The Use of Evidence in Commercial Collection Litigation

Questions often arise as to what rules the courts follow in admitting testimony and documents into evidence in a litigation and trial of a commercial collection account. This article will provide an explanation of the general rules followed by most state and federal courts when they consider what testimony and documents may be allowed and presented. Pertinent questions relative to this issue should be considered, discussed and determined between the creditor and its attorney prior to trial to avoid the dreaded "objection sustained" when a fact or document is offered into evidence, upon the objection of debtor's counsel.

The general rule is that ***all evidence that is relevant is admissible.*** Relevant evidence is defined by the courts as testimony or documentation tending to make any fact pertinent to the claims at issue more or less probable than it would be without the evidence. There are, however, numerous exceptions to the general rule that relevant evidence is admissible. These exceptions are found in the many and varied statutes, procedural codes and case law, which govern the legal procedures in state and federal courts.

The courts require that **only "authenticated" evidence be presented.** Authenticated evidence is evidence that can be proven to be valid and genuine, and not forged, altered, or fabricated afterthe-fact. Authenticating a document requires establishing a chain of custody from the creation of the document to trial. If there is any missing link in the chain of custody, the evidence could be challenged. For instance, consider a credit application. If the original credit application is lost, destroyed or otherwise unavailable, and only a copy remains, there is an authentication problem. Courts are suspicious and guarded as to claims that original documents are missing, and this can raise questions arise as to the validity, content or alteration of the copy. To prevent unnecessary evidentiary issues, the creditor should take care to ensure that safeguards are in place to maintain the safety of original documents.

Inadmissible Evidence

Parol evidence (oral statements preceding a contract) is not admissible to alter or vary the unambiguous terms of a written instrument, if that instrument embodies the entire agreement between the parties. Generally, this rule will exclude oral evidence of negotiations prior to execution of a written instrument if that oral evidence is offered to change the clear terms of the instrument. The law presumes that when parties memorialize an agreement in a written document, and all pertinent terms of the agreement are clearly embodied in that document, the parties intended that the written document would control over any prior oral statement made during negotiations. When written instrument is clear and complete, courts will generally not allow prior oral statements about the contents to be offered or produced to vary the written document.

Hearsay evidence is not admissible even if it is relevant. Hearsay evidence consists of out-ofcourt statements used to prove the truth of the matter asserted in the statements. For instance, a witness at trial normally could not testify that a neighbor told them a car involved in an accident ran a red light, if the purpose of the testimony is to establish that the car in fact ran the light. Hearsay evidence is not admissible because the neighbor is not testifying on the stand, and therefore is not subject to cross-examination or other validation of the reliability of the statement. However, a long series of exceptions to the rule against hearsay has been carved out by the law. The court may hold the hearsay to be reliable because of the circumstances under which the statement was made. For instance, a

statement made by the opposing party is generally not inadmissible hearsay, because the opposing party is bound by its own statements and has the full ability to refute them if they are inaccurate or untrue. The most common exception to the hearsay rule in a collection matter pertains to the records of a creditor kept in the ordinary course of the creditor's business. These documents are sometimes called "business records" or "records of regularly conducted activity." If such records meet all the requirements of the law, they can be admissible despite the hearsay rule.

Other exceptions exist and must be carefully considered during the presentation of evidence during trial. One of these is highly important when proof must be presented in the form of data that is compiled or summarizes data provided from other sources. To introduce compiled or summary data, the opposing party must be given the opportunity to examine the original data sources, to verify that the compilation or summary is accurate and that the original source material is admissible evidence. Care should be taken that the records underlying a compilation or summary qualify for the "business records" exception to the hearsay rule to ensure the court will allow them. In addition, all available backup documents should be readily accessible, for inspection by the opposing party if requested, or as a substitute if the compilation or summary is not allowed into evidence.

Court the "Angel" to Beat the "Devil"

The rules of evidence can be both "devil" and "angel" in court. In the trial of a matter, there is no substitute for thorough preparation of witness testimony and production of documents. This can assure the creditor that all relevant evidence to prove the account will be admitted and that an angel (not the Devil) is sitting on the creditor's shoulder.

To protect the enforcement of a credit agreement, creditors should establish sound practices like maintaining all original documents and ensuring that the creditor's data recording is performed in a reliable and consistent manner. To prevent a debtor from challenging the terms of an agreement, it is good practice for the creditor to include a clause in all written agreements providing that all of the terms of and conditions between the parties are fully included in the document and that any change or modification to the agreement must be in writing and signed by the creditor.

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