'a right of action accrues only when injury is sustained by the plaintiff — not when the causes are set in motion which ultimately produce injury as a consequence.' Here, the damage to Discover Bank occurred when it did not receive the payment due on August 12, 2006 at its post office box in Dover, Delaware. While Hamid's failure to mail her payment may have set events in motion, it was in Delaware where the final significant event took place, that is, where Discover Bank sustained injury from non-payment of Hamid's debt. It was not until Discover Bank failed to receive Hamid's check on August 12, 2006 that it was able to sue her for breach of contract. We conclude that the place where the claim in the underlying action accrued was in Delaware.

Jenkins v. United Collection Bureau, (N.D. Ohio No. 3:11 CV 1191, Doc. #47, (Dec. 2,

2011)<sup>185</sup> [Ohio's borrowing statute required application of Nevada's statute]:

Jenkins contends the only logical place Citibank's cause of action could have arisen is in North Carolina, where Jenkins resides. . . . Jenkins's argues that 'the breach occurs when the Plaintiff fails to mail his check from North Carolina.' . . . That argument, however, is completely untenable. As with his other arguments, this argument relies heavily on Jenkins's state of residence in determining where the breach occurred. . . . For its position that an action for payment on a financial obligation accrues at the place of payment, Citibank relies on Meekison v. Groschner, 153 Ohio St. 301 (1950). In

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<sup>184</sup> C&H's Merit B p. 16 claims, "Pennsylvania courts . . . hold that a cause of action accrued where the defendants were located when they stopped making payments. Brown v. Cosby (E.D. Pa. 1977), 433 F.Supp. 1331, 1336." Hamid flatly repudiates that claim. Moreover, Brown supra does not deal with a contract to pay money at a specified place on a specified date. Brown, 433 F.Supp. at 1338.

<sup>185</sup> App. Doc. No. 17, Sandra's Reply, Exhibit A (S. 988-994).

*Meekison*, the Ohio Supreme Court interpreted the phrase ‘where the cause of action arose’ in the context of one party’s failure to pay on a promissory note. *Id.* at 306. . . . Unlike *Meekinson*, this Court does not have before it the original credit card agreement, which may or may not contain a specific place of payment. What is included in the record are three account statements attached to Citibank’s Answer and Counterclaim, which this Court may consider: two requesting payments be sent to Columbus, Ohio (accounts ‘5167 and ‘0471). . . and one requesting payment be sent to The Lakes, Nevada (account ‘1402) . . . . While different from the promissory note in *Meekison*, the Court finds the two factual situations sufficiently analogous, especially in light of the absence of any allegation or evidence Jenkins actually made his payments in North Carolina. Jenkins’s argument that he could have made payments at a Citibank branch in North Carolina is therefore unavailing, as the same can be said for Ohio or any other state where Citibank has a branch.

**1. D No Cause of Action Accrued In Ohio as Chase Wasn’t Damaged in Ohio.**

Black’s Law Dictionary 37 (Rev. 4<sup>th</sup> ed. 1968) defines the term “accrue” in the context of a “cause of action” to mean:

A cause of action ‘accrues’ when a suit may be maintained thereon. Whenever one person may sue another. Cause of action ‘accrues’ on date that damage is sustained and not date when causes are set in motion which ultimately produce injury. Date of injury. When damage has resulted. As soon as contract is breached. [Citations omitted.]

*When and where* a cause of action accrues is inextricably intertwined.<sup>186</sup> The unity of time and place means that deciding *when* a cause of action accrues helps identify the place *where* a cause of action accrues.<sup>187</sup>

An action on an account is founded upon contract.”<sup>188</sup> “Generally, a breach of contract occurs *when* a party demonstrates the existence of a binding contract or agreement; the nonbreaching party performed its contractual obligations; the other party failed to fulfill its contractual obligations without legal excuse; and the nonbreaching

<sup>186</sup> *Swanson v. Wilson*, 423 Fed. Appx. 587, 593 (6<sup>th</sup> Cir. 2011); *Mack Trucks, Inc., v. Automotive Air Break Co.*, 372 F.2d 18, 20 (3<sup>rd</sup> Cir. 1966), cert. den. 387 U.S. 930, 87 S.Ct. 2053, 18 L.Ed.2d 992 (1967).

<sup>187</sup> C&H’s Merit B p. 24, 2<sup>nd</sup> full paragraph, seems to agree.

<sup>188</sup> *Asset Acceptance Corp. v. Proctor*, 156 Ohio App.3d 60, 2004-Ohio-623, 804 N.E.2d 975 (4<sup>th</sup> Dist.), ¶¶12; *Oxford Sys. Integration, Inc., v. Smith-Boughan Mechanical Services*, 159 Ohio App.3d 533, 2005-Ohio-210, 824 N.E.2d 586 (2<sup>nd</sup> Dist.), ¶16.

party suffered damages as a result of the breach.”<sup>189</sup> A critical element in a cause of action on a contract is damages.<sup>190</sup> “It is axiomatic that a claimant seeking to recover for a breach of contract must show injuries as a result of the breach in order to recover damages from the breaching party. [Citation omitted.] Damages are not awarded for a mere breach alone.”<sup>191</sup> “To recover for breach of contract a claimant must prove damages as a result of the breach.”<sup>192</sup> Without damages there is no cause of action.<sup>193</sup>

Chase<sup>194</sup> suffered no injury or damage until Sandra failed to make her payment on the date and place specified in the contract.<sup>195</sup> Until Sandra failed to make a payment at the time and place specified in the billing invoices, *i.e.*, Delaware, Chase had no cause of

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<sup>189</sup> *Wauseon Plaza Limited Partnership v. Wauseon Hardware Co.*, 156 Ohio App.3d 575, 2004-Ohio-1661, 807 N.E.2d 953 ¶25 (6<sup>th</sup> Dist.). Accord, *Laurent v. Flood Data Services, Inc.*, 146 Ohio App.3d 392, 398, 766 N.E.2d 221 (9<sup>th</sup> Dist. 2001); *Garofalo v. Chicago Title Ins. Co.*, 104 Ohio App.3d 95, 108, 661 N.E.2d 218 (8<sup>th</sup> Dist. 1995).

<sup>190</sup> *Leiby v. Univ. of Akron*, 10<sup>th</sup> Dist. Franklin No. 05AP-1281, 2006-Ohio-2831 ¶14; *Garrett v. Ohio Farmers Ins. Co.*, 11<sup>th</sup> Dist. Lake No. 2003-L-182, 2005-Ohio-413 ¶23; *Technical Construction Specialties, Inc. v. Shenigo Construction, Inc.*, 6<sup>th</sup> Dist. Erie No. E-03-004, 2004-Ohio-1044 ¶20; *City of Cleveland v. Sohio Oil Co.*, 8<sup>th</sup> Dist. Cuyahoga No. 78860 \*10 - \*11, 2001 Ohio App. LEXIS 5192 (Nov. 21, 2001).

<sup>191</sup> *Rasnick v. Tubbs*, 126 Ohio App.3d 431, 435, 710 N.E.2d 750, 752 (3<sup>rd</sup> Dist. 1998); Accord, *Textron Financial Corp. v. Nationwide Mut. Ins. Co.*, 115 Ohio App.3d 137, 144, 684 N.E.2d 1261 (9<sup>th</sup> Dist. 1996); *Metro. L. Ins. Co. v. Trisket Illinois, Inc.*, 97 Ohio App.3d 228, 235, 646 N.E.2d 528 (1<sup>st</sup> Dist. 1994).

<sup>192</sup> *Leiby v. University of Akron*, 10<sup>th</sup> Dist. Franklin No. 05AP-1281, 2006-Ohio-2831 ¶24; Accord, *Boston v. Sealmaster Industries*, 6<sup>th</sup> Dist. Erie No. E-03-040, 2004-Ohio-4278 ¶30.

<sup>193</sup> *City of Cleveland v. Sohio Oil Co.*, 8<sup>th</sup> Dist. Cuyahoga No. 78860, 2001 Ohio App. LEXIS 5192 \*11 (Nov. 21, 2001); *Guess v. Toledo Blade Newspaper Co.*, 6<sup>th</sup> Dist. Lucas No. 97-1276, 1998 Ohio App. LEXIS 439 \*2 (Feb. 6, 1998); *Anchor v. O’Toole*, 94 F.3d 1014, 1020 (6<sup>th</sup> Cir. 1996).

<sup>194</sup> 3 *Farnsworth on Contracts* §11.8, at 809 (2d ed. 1998) (“Every law student knows that ‘the assignee stands in the shoes of the assignor.’”); *Inter Ins. Exchange v. Wagstaff*, 144 Ohio St. 457, 460, 59 N.E.2d 373 (1945); 3 Restatement of the Law 2d, Contracts, §336(1) (1979). FRIC takes Chase’s claim against Sandra, subject to the defense of the statute of limitations. 3 Restatement of the Law 2d, Contracts, §336, Illustration 3 (1979).

