TAKING CARE OF BUSINESS: 1ST CIRCUIT AFFIRMS ADMITTANCE INTEGRATED BUSINESS RECORDS

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U.S. Financial Institutions and Services Litigation Alert

The 1st Circuit Court of Appeals recently affirmed a district court's ruling to allow in evidence a mortgage loan account history printout that included entries from two prior loan servicers as a business record exception to the rule against hearsay. In *U.S. Bank Trust, N.A. v. Jones*,[1] the court confirmed that the document's admission under Federal Rule of Evidence 803(6) was proper because the information was sufficiently reliable based on testimony from the current loan servicer's employee without the need for testimony from any of the prior loan servicers. The court emphasized that the admission of integrated business records turns "on the particular facts of each case."[2]

On appeal, the mortgagor argued that admitting the printout without testimony from prior servicers violated the rule against hearsay, which prohibits statements by an out-of-court declarant offered into evidence to prove the truth of the matter asserted.[3] Federal Rule of Evidence 803(6), known as the business records exception to the rule against hearsay, allows for the admission of business records (1) made at or near the time by someone with knowledge, (2) kept in the course of regular business activities, and (3) making the records was a regular practice.[4] These conditions must be shown by a custodian or other qualified witness and the party opposing admission does not show that the source, method, or circumstances of preparation for the information indicates a lack of trustworthiness.[5]

The 1st Circuit rejected the argument, explaining that "there is no categorical rule barring admission of business records under Rule 803(6) based only on the testimony from a representative of the successor business."[6] The court explained that integrating a third party's records into the offering party's records depends on whether the records are "reliable enough to be admissible."[7] Cases where the 1st Circuit affirmed admission of integrated records without third-party testimony involved entries that were "intimately integrated" into the business records[8] and where the offering party relied on third-party documents in its business.[9] The court has rejected admission where the later business did not follow a procedure for verification, lacked a "self interest" to assure accuracy, or sought to admit statements by strangers to it.[10] To find reliability for business records, the court looked to habits of precision, actual experience relying on the records, and a continuing duty to make an accurate record.[11]

The *Jones* panel found that the trial court properly relied upon testimony from an employee of the current servicer that the servicer "incorporated the previous servicer's records into its own database and 'plac[ed] its own financial interest at stake by relying on those records,' and that '[the current servicer]'s acquisition department took steps to review the previous servicer's records in a way that assured itself of the accuracy of the records.'"[12]

The mortgagor argued that the employee did not meet the exception's "qualified witness" requirement because she was not "was not personally involved in the creation of [the servicer]'s records and lacked knowledge about

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how prior loan servicers maintained their records."[13] The 1st Circuit rejected this argument as well, citing precedent establishing that a qualified witness "need not be the person who actually prepared the record" and may include "simply one who can explain and be cross-examined concerning the manner in which the records are made and kept."[14] Although the employee did not prepare the records herself, she "provided detailed testimony regarding how [the servicer] maintained its records . . . and how it verified the accuracy of the records it got from other servicers" and therefore "was 'qualified' within the meaning of Rule 803(6)."[15]

Lastly, the 1st Circuit found no error in admitting the printout where trial testimony showed that the servicer "reviewed personally the records in this particular case," "found them to be accurate," and "specifically attested that [the printout] was 'an account summary and payment history' printed from [the servicer]'s records."[16] That testimony was "sufficient to 'support a finding' that [the printout] 'is what the proponent claims it is'" and "'accurately reflects' the data in [the servicer]'s database" to qualify as an "original writing" under the requirements of the Federal Rules of Evidence. [17]

Jones, consistent with earlier First Circuit cases, shows the fact-specific analysis to determine the admissibility of integrated servicing records. The decision serves as confirmation that loan servicers may rely upon the business records of prior servicers. It is important to establish and implement processes involving "systematic checking, by regularity and continuity which produce habits of precision."[18] Further, having employees knowledgeable in these processes that can clearly explain how business records are created and maintained will reduce the risk of admissibility issues in court proceedings.

NOTES

[1] 925 F.3d 534 (1st Cir. 2019).

[2] *Id*. at 537.

[3] Fed. R. Evid. 801(c), 802.

[4] Fed. R. Evid. 803(6)(A)–(C).

[5] Fed. R. Evid. 803(6)(D) & (E).

[6] *Id*. at *2.

[7] *FTC v. Direct Marketing Concepts, Inc*., 624 F.3d 1, 16 n.15 (1st Cir. 2010).

[8] *See id.*

[9] *See United States v. Doe*, 960 F.2d 221, 223 (1st Cir. 1992).

[10] *See Jones*, 925 F.3d at 537–38 (citations omitted).

[11] *See id*. at 538 (quoting Fed. R. Evid. 803 advisory committee's note to 1972 proposed rules).

[12] *Jones*, 925 F.3d at 538.

[13] *Id.*

[14] *Id.* (quoting *Wallace Motor Sales, Inc. v. Am. Motors Sales Corp*., 780 F.2d 1049, 1061 (1st Cir. 1985)).

[15] *Id*.

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[16] *Id.*

[17] *Id.*

[18] Fed. R. Evid. 803 advisory committee's note to 1972 proposed rules.

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