Ventura County Superior Court Decision Creates Uncertainty

for Assignees of Credit Card Accounts

By Albert J. Tumpson

A case decided by the Ventura County Superior Court, Appellate Division, has held that the testimony of the custodian of records of the assignee of a credit card account was insufficient to overcome a hearsay objection to the admission of records from the assigning credit card issuer offered to establish liability and the amount owed on the account.

In Sierra Managed Asset Plan, LLC v. David C. Hale (Ventura County Superior Court Case Number 56-2013-00443856-CL-CL-VTA – certified for publication), Hale had a credit card account with Citibank, N.A. Through a series of assignments, Sierra Managed Asset Plan, LLC ("Sierra") acquired Citibank's rights as creditor, and brought suit against Hale to collect on the account.

At the trial, credit card account documents, including credit card statements, created and maintained by Citibank were introduced to prove the amount owed by Hale, and Hale objected based, inter alia, on hearsay. Roberts, the witness used by Sierra to provide the foundation for admission under Evidence Code 1271, the business records exception to the hearsay rule, testified that: he was an agent of Sierra who is thoroughly familiar with the way Sierra maintained its books and records for its outstanding credit card accounts; he was the custodian of records for Sierra's business books and records; the documents to be admitted were created by Citibank prior to assignment of the account to Sierra and are electronically stored on computer media by Sierra; he had personal knowledge that it was Citibank's practice that original credit application and acceptance forms contain the terms and conditions of the account agreement and are sent to and signed by cardholders; it was the regular business practice of Citibank to mail monthly statements to cardholders; he has never worked for Citibank; and he did not have personal knowledge about the account or charges in question other than what he knew as a result of acquiring the account from Citibank.

The Court held that the foregoing testimony was not sufficient to satisfy Evidence Code 1271. In order for business records to qualify for admission under that exception to the hearsay rule, the witness need not be the person who created the documents, or an authorized custodian of the documents if he is a "qualified witness" who can testify "as to the identity and mode of preparation of the documents." However, while the trial court has broad discretion in determining whether a witness is so qualified, the testimony of Sierra's witness did not supply the necessary foundation. "At best, all Mr. Roberts's declaration and testimony establish is that respondent, as assignee from the creditor, received records originating from Citibank concerning

the account in question . . . This falls short of the foundation necessary for admission of business records as against a hearsay objection. Mr. Roberts's declaration and testimony are insufficient to permit any court to determine that '[t]he sources of information and method and time of preparation were such as to indicate its trustworthiness.' (Evid. Code, § 1271, subd. (d).)"

If upheld, this ruling could create a formidable roadblock to collection by an assignee of credit card accounts and other similar choses in action where the records establishing the liability and amounts owed were created and maintained by an assignor, especially where numerous accounts are assigned.