<sup>195</sup> 2 Restatement of the Law 2d, Contracts, §235(2), and comment b (1979).

action against Sandra and therefore possessed no right to sue Sandra.<sup>196</sup> Kincaid v. Erie Ins. Co., 128 Ohio St.3d 322, 2010-Ohio-6036, 944 N.E.2d 207, ¶13;<sup>197</sup> Martin v. Law Offices of Howard Lee Schiff, P.C., 2012 U.S. Dist. LEXIS 185752 \*13 - \*14 [credit card]; Hamid v. Stock & Grimes, LLP, 2011 U.S. Dist. LEXIS 96245 \*5 - \*6 [credit card].

Sandra's (a) alleged use of her credit card in Ohio, and (b) alleged decision in Ohio, not to make her payments on the account,<sup>198</sup> does not make Ohio the place of accrual. The alleged use of the credit card and an alleged decision not to pay merely set in motion events that ultimately produced damages and a cause of action. See, Bank of Boston Internatl. Of Miami v. Tefel, 626 F.Supp. 314, 317 (E.D. N.Y. 1986) [applying N.Y.'s borrowing statute].

#### **1. E Non-Ohio Precedent Supports Finding that the Cause Accrued in Delaware.**

The general rule is that for purposes of a borrowing statute a breach of contract action accrues at the place of performance. See Hailey v. Yellow Freight Systems, Inc., 599 F.Supp. 1332 (W.D. Mo. 1984):

[I]n breach of contract actions the cause ordinarily 'originates' or 'accrues,' for purposes of a 'borrowing' statute, where the breach occurs, with that place being the place of performance. [Citation omitted], and see also Meekison v. Groschner, 153 Ohio St.301, 91 N.E.2d 680, 682-83 (1950).

<sup>196</sup> The doctrine of anticipatory repudiation does not apply to a contract for the payment of money only. 2 Restatement of the Law 2d, Contracts, §243(3), §243 Illustration 4, and §253 Illustration 6 (1979); 2 Farnsworth on Contracts §8.18, at 509-10 (2d ed. 1998); Burke v. Athens, 123 Ohio App.3d 98, 103, 703 N.E.2d 804 (9<sup>th</sup> Dist. 1997).

<sup>197</sup> Accord, Columbus Green Bldg. Forum v. State, 10<sup>th</sup> Dist. Franklin No. 12AP-66, 2012-Ohio-4244, 980 N.E.2d 1, ¶27; Thomas v. Kramer, 194 Ohio App.3d 70, 2011-Ohio-1812, 954 N.E.2d 1235 ¶34 (8<sup>th</sup> Dist.); Catz Enterprises, Inc. v. Valdes, 7<sup>th</sup> Dist. Mahoning Nos. 07 MA 201, 07 MA 202, 08 MA 68, 2009-Ohio-4962 ¶27; VanDyke v. Fisher, 5<sup>th</sup> Dist. Morrow No. 2006 CA 0007, 2007-Ohio-4785 ¶30; Dandrew v. Silver, 8<sup>th</sup> Dist. Cuyahoga No. 86089, 2005-Ohio-6355 ¶14; Cadle Co. II v. HRP Auto Centers, Inc., 8<sup>th</sup> Dist. Cuyahoga No. 84296, 2004-Ohio-6292 ¶¶10-11.

<sup>198</sup> Jarvis, ¶26 accurately observed that the record does not establish any of this.

The universal rule<sup>199</sup> employed in applying borrowing statutes is that if a contract specifies a place for payment, a cause of action accrues at that place upon nonpayment.<sup>200</sup>

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<sup>199</sup> 17A American Jurisprudence 2d, Contracts, §747, at 762 (1991) (“Except in the case of an anticipatory breach, the place where a cause of action for a breach of contract arises is generally – almost universally – the place where the contract is to be performed. The reason why the place of the breach of contract is generally the place of performance is that unless the place of performance is waived or performance is anticipated, it is only at such place that there is a breach or that it can be determined whether there is a breach.”).

<sup>200</sup> **California:** Western Coal and Mining Co., 27 Cal.2d 819, 829, 167 P.2d 719, 725 (1946) [Missouri statute of limitations applied under California borrowing statute] (“The notes in the instant case were payable in Missouri. Hence the cause of action thereon arose in Missouri where the contract was to be performed”.); McKee v. Dodd (1908), 132 Cal. 637, 93 P. 854 (“It was the right of plaintiff to look for payment of his debt at the time it became due and at the place of payment-New York state. It was the duty of deceased to pay the debt, not only when it became due, but at the place of payment-New York state. His failure in this regard gave rise to the cause of action, and, clearly, therefore, that cause of action arose in the state of New York. In a legal sense the cause of action cannot have two places of origin. It can arise in but one place, and that, in such a case as this, is where the note is payable and the payee resides.”)

**Florida:** Aviation Credit Corp. v. Batchelor, 190 So.2d 8, 11 (Fla. Dist. Ct. App. 1966), cert dismissed, *sub nom.* Batchelor v. Aviation Credit Corp., (1967), 198 So.2d 24 [Florida statute of limitations applied because the cause of action accrued in Florida and therefore the borrowing statute was inapplicable] (“The maker had promised to pay in Florida. When he breached this promise, the plaintiff had a cause of action. The incident (failure to pay) which created the cause of action occurred in Florida; therefore, the cause of action arose in Florida. To say that the cause of action did not arise in Florida because the defendant was not amenable to service of process at the time of the breach is specious reasoning. The accrual of a cause of action does not depend upon the coincident existence of all of those factors which are necessary to transform the cause of action into a judgment.”)

**Idaho:** West v. Theis, 15 Idaho 167, 96 P. 932 (1908) (“‘a cause of action arises’ at the time and the place in the state or foreign country when and where the debt is to be paid or the contract performed”.)

**Illinois:** Orschel v. Rothschild, 238 Ill. App. 353, 358 (1925) (“The money was due in Chicago to the plaintiff, and it follows that the cause of action arose here immediately upon default and nonpayment. Putting that construction on the facts, section 20, which covers only cases where ‘a cause of action has arisen out of this State,’ is inapplicable.”)

**Kansas:** Lips v. Egan, 178 Kan. 378, 380, 285 P.2d 767, 769 (1955) (“The note in question showed on its face that it was payable in Kansas. The cause of action arose only because of failure or default on the part of appellee to pay the debt (\$ 300.00) at the time (November 1, 1934) and place (Exchange State Bank, 611 Minnesota Avenue,

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Kansas City, Kansas) so that the cause of action accrued in Kansas”.); Swift v. Clay, 127 Kan. 148, 149, 272 P. 170, 171 (1928) [Note executed in Texas, payable in Missouri, sued on in Kansas, held cause of action accrued at place of payment, Missouri] (“It was not the making, execution, and delivery of this note which gave rise to the cause of action; it was not the promise to pay, but the breaking of that promise--the default of the makers to pay the debt at the place and time they agreed to pay it--which gave rise to the cause of action. [Citations omitted.] That breach of contract, that default of payment, was in Kansas City, Mo., and therefore the statute of limitations which governed the cause of action arising therefrom was the Missouri statute”.)

**Missouri:** Aithent, Inc. v. National Assn. of Ins. Commrs., W.D. Mo. No. 11-00173-CV-W-GAF, 2013 U.S. Dist. LEXIS 73773 \*73 (May 24, 2013) (“When the essence of [a] claim is failure to pay, the cause of action accrues at the place payment was due.”); Great Plains Trust Co. v. Union Pacific R. Co., 492 F.3d 986, 993 (8<sup>th</sup> Cir. 2007) [payable in Kansas; Kansas statute of limitations applied per Missouri borrowing statute] (“Because the interest payment was to be mailed to Great Plains in Kansas, and because Great Plains did not exercise its right to payment in New York or in Missouri, Great Plain's [sic] breach-of-contract claim originated in Kansas.”); Nat'l Heritage L. Ins. Co. v. Frame, 41 S.W.3d 544, 553 (Mo. Ct. App. 2001) [payable in Texas; Texas statute of limitations applied per Missouri borrowing statute] (“South Pointe and Appellants as guarantors were required to make their payment to Victoria in Victoria County, Texas to cure the default, causing the cause of action to accrue in Texas.”); In re Master Mortgage Inv. Fund, Inc., 151 B.R. 513, 517 (W.D. Mo. 1993) [payable in Kansas; Kansas statute of limitations applied per Missouri borrowing statute] (“Master Mortgage's alleged injury was sustained and capable of ascertainment in the state of Kansas due to American National's alleged failure to make payment to Master Mortgage as provided for in the loss payee clause at Master Mortgage's place of business in Kansas”).

