PORZIO
BROMBERG&NEWMAN P.C.
ATTORNEYS AT LAW

Commercial Litigation Briefs

Attorney Advertising **September 2014**

IN THIS ISSUE

EDITORS-IN-CHIEF

Michael L. Rich
973.889.4329
mlrich@pbnlaw.com

Appellate Division Clarifies Proofs Required for Charged-Off Credit Cards, and in the Process Provides Guidance on Business Records Hearsay Exception and Certification Requirements

By C. John DeSimone, III

What do you do when your client acquires assets in a transaction where such assets are summarized in computer records or otherwise stored in formats not particularly suited for presentation in Court? How do you demonstrate ownership of the assets, and a borrower's obligation to repay it? On March 5, 2014, approved for publication September 2, 2014, the Appellate Division in *New Century Financial Services, Inc. v. Oughla*, and *MSW Capital, Inc. v. Zaidi*, consolidated for appeal, provided guidance on just that.

New Century and *MSW* concerned debt buyers trying to collect on charged-off credit card accounts they had purchased from other debt buyers in a chain of debt buyers eventually leading back to the credit card companies with whom the defendant consumers allegedly had accounts. The debt buyers had been granted summary judgment at the trial level, and on appeal the Appellate Division affirmed *MSW* but reversed *New Century*.

The Court ruled that parties suing on assigned, charged-

Charles J. Stoia
973.889.4106
cjstoia@pbnlaw.com

CONTRIBUTING EDITORS

C. John DeSimone, III
973.889.4272
cjdesimone@pbnlaw.com

Peter J. Gallagher
973.889.4147
pjgallagher@pbnlaw.com

Eliyahu S. Scheiman
973.889.4232
esscheiman@pbnlaw.com

off credit card debts must prove two things: 1. ownership of the allegedly charged-off debt; and, 2. the amount due the credit card company at the time of the charge-off. In laying out the proofs needed to establish a prima facie claim, the Court disposed of a number of arguments commonly made by debtor defendants in such matters, holding that: the lack of notice of the assignment does not affect the validity of the assignment; the assignment need not reference the cardholder's name or account number but could instead reference an electronic file containing that information; and, no affidavit need be produced from each transferring debt buyer in the chain of debt buyers. Furthermore, the Court held that an electronic copy of the periodic credit card statement for the last billing cycle prior to the charge-off is prima facie evidence of the amount due. The Court also rejected defendants' arguments that standing must be shown, i.e., that ownership of the debt need be demonstrated, prior to a defendant having to participate in discovery.

More broadly, the case clarified the law of assignments, the business records exception to the hearsay rule, and certification requirements when seeking summary judgment. The Court noted that the law does not require a precise form of assignment; rather, that all that need be shown is "evidence of the intent to transfer one's rights and a description of the intangible right being assigned sufficient to make it readily identifiable." Intent is determined from the document itself and surrounding circumstances. Where there is a "chain" of assignments, the purported assignee must provide evidence of each link in the chain.

To establish the chain of assignments an affiant may utilize business records. Such records must be made in the regular course of business, prepared within a short

STAY CONNECTED

More On Us

Join Our Mailing List!

time of the condition being described, and the "source of the information and the method and circumstances of the preparation of the writing must justify allowing it into evidence." There is no requirement that the affiant "possess any personal knowledge of the act or event recorded" in those business records. However, affiants must generally aver that the facts they are presenting are on "personal knowledge, identify the source of such knowledge, and must properly authenticate any certified copies of documents referred to therein and attached to the affidavit or certification." An affiant is required to "satisfactorily attest" to the circumstances under which the business records were acquired. The Court presented a detailed analysis of the affidavits offered in support of summary judgment in the consolidated matters, leading to the reversal/affirmance noted above.

Finally, no special evidentiary requirements are needed for records stored in electronic, as opposed to paper, format. A party claiming that computerized business records are untrustworthy must come forward with some evidence to support the claim.

Although the *New Century/MSW* decision appears at first blush to be relevant to debt collectors, the decision is also useful for understanding evidentiary burdens when faced with complex financial computerized records and other business records, offered via affiants and/or other foundational witnesses who lack personal knowledge of the documents' creation. A thorough review of the decision is suggested under such circumstances.

Delaware Court Compels Production Of Attorney-Client Communications As Part Of Shareholders Investigation Into Corporate Misconduct

By Peter J. Gallagher

A court ordering a party to produce documents that the party claimed to be protected by the attorney-client privilege may not seem terribly important. But, the

Delaware Supreme Court's recent decision in *Wal-Mart Stores, Inc. v. Indiana Electrical Workers Pension Trust Fund* is notable because the court ordered the production of the documents before any litigation was even filed, as part of a putative plaintiff's investigation into whether it should bring a derivative action. In other words, the corporation was ordered to produce sensitive documents to a party deciding whether to sue the corporation.

In *Wal-Mart*, the document requests were made under Section 220 of the Delaware General Corporation Law, a unique provision that allows any stockholder to inspect the books and records of a corporation "for a proper purpose." "Proper purpose" has been defined to include an investigation into alleged corporate misconduct. In *Wal-Mart*, a pension fund requested information about a bribery scandal reported on by the New York Times, involving Wal-Mart's Mexican subsidiary. In response to the request, Wal-Mart produced some documents but withheld or redacted many more under the attorney-client privilege and work-product doctrine. The pension fund sued to compel Wal-Mart to produce all of these documents.

The Chancery Court granted the pension fund's request and the Delaware Supreme Court affirmed. In doing so, the Supreme Court expressly adopted the so-called "Garner Doctrine," first announced by the US Court of Appeals for the Fifth Circuit in *Garner v. Wolfinberger*, 430 F.2d 1093 (5th Cir. 1970). As the Delaware Supreme Court noted in *Wal-Mart*, the Garner Doctrine is a fiduciary exception to the attorney-client privilege that "allows stockholders of a corporation to invade the corporation's attorney-client privilege in order to prove fiduciary breaches by those in control of the corporation upon showing good cause." It has not been universally accepted in jurisdictions outside of the Fifth Circuit, and some have actually criticized and rejected it, but Delaware is not one of them.

In *Wal-Mart*, the Delaware Supreme Court ruled that the pension fund had demonstrated good cause sufficient to compel the production of the documents because: it had a colorable claim against Wal-Mart; the information requested was necessary to that claim and was not available from other, non-privileged sources; the attorney-client communications that the fund sought were identified with some specificity and were not part of a "fishing expedition;" and there was little, if any, risk that producing the documents would reveal any of Wal-Mart's trade secrets or confidential information. Accordingly, Wal-Mart was ordered to produce all of the attorney-client information that the pension fund requested.

As noted above, this decision is only the beginning of the story for Wal-Mart and the

pension fund, as the Delaware Supreme Court's decision just requires Wal-Mart to produce documents, it does not even touch on the merits of any future claim against Wal-Mart or the discovery that might be conducted in furtherance of that claim. Nonetheless, this is an important decision for corporations, particularly those organized under Delaware law, and corporations should be aware of it as they respond to potential crises and respond to the pre-litigation demands from shareholders.
