

No. S183703

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ALLAN PARKS,

PLAINTIFF AND APPELLANT,

vs.

MBNA AMERICA BANK, N.A.,

DEFENDANT AND RESPONDENT.

SUPREME COURT
FILED

SEP -1 2011

Frederick K. Ohnion Clerk

Deputy

AFTER A DECISION BY THE COURT OF APPEAL, FOURTH APPELLATE
DISTRICT, DIVISION THREE, CASE No. G040798
REVERSING A JUDGMENT OF THE
SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE
CASE No. 04CC00598
THE HONORABLE GAIL S. ANDLER, JUDGE

RESPONDENT'S OPPOSITION TO PLAINTIFF/APPELLANT'S
REQUEST FOR JUDICIAL NOTICE OF LEGISLATIVE HISTORY OF
CIVIL CODE SECTION 1748.9

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now known as FIA Card Services, N.A.*

Respondent MBNA America Bank, N.A. (“MBNA”)¹ opposes the request of Appellant Allan Parks (“Parks”) that this Court take judicial notice of what is purported to be “the legislative history of Civil Code Section 1748.9, as compiled by the Legislative Intent Service.” (Plf./Appellant’s Req. for Judicial Notice of Legislative History of Civil Code Section 1748.9, pt. I [the “Request”].) The Request should be denied because it particularly seeks notice of letters from a private entity and a private individual that (1) were not presented to the Court of Appeal and thus did not inform the decision under review by this Court; (2) do not constitute proper legislative history; and (3) are irrelevant because they are not probative of the preemption question at issue before this Court.

A. Parks Failed to Present His Request in the Court of Appeal.

The Request should be denied because Parks failed to present it to the Court of Appeal and has not explained that failure. Generally, this Court limits its review to the judgment of the Court of Appeal on the record before that court. (Cal. Rules of Court, rule 8.500(c).) As Parks points out, he requested notice of substantially the same packet of material from the Legislative Intent Service in the trial court, which was granted.² He failed, however, to request judicial notice of any of this material in the Court of Appeal. And none of the material otherwise appeared in the record presented to the Court of Appeal. Thus, the material did not inform, and could not have informed, the Court of Appeal’s judgment under review by

¹ Respondent MBNA America Bank, N.A. is now known as FIA Card Services, N.A.

² Request, pt. I. We note that the first two pages of Exhibit 3 to the Request – “Policies & Follow-Up Services” of the Legislative Intent Service – were not included in the material Parks submitted in the trial court and would appear to have been included here in error.

this Court. Because Parks offers no reasons for his failure to preserve consideration of the material in this Court, his request should be denied.

B. The Letters Parks Offers as “Legislative History” Are Not Legislative History.

Under the guise of “legislative history,” Parks seeks judicial notice of letters from James Clark, on behalf of the California Bankers Association, and from lawyer Paul Soter, in his individual capacity, addressed to State Senator Joseph Dunn. (See Request, pt. I; Plf./Appellant’s Answer Br. to *Amici Curiae* at 36.) But courts consider legislative history to determine legislative intent. (See *Elsner v. Uveges* (2005) 34 Cal. 4th 915, 929.) Absent some indication that the views of private entities and persons were shared with the Legislature, they cannot properly be considered as legislative history because they do not reflect the intent of the Legislature. (See *In re Marriage of Pendleton & Fireman* (2000) 24 Cal. 4th 39, 47 fn. 6 [denying request for judicial notice of letters from a state bar section where there was “no basis for an assumption that such letters reflect legislative intent”]; *Cortez v. Purolator Air Filtration Prods. Co.* (2000) 23 Cal. 4th 163, 168 fn. 2 [denying request for judicial notice of magazine articles “as legislative history” because “[i]nasmuch as there [was] no indication that [the] articles were considered by the Legislature, judicial notice for that purpose [was] not warranted”].)