**New York:** Snyder v. Madera Broadcasting, Inc., 872 F.Supp. 1191, 1197 (E.D. N.Y. 1995) [payable in New York, therefore New York borrowing statute was inapplicable and the New York statute of limitation applied because the cause of action accrued in New York] (“It is undisputed that plaintiffs reside in New York and that the note was payable to them here. Consequently, plaintiffs' action for repayment of the debt accrued within New York--eliminating any need to look to the borrowing statute”).

**Utah:** Financial Bancorp, Inc. v. Pingree & Dahle, Inc., 880 P.2d 14, 17 (Ct. of App. of Utah 1994) (“Unless the contract states otherwise, a cause of action for a breach of contract generally arises where the contract is to be performed. [Citations omitted.] The only performance remaining under the contract in this case was payment of the loan service fee to Financial. Because the contract is silent regarding the place of payment, we presume payment was to be made where the payee resides or at its place of business. [Citations omitted.] Hence, we conclude that the cause of action arose in California and thus, by reason of section 78-12-45, the action is barred in Utah if it would be barred if brought in California.”).

**Wyoming:** Stanbury v. Larsen, 803 P.2d 349, 353 (Wyo.1990) [payable in Wyoming; Wyoming statute of limitations applied because the cause of action under Wyoming law, accrued in Wyoming] (“the default occurred in Wyoming where the payment was to have been made in accord with its terms, ‘Payable at Riverton, Wyo. on

The trial court<sup>201</sup> cited one case for the proposition that a cause accrues at the residence of the debtor, viz., Combs v. Internat'l Ins. Co., 163 F.Supp.2d at 693-94 (E.D. Ky. 2001) which construed Kentucky's borrowing statute in the context of the denial of insurance coverage, not the payment of money at a place specified in the contract,<sup>202</sup> and held, "This Court finds that the alleged breach of the Combs's insurance policy occurred when International . . . made the decision to deny insurance coverage and mailed a letter to that effect to Spendthrift Farms". Combs v. Internat'l Ins. Co., 354 F.3d at 602 affirmed and held, "an anticipatory breach occurs where the breaching party posts its letter of renunciation." Combs does not touch on the accrual of a cause of action on a contract requiring the payment of money at a specified place and time.

Defendants claim the "place of wrongful conduct" is the rule followed in Wisconsin for determining where a cause of action accrued. Defendants cite 3 cases to support this proposition, viz., Abraham v. Gen. Cas. Of Wisconsin, 217 Wis.2d 294, 574 N.W.2d 46 (1997); Ristow v. Threadneedle Ins. Co., 220 Wis.2d 644, 583 N.W.2d 452, 455 (Wisc.Ct.App. 1998); and Terranova v. Terranova, 883 F.Supp. 1273, 1280-81 (W.D. Wis. 1995).<sup>203</sup> Like Coombs, both Abraham and Terranova involve indemnification contracts that do not require the payment of money at a specified time

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demand by maker S.J. Stanbury.""); Baker v. First Nat'l Bank, 603 P.2d 397, 398 (Wyo.1979) [payable in Colorado; Colorado statute of limitations applied per Wyoming borrowing statute] ("The indebtedness was to be paid in Colorado at a specified time. It was not then and there paid. The cause of action accrued at that time and at that place. It was 'the time and place where that is not done which ought to be done.'").

<sup>201</sup> JE p. 12, (S. 165).

<sup>202</sup> C&H's Merit B p. 13 concedes that when a contract "require[s] payment at a specified place" that fact "is important" in determining where a cause of action accrues.

<sup>203</sup> C&H's Merit B p. 15 -16.

and place.<sup>204</sup> Like Coombs, both Abraham and Terranova involve an anticipatory breach of contract where the courts found that the breach of contract occurred when and where the insurance company repudiated its obligations under the indemnification contract.<sup>205</sup>

Ristow also does not involve a contract requiring the payment of money at a specified place and time. See, Combs, 354 F.3d at 594, which distinguishes Ristow on this basis.

Defendants, citing Willits v. Peabody Coal Co., 6<sup>th</sup> Cir. Nos. 98-5458 & 98-5527, 1999 U.S. App. LEXIS 21095 (Sept. 1, 1999) claim “the Sixth Circuit rejected application of a place of payment test to determine the place of accrual”.<sup>206</sup> The Willits court carefully distinguished cases where money was payable at a specified place and time<sup>207</sup> from the facts in Willits and observed, “the royalty agreements [in Willits] do not specify a place of payment, and the locations of the Plaintiffs were immaterial to the obligation to pay the royalties.”<sup>208</sup> In short, Willits is also distinguishable and inapposite.

Since Chase’s cause of action accrued in Delaware, R.C. 2305.03(B) requires that the Delaware 3 year statute of limitation govern to prohibit the filing of FRIC’s complaint more than 3 years after Sandra made her last payment on the Chase credit card account.

Proposition of Law No. II. Absent an agreement otherwise, a claim for breach of a credit card contract accrues when a consumer fails to make a required payment, and subsequent insufficient payments do not cure the breach.

Counterproposition of law No. 2 (a):

R.C. 2305.03(B) applies prospectively to prohibit the filing of a complaint after its effective date, *i.e.*, April 7, 2005, if (1) the cause of action accrued in a foreign state and (2) the statute of limitations had expired in (a) the foreign state or (b) Ohio. R.C. 2305.03(B) is a procedural statute and is properly applied prospectively to a complaint

<sup>204</sup> Terranova, 883 F.Supp. at 1280-81.

<sup>205</sup> Abrahams, 217 Wis.2d at 298-299 and 312-313, 576 N.W.2d at 48-49, and 54.

<sup>206</sup> C&H’s Merit B p. 14; F&F’s Merit B p. 10.

<sup>207</sup> Willits v. Peabody Coal Co., 6<sup>th</sup> Cir. Nos. 98-5458 & 98-5527, 1999 U.S. App.

LEXIS 21095 \*41 - \*43 (Sept. 1, 1999)

<sup>208</sup> *Id.*, \*43.

filed in 2010 asserting a cause of action that accrued before the statute's 2005 effective date. *Estate of Johnson v. Randall Smith, Inc.*, 135 Ohio St.3d 440, 2013-Ohio-1507, \_\_\_ N.E.2d \_\_\_, ¶¶16, 20, and 21, approved and followed.

**2. A The Date of Accrual is Irrelevant Because the Statute Applies Prospectively.**

The conduct regulated by R.C. 2305.03(B) is the filing of a complaint after the statute's effective date, irrespective of when the cause of action accrued, if the conditions described in the statute are met. R.C. 2305.03(B) provides in pertinent part, "**No civil action that is based upon a cause of action that accrued in any other state, \*\*\* may be commenced and maintained in this state \*\*\*.**" [Emphasis added.] Civ.R. 3 (A) provides, "A civil action is commenced by filing a complaint".

*Estate of Johnson v. Randal Smith, Inc.*, 135 Ohio St.3d 440, 2013-Ohio-1507, \_\_\_ N.E.2d \_\_\_, ¶21 held that the apology statute was properly applied to a civil action brought to vindicate a cause of action that accrued before the statute's enactment:

[C]oncern over retroactive application of the statute was unnecessary, for the trial court used a prospective application to exclude Dr. Smith's statement. R.C. 2317.43 took effect on September 13, 2004, covering 'any civil action brought' after that date. The Johnsons' filing of this case on July 26, 2007, meant that the statute applied. This interpretation gives effect to the plain meaning of the statute, as well as R.C. 1.48's instruction that laws are presumed to apply prospectively.

"R.C. 1.48 provides that: 'A statute is presumed to be prospective in its operation unless expressly made retrospective.'... the application of statutes affecting procedural rights to all causes tried after the effective date of the statute constitutes prospective operation as, in such instances, the date of the trial is the reference point from which prospectivity and retroactivity are measured."<sup>209</sup> *Johnson*, ¶20 holds:

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<sup>209</sup> *Viers v. Dunlap*, 1 Ohio St.3d 173, 174, 438 N.E.2d 881 (1982), overruled on other grounds in *Wilfong v. Batdorf*, 6 Ohio St.3d 100, 451 N.E.2d 1185. Accord, *Terrago-Snyder v. Mauro*, 7<sup>th</sup> Dist. Mahoning No. 08 MA 237, 2010-Ohio-5524, ¶88 (Nov. 12, 2010); *Curry v. Curry*, 4<sup>th</sup> Dist. Athens No. 01CA10, 2001 Ohio App. LEXIS 4745 \*5 - \*6 (Sept. 26, 2001); *In Re Rodgers*, 138 Ohio App.3d 510, 516, 741 N.E.2d

R.C. 2317.43 applies to all civil actions filed after the statute's effective date of September 13, 2004. 'If there is no clear indication of retroactive application, then the statute may only apply to cases which arise subsequent to its enactment.' [Citation omitted.] We have also held that '[l]aws of a remedial nature providing rules of practice, courses of procedure, or methods of review are applicable to any proceedings conducted after the adoption of such laws.' [Citation omitted.]. Moreover, a statute is properly applied prospectively if it has been enacted after the cause of action but before the trial of the case. See R.C. 1.48 . . . .

