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Loan Buyer Beware: Recent Connecticut Appellate Court Decision Toughens Ability to Prove Debt Owed Under an Acquired Loan

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In a loan sale transaction, the parties will often focus their time on due diligence related to the collateral and borrower's ability to pay, as well as in negotiating the purchase price. However, a recent Connecticut Appellate Court decision highlights the need for the loan buyer to consider how it will prove the debt if it needs to exercise remedies post-acquisition. In the absence of such planning, the loan buyer may find itself struggling to prove the debt in a contested action to enforce the loan, particularly if the seller is no longer in business.

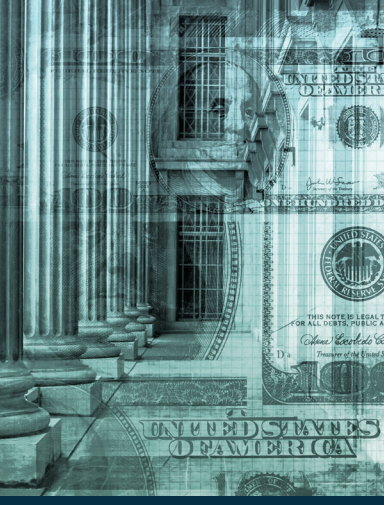
In *Jenzack Partners, LLC v. Stonebridge Associates, LLC,* 183 Conn. App. 128 (2018), the plaintiff acquired the underlying mortgage loan from Sovereign Bank. When the loan was purchased, Sovereign Bank provided the plaintiff with a statement of the loan's balance as of closing. Within months of the loan's acquisition, the plaintiff commenced an action to enforce the loan, including foreclosing on a mortgage securing the obligation of one of the loan guarantors. Because the guarantor contested the action, a trial was held. At trial, the Superior Court admitted into evidence, over the defendant's objection, an exhibit created by the plaintiff calculating the loan's outstanding balance, which used the starting balance provided by Sovereign Bank.

After the Superior Court rendered a judgment of strict foreclosure, the defendant appealed the judgment arguing that the trial court erred by admitting into evidence the debt calculation exhibit because it was based on Sovereign Bank's starting balance, which was inadmissible hearsay. The Connecticut Appellate Court agreed, reversed the judgment, and remanded the case for a new trial.

Hearsay is an out-of-court statement made for the truth of the matter asserted. Unless hearsay evidence falls within a recognized exception, it is inadmissible. In *Jenzack,* the plaintiff argued that the debt calculation exhibit fell within the business records exception. To admit a record under this exception, a party must show that (i) it was made in the regular course of business, and (ii) it was the regular course of the business to make the writing or record at the time of the act, transaction, occurrence or event or within a reasonable time thereafter.[1]

The Appellate Court observed that it is typically insufficient to meet the business record exception's requirements when a record is received, as opposed to made, in the regular course of the proponent's business.[2] Relying on the Connecticut Supreme Court's decision in *River Dock & Pile, Inc. v. O & G Industries, Inc.*,[3] the Appellate Court reasoned that statements in a record ***made*** in the ordinary course of the proponent's business are entitled to a presumption of reliability; however, this presumption does not apply when the record was ***received*** by the proponent in the regular course of business because there is no indication about the circumstances of how the record was made.[4] The Appellate Court held that the admission

1 Conn. Gen. Stat. Ann. § 52-180.
2 *Jenzack Partners, LLC,* 183 Conn. App. at 142.
3 219 Conn. 787 (1991).
4 *Id.*



of the debt calculation exhibit into evidence was in error because the first requirement of the business record exception was not met due to the plaintiff's failure to offer evidence concerning "Sovereign [Bank's] business records or its duty to report an accurate starting balance to the plaintiff."[5] In so doing, the Appellate Court specifically noted that plaintiff did not calculate the starting balance, and, therefore, the computation of debt was ***received***, not made, in the ordinary course of business.[6]

The Appellate Court's decision presents some practical difficulties for the plaintiff because it will likely need to obtain a witness from Sovereign Bank (now Santander Bank) to meet its evidentiary burden under the business records exception. More generally, this ruling may present a serious problem when a loan is enforced and the loan seller no longer exists. Thus, documenting the loan purchase at the time of acquisition to address the evidentiary issue in *Jenzack*, if possible, is of paramount importance.

The *Jenzack* decision provides at least some clues as to how to approach this issue.[7] Citing the Connecticut Supreme Court's decision in *River Dock & Pile, Inc.*, the Appellate Court stated that "mere receipt of documents in the ordinary course of business, ***in the absence of any duty owed by the entrant to the business to prepare the record***, would not ordinarily establish such documents as business records."[8] Indeed, the Appellate Court identified one of the plaintiff's evidentiary shortfalls as the failure to provide evidence of Sovereign Bank's duty to report the starting balance to plaintiff.[9] Thus, evidence of a legal duty by the seller to deliver a true and accurate starting balance to the buyer may satisfy the business record exception. This could be accomplished by including in the loan sale documents (i) a seller covenant to deliver to the buyer at closing a payment history of the loan with an outstanding balance as of the closing date, and (ii) a seller representation that the payment history delivered at closing is true and accurate, and the entries contained therein were made in the regular course of its business at the time the reported transactions occurred. At trial, the buyer could introduce the loan sale documents into evidence together with witness testimony concerning the seller's legal obligation to deliver the payment history in the loan sale and seller's compliance with that covenant.

Questions or Assistance:

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5 *Id.,* 143.
6 *Id.*
7 The plaintiff has petitioned for certification of the *Jenzack* decision to Connecticut Supreme Court, and, thus, further guidance on this issue may be forthcoming.
8 *Id.,* 142 (citation omitted; emphasis added; quotation marks omitted).
9 *Id.,* 143.

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