

Legal Alert

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Court of Appeals Increases Burden on Creditors Seeking Summary Judgment

Wells Fargo v. Allen started like any run-of-the-mill collection lawsuit. Wells Fargo filed a complaint alleging that the Allens owed over \$23,000 in unpaid credit-card charges. The Allens filed an answer on their own behalf. Wells Fargo then moved for summary judgment.

Under Arizona procedure, a party can prevail by summary judgment by showing that the material facts are not genuinely disputed. The moving party uses affidavits and other evidentiary materials to establish its case. The opposition likewise uses affidavits and evidence to show a factual dispute to be resolved at trial.

Wells Fargo's motion included an employee's affidavit. The employee described himself as a custodian of records. The affidavit averred that the employee had reviewed the Allens' account, that the Allens had defaulted on their payment obligations, and that the balance due was the amount sought in the complaint. Attached to the affidavit were copies of Wells Fargo's customer agreement and the Allens' latest credit-card statement.

In response, the Allens did not dispute having failed to pay their credit card. But the Allens argued whether the credit-card statement was admissible. (The parties also disputed whether Wells Fargo had attached the correct customer agreement, but the court did not focus on that issue.) Wells Fargo replied by supplying 140 pages itemizing the Allens' credit-card charges and emphasizing the Allens' failure to offer any evidence controverting the amount due. The trial court granted summary judgment to Wells Fargo.

The court of appeals reversed. It held that the trial court should not have considered the credit-card statement.

Indeed, Wells Fargo probably should have done more. Courts routinely consider "business records" that describe past transactions. But to be admissible, the party offering a business record should show (i) that the record was prepared using information from someone with personal knowledge (i.e., that the statement

gathers individual charges that were initially inputted by someone with knowledge of the transaction); (ii) that preparing this type of document is a regular practice; and (iii) that the document was maintained in the ordinary course of business. Wells Fargo's affidavit did not describe or even refer expressly to the credit-card statement. Plus, Wells Fargo submitted the 140-page itemization without any authentication.

But the court of appeals did not stop there. In describing what Wells Fargo should have done, the court noted that there was no way to "evaluate the accuracy of the [] calculation of the amount claimed." The court went on to state that a "merely general description" of the parties' transactions is insufficient when suing on an account.

This seems to go beyond the business-record doctrine and what should be required on summary judgment. A typical credit-card statement does not itemize transactions except for the most recent month. Is a credit-card provider required to provide copies of each individual transaction before obtaining judgment for the unpaid balance? With a heavily used business account, this could total thousands of pages. Similarly, must a bank, when suing on a loan, produce records for each individual payment and interest accrual? Such requirements feel like overkill, especially when with a properly authenticated account statement the debtors might not challenge the amount stated. Yet the court of appeals suggested that the plaintiff bears this initial burden.

As with many appellate decisions, the court was guided by the facts, which here involved possibly sympathetic debtors. A debtor should be able to review the account detail to determine whether a business record is accurate. Procedures already exist to enable this review in litigation—mandatory disclosure statements and discovery requests—but the Allens were representing themselves and likely did not know what to do. The court of appeals was trying to protect the Allens' rights, but in so doing it intruded on the standards for seeking judgment.

The opinion is new, and it remains to be seen how strictly trial courts apply these statements. The lesson here is that even run-of-the-mill lawsuits require an attorney who is familiar with Arizona procedures and pays attention to ensure those requirements are met.

The case is *Wells Fargo Bank v. Allen*, No. 1 CA-CV 11-0572 (Ariz.App, Div. One, Dec. 4, 2012). A copy of the opinion is available here:

<http://azcourts.gov/Portals/0/OpinionFiles/Div1/2012/1CA-CV11-0572.pdf>

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