"R.C. 5747.13(C), as a statute of limitations, is a remedial statute applicable to any proceedings conducted after its effective date."<sup>210</sup> "Statutes of limitation are remedial in nature and may generally be classified as procedural legislation."<sup>211</sup>

This Court has repeatedly held that the application of a shortened statute of limitations to a cause that accrued before the date the statute was shortened, is not impermissibly retroactive as long as the plaintiff has a reasonable time after the effective date to file his complaint. *State ex rel. Nickoli v. Erie Metroparks*, 124 Ohio St.3d 449, 2010-Ohio-606, 923 N.E.2d 588, ¶29.<sup>212</sup>

Moreover, the fact that the borrowing statute draws on antecedent facts, *i.e.*, the accrual of a cause of action in a foreign state, and the expiration of the foreign state's statute of limitations or Ohio's statute, does not render the statute retroactive. See, *State*

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901 (12<sup>th</sup> Dist. 2000); *Dunn v. Dunn*, 137 Ohio App.3d 117, 124, 738 N.E.2d 81 (12<sup>th</sup> Dist. 2000); *In re Kerby*, 12<sup>th</sup> Dist. Butler No. CA99-09-164, 2000 Ohio App. LEXIS 4361 \*5 (Sept. 25, 2000); *Meadow Brook Properties v. American Asphalt Sealcoating*, 11<sup>th</sup> Dist. Lake No. 97-L-249, 1998 Ohio App. LEXIS 4621 \*9 (Sept. 30, 1998); *In re Smith*, 77 Ohio App.3d 1, 19-20, 601 N.E.2d 45 (6<sup>th</sup> Dist. 1991).

<sup>210</sup> *Schoenrade v. Tracy*, 74 Ohio St.3d 200, 202, 658 N.E.2d 247 (1996). Accord, *Smith v. New York Cent. Rd. Co.*, 122 Ohio St. 45, 170 N.E. 637 (1930) paragraph two of the syllabus, and 122 Ohio St. at 48.

<sup>211</sup> *Gregory v. Flowers*, 32 Ohio St.2d 48, 290 N.E.2d 181 (1972), syllabus paragraph one.

<sup>212</sup> Accord, *Gaines v. Preterm-Cleveland, Inc.*, 33 Ohio St.3d 54, 60, 514 N.E.2d 709 (1987); *Lechli v. Csanad*, 8<sup>th</sup> Dist. Cuyahoga No. 88277, 2007-Ohio-364 9, ¶14; *Walsh v. Urban*, 8<sup>th</sup> Dist. Cuyahoga No. 85466, 2005-Ohio-3727, ¶6.

v. Roberts, 134 Ohio St.3d 459, 2012-Ohio-5684, 983 N.E.2d 334 at ¶29.<sup>213</sup>

Johnson involved a procedural statute, viz., the apology statute; this case presents the borrowing statute, which is also procedural. In Johnson the statute applied to civil actions brought after its effective date; in our case the statute prohibits the filing of certain civil actions after its effective date. In Johnson, the cause of action had accrued before the effective date of the legislative enactment, i.e., the medical malpractice cause of action accrued in 2001 and the apology statute was enacted in 2004; in the case *sub judice*, it is claimed that FRIC's entire cause of action accrued on Jan. 1, 2005<sup>214</sup> before the April 7, 2005 effective date of the borrowing statute. In Johnson a civil action was brought in 2007 after the 2004 effective date of the apology statute; in this case a civil action was commenced in 2010 after the 2005 date the borrowing statute prohibited the filing of certain civil actions, i.e., April 7. The rule enunciated in Johnson, i.e., a procedural statute is not retroactively applied to a civil action commenced after its effective date, should be applied to hold that the borrowing statute is not retroactively applied to a civil action commenced after its effective date where the conditions for the statute's application are met.

Since (1) FRIC's complaint was filed in 2010 after the effective date of R.C. §2305.03(B), and (2) FRIC's cause accrued in Delaware and (3) the 3-year Delaware statute of limitations had expired before FRIC filed its complaint, R.C. 2305(B) applies prospectively to prohibit FRIC from commencing and maintaining its cause.

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<sup>213</sup> Accord, EPI of Cleveland, Inc. v. Limbach, 42 Ohio St.3d 103, 106, 537 N.E.2d 651 (1989); State ex rel. Bouse v. Cickelli, 165 Ohio St. 191, 192, 134 N.E.2d 834 (1956).

<sup>214</sup> JE, p. 11 (S. 164); C&H's Merit B p. 26; F&F's Merit B p. 16.

Counterposition of law No. 2 (b):

Absent a written agreement containing an acceleration clause, if a consumer fails to make an installment payment on a credit card account, the entire indebtedness does not automatically become immediately due and payable; rather, a cause of action accrues with respect to that installment only. When a credit card company (1) exercises its power to apply payments it received from a consumer to the earliest past due amounts and otherwise waives the breach respecting a late installment and (2) thereafter sells and assigns its remaining claim on the credit card account, the assignee is bound by the credit card company's waiver of the breach and the application of the payments. U.S. Bank Nat'l Ass'n v. Gullotta, 120 Ohio St.3d 399, 2008-Ohio-6268, 899 N.E.2d 987, 2 Restatement of the Law 2d, Contracts, §259 and Comment e (1979), 3 Restatement of the Law 2d, Contracts, §338(1) (1979), and Inter Ins. Exchange v. Wagstaff, 144 Ohio St. at 460, approved and followed.

**2. B FRIC's Cause Accrued After the Statute's Effective Date.**

2. B. (1) As of April 7, 2005 Chase's Cause of Action was Only for the Installment Payment then Due, i.e. \$632.

Sandra did not make the minimum payment due of \$188 by the Jan. 1, 2005 due date. The trial court concluded that the entire balance owed on the account was automatically due and payable on Jan. 1, 2005 and therefore Chase's entire cause of action accrued before the April 7, 2005 effective date of the borrowing statute; accordingly the trial court held that R.C. 2305.03(B) could not apply to Sandra's account without violating Ohio's prohibition on retroactive laws.<sup>215</sup>

As of April 7, 2005, the effective date of the borrowing statute, the past due installment payment amount on Sandra's Chase account was \$433, the minimum installment payment due was \$632, payable on or before May 2, 2005, and the total amount owed was \$7,999.51.<sup>216</sup>

Black's Law Dictionary 233 (7<sup>th</sup> ed. 1999) defines an "installment contract" as "A contract requiring or authorizing \*\*\* payments in separate increments, to be separately accepted." Sandra's Chase credit card account authorized her to make payments,

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<sup>215</sup> JE, p. 10-12 (S. 163-65).

<sup>216</sup> Doc. No. 58, Exhibit C, payment due date of May 2, 2005 (S. 474).

denominated as the minimum payment due, “in separate increments” which Chase would separately accept; therefore the account is an installment contract.<sup>217</sup>

When a contract provides for installment payments, the non-payment of an installment does not constitute a breach of the entire contract. U.S. Bank Nat'l Ass'n v. Gullotta, 120 Ohio St.3d 399, 2008-Ohio-6268, 899 N.E.2d 987 ¶30; 2 Restatement of the Law 2<sup>nd</sup>, Contracts §243(3), comment c (1979). When an obligation is due in installments, a cause of action accrues on each separate unpaid installment. Gullotta, supra ¶30.<sup>218</sup> This rule applies to all manner of divisible contracts; the rule is not limited to notes. See, Lutz v. Chesapeake Appalachia, L.L.C., 6<sup>th</sup> Cir. Nos. 10-4538 & 11-3034, 2013 U.S. App. LEXIS 10733 \*17 - \*18 (May 29, 2013) [collecting cases].<sup>219</sup>

There is an exception to the rule which applies if (1) an acceleration clause exists and (2) the acceleration clause is properly invoked, in which case all amounts owed are immediately due and a cause of action accrues on the entire obligation when an installment payment is not made.<sup>220</sup>

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<sup>217</sup> See also, Fisher v. First Nat'l Bank of Omaha, 548 F.2d 255, 260 (8<sup>th</sup> Cir. 1977)

<sup>218</sup> Accord, 31 R.A. Lord, Treatise on the Law of Contracts by Williston, Section 79:17, at 338 (4<sup>th</sup> Ed. 2004); 2 Restatement of the Law 2d, Contracts, §243 Illustration 4 (1979); 10 Corbin on Contracts §951, at 16-17 (Interim ed. 2007).<sup>218</sup>

<sup>219</sup> State ex rel. North Olmsted Fire Fighters Assn. v. City of North Olmsted, 64 Ohio St.3d 530, 536 597 N.E.2d 136 (1992) [vacation pay]; General Development Corp. v. Wilbur-Rogers Atlanta Corp., 28 Ohio App.2d 35, 38, 273 N.E.2d 908 (1<sup>st</sup> Dist. 1971) [rents]; Blake Homes, Ltd. v. Firstenergy Corp., 6<sup>th</sup> Dist. Lucas No. L-03-1109, 2004-Ohio-887, ¶16, [maintenance expenses].

<sup>220</sup> U.S. Bank Nat'l Ass'n v. Gullotta, 120 Ohio St.3d 399, 2008-Ohio-6268, 899 N.E.2d 987, ¶31; 3 Farnsworth on Contracts §8.18, at 505 (2d ed. 1998).

Acceleration clauses are routinely invoked in credit card litigation. Chase Bank, USA v. Curren, 191 Ohio App.3d 507, 2010-Ohio-6596, 946 N.E.2d 810 (4<sup>th</sup> Dist. 2010), ¶3; National City Bank v. Graham, 11<sup>th</sup> Dist. Lake No. 2010-L-047, 2011-Ohio-2584, ¶2; Discover Bank v. Doran, 10<sup>th</sup> Dist. Franklin No. 10AP-496, 2011-Ohio-205, ¶2; FIA Card Services, N.A. v. Marshall, 7<sup>th</sup> Dist. Carroll No. 10 CA 864, 2010-Ohio-4244, ¶¶4, 10; Chase Bank USA, NA v. Lopez, 8<sup>th</sup> Dist. Cuyahoga No. 91480, 2008-Ohio-6000, ¶2.

Chase increased Sandra's available cash line as of April 7, 2005. Chase distinguished between the minimum installment payment due and the total outstanding balance as late as the Feb. 1, 2006 due date. Chase never sued Sandra for anything. Rather, Chase elected to accept Sandra's tardy payments and charge Sandra "late payment fees" and interest. Chase failed to exercise an option to accelerate the remaining unpaid balance, accordingly no cause of action with respect to the total unpaid balance of \$7,999.51 accrued before April 7, 2005.<sup>221</sup> Even if Chase had a right to accelerate the full amount due as of April 7, 2005, and there is no such evidence, there is no evidence that Chase, in fact, demanded full payment of Sandra's credit card account on or before April 7, 2005. Therefore at most, as of April 7, 2005 Chase only had a cause of action against Sandra for the minimum payment due on May 2, 2005 of \$632.

2. B. (2) Between April 7, 2005 and June 28, 2006 Sandra Paid \$1,150 Which Chase Applied to the Earliest Past Due Amounts. Accordingly, Chase's Accrued Claim of \$632 As Of April 7, 2005 was Paid and Discharged by June 28, 2006. FRIC is Bound by Chase's Actions, Which Means FRIC's Entire Cause of Action Accrued After April 7, 2005.

Between April 7, 2005 and June 28, 2006 Sandra paid a total of \$1,150 on the Chase credit card account. Chase always accepted Sandra's payments and credited her payments to the earliest past due amounts.<sup>222</sup> Chase had the right to apply the payments

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<sup>221</sup> *U.S. Bank Natl. Assn. v. Gullotta* (2008), 120 Ohio St.3d 399, 2008-Ohio-6268 899 N.E.2d 987, ¶¶30-31.

<sup>222</sup> The trial court at JE, p. 8-9, (S. 161, 162) declared, "[Sandra] claims that the minimum monthly payment due on May 2, 2005 was \$632.00. Plaintiff claims that she made payments of \$1,150 between April 7, 2005 and June 28, 2006. Plaintiff argues that, if the *Defendants [sic]* would have applied this amount to the minimum monthly amount due in May of 2005, then technically, [Sandra] would not have been in default on her account until after May of 2005 and after Ohio's borrowing statute was in effect." The trial court misunderstood Sandra's argument. First, the trial court conflates the defendants with Chase. Chase's cause of action at April 7, 2005 was for \$632; the defendants never have had a cause of action with respect to amounts accrued before April 7, 2005. Second, Sandra never argued that "if" Chase "would have applied" her

to the earliest past due amounts.<sup>223</sup> The law favors the application of payments to the oldest outstanding debt; first in first out.<sup>224</sup>

When Chase accepted Sandra's late post-April 7<sup>th</sup> payments totaling \$1,150 it waived any right to sue Sandra for the \$632 cause of action it possessed as of April 7, 2005. *Samson Sales v. Honeywell, Inc.*, 8<sup>th</sup> Dist. Cuyahoga No. 51139, 1986 Ohio App. LEXIS 9341 \*14 - \*15 (DEC. 18, 1986).<sup>225</sup> Once Chase applied Sandra's payments of \$1,150 to the earliest past due amounts, Chase lost the power to re-allocate Sandra's payments.<sup>226</sup> Chase's (a) acceptance of Sandra's payments totaling \$1,150 and (b) application of those payments to the earliest past due amounts fully satisfied and discharged Chase's April 7, 2005 cause of action for \$632.<sup>227</sup> 13 Jenkins & Perillo *Corbin on Contracts*, Section 67.3(1), at 18-19 (Rev. Ed. 2003) ("if the primary contractual duty of performance is the payment of the money, this duty can be rendered by the debtor after the due date as well as at the agreed time. Payment of the amount of

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payments of \$1,150 she would not be in default as of May 2, 2005. Sandra demonstrated that Chase had, in fact, actually applied all of her payments to the earliest past due amount thereby satisfying and discharging any obligation Sandra had to Chase existing on April 7, 2005. Doc. No. 56, Sandra's MSJ p. 27-34 (S. 197 – 204) and Doc. No. 65, Sandra's Reply to Defendants' MSJ, p. 3-6 (S. 869-872). The trial court's misunderstanding led it to conclude that Sandra's argument was, JE p. 11, (S. 164), "the payments she made, which were less than the minimum monthly payments demanded by Chase, somehow prevented Chase, or Defendants, from filing a claim against her."

<sup>223</sup> *Swisher v. McWhinney*, 64 Ohio St. 343, 350, 60 N.E.565 (1901); 2 Restatement of the Law 2d, Contracts, §259(1), and Comment a (1979)

<sup>224</sup> 2 Restatement of the Law 2d, Contracts, §260(2) (1979).

<sup>225</sup> Accord, *Gates v. Norris*, 9<sup>th</sup> Dist. Summit No. 13445, 1998 Ohio App. LEXIS 3718 \*5 (Sept. 14, 1988); *Waterville Gas Co. v. Mason*, 93 Ohio App.3d 798, 808 (6<sup>th</sup> Dist. 1994); *Gaul v. Olympia Fitness Center, Inc.*, 88 Ohio App.3d 310, 316-317, 623 N.E.2d 1281 (8<sup>th</sup> Dist. 1993).

<sup>226</sup> 2 Restatement of the Law 2d, Contracts, §259 and Comment e (1979); Restatement of Law, Contracts, §392 (1932).

<sup>227</sup> 2 Restatement of the Law 2d, Contracts, §235(1) (1979); Restatement of the Law, Contracts, §386 (1932).

the debt discharges the debt when made even if made after the due date.”);<sup>228</sup> Cadle Co. II v. HRP Auto Centers, Inc., 2004-Ohio-6292, ¶11.

When Chase eventually assigned its interest in Sandra’s credit card account in 2008, FRIC, as assignee, acquired no more right in the account than Chase possessed. FRIC is bound by Chase’s application of payments.<sup>229</sup> Accordingly, FRIC’s entire cause of action accrued only after the effective date of R.C. §2305.03(B); therefore, the borrowing statute is properly applied prospectively.<sup>230</sup>

Proposition of Law No. III: A complaint for breach of a credit card contract may pray for post-judgment interest that exceeds the statutory rate when there is evidence suggesting that the parties agreed to a higher interest rate.

Counterproposition of law No. 3: A creditor is limited to post-judgment interest at the Statutory Rate “unless a written contract provides a different rate of interest” per R.C. §1343.03(A) and an invoice “does not constitute such a writing.” Minister Farmers Coop. Exchange Co., Inc. v. Meyer, 117 Ohio St.3d 459, 2008-Ohio-1259, 884 N.E.2d 1056 at ¶27, approved and followed. Accordingly when a debt collector not only sues for 24% post-judgment interest without possessing or producing “the agreement creating the debt”, but also moves for and is awarded a default judgment awarding it post-judgment interest at 24%, it has violated the FDCPA, 15 U.S.C. 1692f(1), 1692e(2)(A),<sup>231</sup> and 1692e(5), because in the absence of a “written contract [providing] a different rate of interest”, from the Statutory Rate, 24% interest is not “permitted by [the] law” of Ohio.

### **3. A Absent a Written Contract, Interest is Limited to the Statutory Rate.**

The central evidentiary fact in this case is that no CMA or other written contract authorizing 24% interest was properly before the trial court. Both the trial court and the

<sup>228</sup> Accord, Perillo, *Calamari and Perillo on Contracts* (6<sup>th</sup> Ed. 2009) §21.17, at 727.

<sup>229</sup> 3 Restatement of the Law 2d, Contracts, §338(1) (1979); 3 *Farnsworth on Contracts* (2004), at 102, Section 11.7; *Zenfa Labs, Inc. v. Big Lots Stores, Inc.*, 10<sup>th</sup> Dist. Franklin No. 05AP-343, 2006-Ohio-2069.

<sup>230</sup> C&H’s Merit B p. 26 conflates Chase’s cause of action with FRIC’s cause of action. They are different. Chase had a cause of action at the effective date of the statute, but subsequent payments satisfied and discharged that cause. FRIC only acquired its cause in 2008, when Chase no longer owned a cause as of April 7, 2005.

<sup>231</sup> *McDermott v. Marcus, Errico, Emmer & Brooks, P.C.*, 911 F. Supp.2d 1, 59 (D. Mass. 2012)

Court of Appeals concluded that the CMA was not cognizable for Civ.R. 56 purposes. Accordingly, a CMA cannot be used to justify the attempt to impose a 24% post-judgment interest rate.<sup>232</sup> Even after discovery, defendants failed to offer any evidence establishing that Sandra had agreed in writing to 24% post-judgment interest as mandated by R.C. 1343.03(A).

In the trial court defendants argued that Sandra's "credit card statements clearly establish that her credit card account was subject to an interest rate of 24.99%."<sup>233</sup> The trial court noted that FRIC "argues that the monthly credit card statements that [Sandra] received clearly establish that her credit card account was subject to an interest rate of 24.99%."<sup>234</sup> In short, the argument defendants advanced in the trial court respecting Ohio law was that the Chase invoices sufficed to establish entitlement to 24%.<sup>235</sup> In the Court of Appeals the entire argument C&H advanced with respect to their claim of 24% interest was four paragraphs, none of which addressed Ohio law.<sup>236</sup> F&F's Appellate Brief was not more extensive and merely reiterated the argument it made in the trial court.<sup>237</sup>

As a matter of Ohio law, the Chase credit card invoices<sup>238</sup> do not constitute evidence justifying the imposition of 24% post-judgment interest. *Meyer*, 117 Ohio St.3d

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<sup>232</sup> *Citibank (South Dakota, N.A. v. Perz*, 191 Ohio App.3d 575, 2010-Ohio-5890, 947 N.E.2d 191 (6<sup>th</sup> Dist.), ¶21; *Discover Bank v. Lammers*, 2<sup>nd</sup> Dist. Greene No. 08-CA-85, 2009-Ohio-3516, ¶33. Accord, *McCollough v. Johnson, Rodenburg & Lauinger, LLC*, 637 F.3d 939, 950 (9<sup>th</sup> Cir. 2011); *Fratz v. Goldman & Warshaw, P.C.*, E.D. Pa. No. 11-cv-02577, 2012 U.S. Dist. LEXIS 148744 \*17 (Oct. 16, 2012).

<sup>233</sup> Doc. No. 59, FRIC's MSJ, (S. 545); Doc. No. 61, C&H's MSJ, (S. 478).

<sup>234</sup> JE p. 14, (S. 167).

<sup>235</sup> F & F's Merit B p. 19 and C&H's Merit B at p. 34 reiterate the same.

<sup>236</sup> Appellate Doc. No. 18, C&H's Appellate Brief, p. 10-11 (S. 927-28).

<sup>237</sup> Appellate Doc. No. 13, F&F's Appellate Brief, p. 18-20 (S. 955-957).

<sup>238</sup> *Jarvis*, ¶38.

459, 2008-Ohio-1259, 884 N.E.2d 1056, ¶¶26-29.<sup>239</sup> In 2010 the Statutory Rate was 4.0%.<sup>240</sup> Pursuant to R.C. 1343.03(A) and *Meyer*, in the absence of a written agreement authorizing 24% interest,<sup>241</sup> e.g., a CMA, a creditor is only entitled to the Statutory Rate.<sup>242</sup> As a matter of Ohio law, FRIC was limited to post-judgment interest at 4%.

**3. B In the Absence of “the agreement creating the debt”, the FDCPA Prohibits Attempts to Collect Any Amount Unless That Amount is “permitted by [Ohio] law”.**

The FDCPA is “extraordinarily broad”<sup>243</sup> and sweeps with extraordinary breadth.<sup>244</sup> The FDCPA is a comprehensive and reticulated statute.<sup>245</sup> As a remedial statute, the FDCPA is to be liberally construed<sup>246</sup> in favor of the consumer.<sup>247</sup> The FDCPA is a strict liability<sup>248</sup> statute and a single violation of the statute is sufficient to incur liability.<sup>249</sup> Under the FDCPA there is no need to establish that a debt collector

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<sup>239</sup> Accord, *Retail Recovery Services of NJ v. Conley*, 3<sup>rd</sup> Dist. Mercer No. 10-09-15, 2010-Ohio-1256 ¶30; *Capital One Bank (USA) v. Heidebrink*, 6<sup>th</sup> Dist. Ottawa No. OT-08-049, 2009-Ohio-2931 ¶43

<sup>240</sup> [http://www.tax.ohio.gov/ohio\\_individual/individual/interest\\_rates.aspx](http://www.tax.ohio.gov/ohio_individual/individual/interest_rates.aspx).

<sup>241</sup> *Jarvis* ¶38.

<sup>242</sup> *Marion Plaza, Inc. v. 700 Block LLC*, 7<sup>th</sup> Dist. Mahoning No. 09 MA 113, 2010-Ohio-1539, ¶13 (Mar. 31, 2010); *Cafaro Northwest Partnership v. White*, 124 Ohio App.3d 605, 608, 707 N.E.2d 4 (7<sup>th</sup> Dist. 1997); *Testa v. Roberts*, 44 Ohio App.3d 161, 542 N.E.2d 654 (6<sup>th</sup> Dist. 1988), paragraph seven of the syllabus.

<sup>243</sup> *Bridge v. Ocwen*, 681 F.3d 355, 361-62 (6<sup>th</sup> Cir. 2012).

<sup>244</sup> *Miller v. Javitich, Block & Rathbone*, 561 F.3d 588, 591 (6<sup>th</sup> Cir. 2009)

<sup>245</sup> *Sayyed v. Wolpoff Abramson*, 485 F.3d 226, 233 (4<sup>th</sup> Cir. 2007).

<sup>246</sup> *Evon v. Law Offices of Sidney Mickell*, 688 F.3d 1015, 1025 (9<sup>th</sup> Cir. 2012); *Leshner v. Law Offices of Mitchell N. Kay, PC*, 650 F.3d 993, 998-99 (3<sup>rd</sup> Cir. 2011); *Hamilton v. United Healthcare of Louisiana, Inc.*, 310 F.3d 385, 392. (5<sup>th</sup> Cir. 2002).

<sup>247</sup> *Clark v. Capital Credit & Collection Service, Inc.*, 460 F.3d 1162, 1171-1177. (9<sup>th</sup> Cir. 2006); *Johnson v. Riddle*, 305 F.3d 1107, 1117 (10<sup>th</sup> Cir. 2002).

<sup>248</sup> *McLean v. Ray*, 488 Fed. Appx. 667, 682 (4<sup>th</sup> Cir. 2012); *Riggs v. Prober & Raphael*, 681 F.3d 1097 (9<sup>th</sup> Cir. 2012); *Picht v. Jon R. Hawks, Ltd.*, 236 F.3d 446, 451 (8<sup>th</sup> Cir. 2001).

<sup>249</sup> *Gamby v. Equifax Information Services LLC*, 462 Fed. Appx. 552, 556 (6<sup>th</sup> Cir. 2012); *Ellis v. Solomon & Solomon, P.C.*, 591 F.3d 130, 133 (2d Cir. 2010).

acted intentionally to hold him liable for a violation of the Act.<sup>250</sup> The FDCPA imposes liability irrespective of the knowledge or intent of the Debt Collector.<sup>251</sup>

15 U.S.C. 1692f provides in pertinent part:

A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section: (1) The collection of any amount (including interest . . .) unless *such amount is expressly authorized by the agreement creating the debt or permitted by law*. [Emphasis added.]

“There is no doubt that filing a lawsuit is an ‘attempt to collect a debt.’”<sup>252</sup> An attempt to collect interest, which a debt collector is not entitled to, violates §1692f(1).

*Allen v. LaSalle Bank, N.A.*, 629 F.3d 364, 367, n.4 (3<sup>rd</sup> Cir. 2011); *Turner v. J.V.D.B. & Associates, Inc.*, 330 F.3d 991, 996 (7<sup>th</sup> Cir. 2003); *Duffy v. Landberg*, 215 F.3d 871, 875 (8<sup>th</sup> Cir. 2000).<sup>253</sup> Moreover, to avoid liability under §1692f(1), defendants have the burden of proving that they are entitled to 24% post-judgment interest. *Seeger v. AFNI*.

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<sup>250</sup> *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 130 S.Ct. 1605, 1611, 174 L.Ed.2d 519 (2010); *Gamby*, 462 Fed. Appx. At 556; *D.A.N. Joint Venture III, L.P.*, 2007-Ohio-898, ¶47.

<sup>251</sup> *Glover v. F.D.I.C.*, 698 F.3d 139 (3<sup>rd</sup> Cir. 2012); *McCullough*, 637 F.3d at 952); *Owen v. I.C. System, Inc.*, 629 F.3d 1263, 1270-71 (11<sup>th</sup> Cir. 2011).

<sup>252</sup> *Kelly v. Great Seneca Financial Corp.*, 443 F.Supp.2d 954, 961 (S.D. Ohio 2005). Accord, *Garcia-Contreras v. Brock & Scott, PLLC*, 775 F.Supp.2d 808, 824 (M.D.N.C. 2011); *Anderson v. Frederick J. Hanna & Associates*, 361 F.Supp.2d 1379, 1383 (N.D. Ga. 2005). The FDCPA applies to complaints. *Donohue v. Quick Collect, Inc.*, 592 F.3d 1027, 1031-32 (9<sup>th</sup> Cir. 2010); *Gionis v. Javitch, Block, Rathbone, LLP*, 238 Fed. Appx. 24, 2607 (6<sup>th</sup> Cir. 2007); *Goldman v. Cohen*, 445 F.3d 152, 155 (2<sup>nd</sup> Cir. 2006); *Gearing v. Check Brokerage Corp.*, 233 F.3d 469, 472-73 (7<sup>th</sup> Cir. 2000).

<sup>253</sup> Accord, *Gigli v. Palisades Collection, LLC*, M.D. Pa. No. 3:CV-06-1428, 2008 U.S. Dist. LEXIS 62684 \*18 (Aug. 14, 2008); *Williams v. Edelman*, 408 F.Supp.2d 1261, 1268 (S.D. Fla. 2005); *Sandlin v. Shapiro & Fishman*, 919 F.Supp. 1564, 1568 (M.D.Fla. 1996).

*Inc.*, 548 F.3d 1107, 1111 (7<sup>th</sup> Cir. 2008).<sup>254</sup>

Proposition of Law No. III is confined to the filing of a complaint, but this case involves more. Defendants assert that Jarvis, “effectively requires a plaintiff to prove his . . . case at the pleading stage, ignoring the ordinary role of a complaint and discovery in the litigation process” citing Harvey v. Great Seneca Financial Corp., 453 F.3d 324 (6<sup>th</sup> Cir. 2006).<sup>255</sup> Jarvis does no such thing.

Defendants admit that they were not entitled to 24% based on the evidence they presented to the trial court.<sup>256</sup> Defendants know that most debtors do not appear and defend debt collection actions and that it is therefore, likely that debt collectors will win by default. And defendants structured their conduct to take advantage of this consumer propensity. FRIC purchased Sandra’s debt to Chase from Unifund. Unifund reported that the applicable interest rate on Sandra’s account was 5%. (S. 604, 727, 831). Knowing that 24% interest was improper,<sup>257</sup> without possessing evidence authorizing 24% interest, defendants (1) filed a Complaint, seeking 24% post-judgment interest while admitting that FRIC did not possess a CMA<sup>258</sup> and the CMA and other evidence may have been destroyed<sup>259</sup> (2) filed a motion for a default judgment seeking interest at 24% (S.239-45) and (3) prepared a journal entry awarding FRIC post-judgment interest at

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<sup>254</sup> Accord, *Del Campo v. Am. Corrective Counseling Serv., Inc.*, 718 F.Supp.2d 1116, 1133 (N.D. Cal. 2010); *Schwarm v. Craighead*, 552 F.Supp.2d 1056, 1080 (E.D. Cal. 2008); *Irwin v. Mascott*, 96 F.Supp.2d 968, 980 (N.D. Cal. 1999).

<sup>255</sup> C&H’s Merit B. 27; F&F’s Merit B p. 18 - 20.

<sup>256</sup> C&H’s Merit B p. 32 concedes, “This is not to say that FRIC should have ultimately been awarded the prayed for interest rate solely on the basis of the credit card statements it attached to its complaint.”

<sup>257</sup> Doc. No 55, FRMC’s manual, Exhibit XXX, p. 37 (S. 311) declares that when there is no documentation, interest in Ohio is limited to 10%.

<sup>258</sup> Doc. No. 1, FRIC’s Complaint, ¶4(a) (S. 37).

<sup>259</sup> Doc. No. 1, FRIC’s Complaint ¶4(d) (S. 37).

24%, without informing the trial court of all the facts (S.246).<sup>260</sup> (4) Regrettably, the busy trial court awarded FRIC 24% post-judgment interest without requiring FRIC to produce evidence justifying the same. This conduct compelled Sandra (5) to file a Civ.R. 60(B) motion to vacate (S. 247-300). On Sept. 10, 2010, six months after commencing this litigation, only after Sandra had the default judgment vacated, FRIC acting through Cheek dismissed its case against Sandra because both Cheek and FRIC knew that FRIC had no proof that it was entitled to 24% and had been caught violating the FDCPA.<sup>261</sup> In addition (6) when defendants filed their MSJs, seeking exoneration under the FDCPA, they were unable to produce evidence authorizing the collection of 24% interest.<sup>262</sup>

*Harvey*, 453 F.3d at 332, expressly pointed out that the consumer never denied, “that she owed a debt, nor did [the consumer] claim that [the debt buyer] misstated or misrepresented the amount that [the consumer] owed.” And *Harvey* specifically pointed

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<sup>260</sup> 2 Restatement of the Law 3d, The Law Governing Lawyers §112(2) (2001); Prof.Cond.R. 3.3(d) and comment 14; *Disciplinary Counsel v. Stafford*, 131 Ohio St.3d 385, 2012-Ohio-909, 965 N.E.2d 971, ¶28.

<sup>261</sup> Defendants argue that *Matrix Acquisitions, LLC v. Swope*, 8<sup>th</sup> Dist. Cuyahoga No. 94943, 2011-Ohio-111 provides them with a defense to Sandra’s FDCPA claim. *Matrix* does not. In *Matrix*, the court noted, ¶17, that whether the debt buyer was entitled to 25% interest was not at issue, “the propriety of the alleged 25% interest rate is not an issue in this appeal.” Without elaboration on the basis for the debtor’s FDCPA claim, *Matrix*, at ¶18 states, “Even if a 25% interest rate is ‘impermissible,’ as Swope claims, the court’s ruling does not conflict with its finding that Matrix did not violate the FDCPA or the OCSA because the court was to determine the proper interest rate at trial.” In *Matrix*, the only action the debt buyer took was the filing of a complaint seeking 25% interest; there was no motion for default judgment seeking an award of 25% interest, there was no preparation of a journal entry awarding Matrix 25% interest without advising the trial court of all the facts, and the trial court never awarded Matrix 25% interest. In fact the trial court awarded Matrix, with the consent of the debtor’s counsel, interest at 4%. In *Matrix, supra*, ¶19, the court found, that there were no damages incurred by the consumer because his attorney agreed to the imposition of the Statutory Rate on the debt. In our case we have a clear violation of 15 U.S.C. 1692f(1), which merits an award of statutory damages. 15 U.S.C. 1692k(a).

<sup>262</sup> *Jarvis* ¶38.

out that “misrepresenting the amount owed,” violated the FDCPA. *Id.* at 331.

Accordingly, *Harvey* does not apply where the consumer asserts that the debt collector is attempting to collect amounts it is not entitled to collect.<sup>263</sup> In this case Sandra claimed that defendants attempted to collect an amount that they were not entitled to collect.

FACACC ¶¶88 – 89, 91, 94 – 101,<sup>264</sup> 159, 161 – 174, so *Harvey* is inapplicable.

*Jarvis* prohibits predatory debt collectors from claiming entitlement to 24% post-judgment interest when a debt collector has no evidence authorizing 24% interest. Unlike *Harvey*, defendants here failed to produce evidence with their MSJs, *even after they engaged in discovery*. *McCullough*, 637 F.3d at 950 (entitlement to amount not proved at summary judgment merited FDCPA liability; *Harvey* distinguished).

When the defendants attempted to collect 24% post-judgment interest from Sandra, they violated the FDCPA, specifically, §1692f(1).<sup>265</sup> This follows because (1) without an express authorization in the “agreement creating the debt”, (2) Ohio law determines whether the defendants were “permitted by law” to charge Sandra 24%

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<sup>263</sup> Accord, *Robinson v. Sherman Fin. Group, LLC*, E.D. Tenn. No. 2:12-CV030, 2013 U.S. Dist. LEXIS 42971 \*23 - \*27 (Mar. 27, 2013); *Gigli*, 2008 U.S. Dist. LEXIS 62684 \*28 - \*30; *Delawder v. Platinum Fin. Servs. Corp.*, S.D. Ohio No. 1:04-cv-680, 2007 U.S. Dist. LEXIS 31174 (April 27, 2007).

<sup>264</sup> *Samuels v. Midland Funding, LLC*, S.D. Ala No. 12-0490-WS-C, 2013 U.S. Dist. LEXIS 17085, \*13 (Feb. 7, 2013) (“the *Harvey* plaintiff ‘alleged only that, at the time of filing, [the defendants] did not have the means of proving their debt-collection claim.’ 453 F.3d at 328. This case, unlike *Harvey*, is not centered on the defendant’s inability to prove its claim on the day it filed suit, but on its fixed intention not to prove its claim and its knowledge that it would never be able to prove its claim, since it had no evidence and deliberately elected to seek none.”).

<sup>265</sup> *Allen*, 629 F.3d at 368; *Federal Trade Comm’n v. Check Investors*, 502 F.3d 159, 168 (3<sup>rd</sup> Cir. 2007); *Olvera v. Blitt & Gains, P.C.*, 431 F.3d 285, 287 (7<sup>th</sup> Cir. 2005); *Williams*, 408 F.Supp.2d at 1269.

interest. *Johnson v. Riddle*, 305 F.3d at 1117.<sup>266</sup> *Riddle* 305 F.3d at 1119 held, “an amount is ‘permitted by law’ . . . if state supreme court holdings establish that collection of the amount is lawful.”<sup>267</sup> No Ohio Supreme Court decision permits the imposition of 24% post-judgment interest in the absence of a written agreement specifically authorizing 24%.

### 3. C Forfeited Arguments.

Defendants advance arguments never raised in the lower courts *viz.*, (1) defendants could have established that they were entitled to 24% interest without producing a CMA,<sup>268</sup> (2) the Delaware Statute of limitations was tolled and therefore has not expired,<sup>269</sup> (3) complying with the FDCPA by being able to produce proof of their entitlement to 24% post-judgment interest would result in the amendment of Civ. R. 8;<sup>270</sup> (4) the proper standard to measure defendants’ compliance with the FDCPA is Civ.R. 11,<sup>271</sup> (5) attorney debt collectors are privileged to violate or are immunized from

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<sup>266</sup> Accord, *Newman v. Checkrite California, Inc.*, 912 F.Supp. 1354, 1367 (E.D. Cal. 1995).

<sup>267</sup> *Johnson v. Riddle*, 305 F.3d at 1119.

<sup>268</sup> C&H’s Merit B p. 29-32; F&F’s Merit B p. 19. This “coulda, woulda” argument is contrived as no defendant adduced evidence establishing FRIC’s entitlement to 24%.

<sup>269</sup> C&H’s Merit B p. 21. This argument has been rejected; *Resurgence Financial, LLC v. Chambers*, 173 Cal.App.4<sup>th</sup> Supp. 1, 6- 7, 92 Cal. Rptr. 3d 844 (2009); *McCorryston v. L.W.T., Inc.*, 536 F.Supp.2d 1268, 1276 – 77 (M.D. Fla. 2008).

<sup>270</sup> C&H’s Merit B p. 32 – 33. This argument was rejected in *Hartman v. Great Seneca Fin. Corp.*, 569 F.3d 606, 617 (6<sup>th</sup> Cir. 2009). If defendants do not have a written agreement authorizing a rate of interest greater than the Statutory Rate at the time they file a consumer debt collection complaint, then they should seek the Statutory Rate. If, during discovery, they are able to locate such an agreement, they can amend their complaint to seek excess interest.

<sup>271</sup> C&H’s Merit B p. 33 – 34. In the context of a 15 U.S.C. 1692f(1) claim, the argument advanced by defendants has specifically been rejected. *Johnson v. Riddle*, 305 F.3d at 1118.

violations of the FDCPA,<sup>272</sup> and (6) the decision in *Minister* cannot apply to Sandra's cause of action because it arose before *Minister* was decided.<sup>273</sup> These arguments have been forfeited. *State v. Williams*, 51 Ohio St.2d 112, 364 N.E.2d 1364 (1977), paragraphs one and two of the syllabus.<sup>274</sup>

Proposition of Law No. IV: The Ohio Consumer Sales Practices Act does not apply to bank assignees and their collection attorneys because there is no "consumer transaction" or "supplier".

Counterproposition of law No. 4: The "Financial Institution" Exemption contained in the OSCPA Cannot Be Invoked or Applied Absent Proof that a Creditor is, in Fact, a Financial Institution. The OSCPA applies to Debt Collectors because Debt Collection is a Consumer Transaction and Debt Collectors Are Suppliers.

#### 4. The OSCPA was properly applied.

Defendants adduced no affidavits or other cognizable evidence establishing that Chase is a financial institution,<sup>275</sup> as defined in the Ohio Rev. Code; accordingly, *Jarvis*, correctly reversed the trial court's grant of summary judgment to the defendants and awarded summary judgment to Sandra. See, *Frost v. Ford*, 10<sup>th</sup> Dist. Franklin No. 00AP-1205, 2001 Ohio App. LEXIS 3124 \*8 - \*9.

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<sup>272</sup> C&H's Merit B p. 34 – 36. These arguments have repeatedly been rejected. *Allen*, 629 F.3d at 369; *Hartman*, 569 F.3d at 616; *Sayed*, 485 F.3d at 229; *Todd v. Weltman, Weinberg & Reis. Co.*, 434 F.3d 432 (6<sup>th</sup> Cir. 2006). See also, *Heintz v. Jenkins*, 514 U.S. 291, 115 S.Ct. 1489, 131 L.Ed.2d 395 (1995).

<sup>273</sup> F&F's Merit B p. 20 – 21. Ohio Appellate Courts had come to the same conclusion that this Court did in *Minister* years before *Minister* was handed down. *Minister* at ¶27. This Court, in *Minister*, was concerned that the floodgates of litigation would be opened to debtors filing cases seeking the benefit of the lower Statutory Rate; in this case FRIC initiated this litigation in March 2010, more than 3 years after this Court handed down its decision in *Minister* compelling Sandra to counterclaim. Sandra's conduct was not the conduct this Court had in mind when it decided *Minister*.

<sup>274</sup> Accord, *State ex rel. Quarto Mining Co. v. Foreman*, 79 Ohio St.3d 78, 81, 679 N.E.2d 706 (1997).

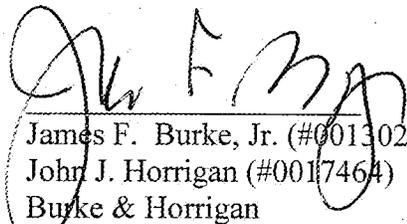
<sup>275</sup> Doc. Nos., 59, 60, and 61, FRIC's MSJ, FRMC's MSJ, and C&H's MSJ.

Debt collectors are engaged in consumer transactions when they attempt to collect a debt. See, *Rini v. Javitch, Block & Rathbone*, LLC, N.D. Ohio No. 1:13:CV 178, 2013 U.S. Dist. LEXIS 80707 \*9 - \*12 (June 7, 2013).<sup>276</sup> Accordingly, defendants are subject to the OSCPA.

### CONCLUSION

The decision of the Court of Appeals should be affirmed.

Respectfully,



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<sup>276</sup> Accord, *Hagy v. Demers & Adams, LLC*, S.D. Ohio No. 2:11-cv-530, 2011 U.S. Dist. LEXIS 141446 \*29 - \*30 (Dec. 7, 2011); *Midland Funding LLC v. Brent*, 644 F.Supp. 961, 976-77 (N.D. Ohio 2009); *D.A.N. Joint Venture III, L.P.*, 2007-Ohio-898, ¶49; *Broadnax v. Greene Credit Service*, 118 Ohio App.3d 881, 892, 694 N.E.2d 167 (2<sup>nd</sup> Dist. 1997); *Celebrezze v. United Research, Inc.*, 19 Ohio App. 3d 49, 482 N.E.2d 1260 (9<sup>th</sup> Dist. 1984), at paragraphs two and three of the syllabus; *Liggins v. The May Co.*, 44 Ohio Misc., 81, 83-84 337 N.E.2d 816 (C.P. 1975).

Certificate of Service

I hereby certify that a true and correct copy of the foregoing was served on this 12<sup>TH</sup> day of August, 2013, via regular U.S. mail to the following:

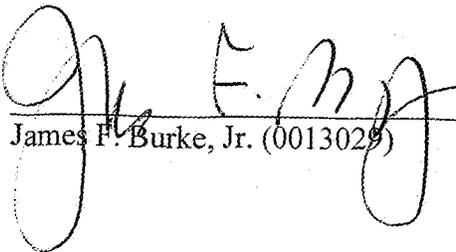
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