Unsurprisingly, the cases Parks cites as purported support for his Request merely confirm the significance of legislative intent to the consideration of legislative history; none holds that a letter from a private entity or individual constitutes legislative history properly subject to judicial notice. (See *Arya Grp., Inc. v. Cher* (2000) 77 Cal. App. 4th 610, 614 fn. 3 [considering legislative history on the question of “the intended consequences of a violation of [a] statute”]; *Fendrich v. Van de Kamp* (1986) 182 Cal. App. 3d 246, 260 [considering legislative history in

connection with “the purpose of the legislation”]; *Commodore Home Sys., Inc. v. Superior Court* (1982) 32 Cal. 3d 211, 218-21 [considering legislative history to determine whether Legislature intended to include punitive damages in a cause of action].) Indeed, Parks makes no attempt to connect the letters he offers to the intent of the California Legislature. In any event, the meaning of § 1748.9 is not in dispute in this case. Therefore, the Request should be denied.

C. The Letters Upon Which Parks Seeks to Rely Are Irrelevant.

Finally, the Request should be denied because the letters Parks calls “legislative history” are not probative of the inference Parks would have this Court draw from them and the letters are, therefore, irrelevant. To be a proper subject of judicial notice, a matter “must be relevant to a material issue.” (*People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal. 4th 415, 422.) Mr. Clark, in his letter on behalf of the California Bankers Association, raised two concerns with respect to a prior version of the legislation that resulted in § 1748.9: (1) the negotiability of a convenience check with the proposed disclosures printed on the check itself in light of space constraints; and (2) the ability to offer convenience checks on terms different than the standard terms of the cardholder’s credit card agreement. (See Request, Ex. 4, at SP9-SP10.) Mr. Soter, who was not writing on behalf of any disclosed client, was interested primarily in the impact of the pending legislation on California-based institutions and raised the same “practical concerns” with negotiability. (*Id.* at SP1-SP2.) Neither letter purports to address the issue before this Court – the impact of the statute on national banks’ exercise of their federally granted lending powers.

From the silence of the two letters on that point, Parks would have this Court draw an inference that national banks in general, and presumably MBNA in particular, did not believe § 1748.9 would significantly interfere

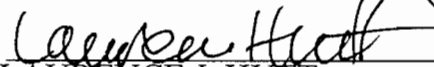
with the exercise of their federally granted lending powers. However, to the extent it is discernable, his reasoning is fatally flawed. Neither national banks nor any other private parties are required to express their views on pending legislation. And, to the extent they do comment, they have no obligation to ensure that such comments exhaustively express all of their concerns about the pending legislation. The letter writers did not even purport to speak on behalf of MBNA.

Moreover, the submission of any such comments has no bearing on positions taken once the legislation is enacted. Indeed, the U.S. Supreme Court has expressly confirmed this point: "That a party collaborated with others in seeking legislation has never been understood to estop the party from challenging the legislation in subsequent litigation." (*New York v. United States* (1992) 505 U.S. 144, 183.) Thus, that the California Bankers Association and a private lawyer were concerned about the negotiability of convenience checks before § 1748.9 became law is irrelevant to the issue before this Court: whether § 1748.9 is preempted as applied to national banks.

For all the foregoing reasons, the Court should deny Parks' Request for Judicial Notice.

DATED: September 1, 2011

ARNOLD & PORTER LLP

By: 
LAURENCE J. HUTT
Attorneys for Respondent

PROOF OF SERVICE

Allan Parks v. MBNA America Bank, N.A.

I am employed in the District of Columbia. I am over the age of 18 and not a party to the above-entitled action. My business address is 555 Twelfth Street, NW, Washington, D.C. 20004.

On September 1, 2011, I served the foregoing document described as a RESPONDENT'S OPPOSITION TO PLAINTIFF/APPELLANT'S REQUEST FOR JUDICIAL NOTICE OF LEGISLATIVE HISTORY OF CIVIL CODE SECTION 1748.9 by placing a true copy thereof enclosed in sealed envelope(s) addressed as follows:

Michael Vachon Law Office of Michael Vachon 16935 West Bernardo Drive, Suite 175 San Diego, CA 92127-1100 <i>Counsel for Plaintiffs and Appellants</i>	District Attorney for the County of Orange 401 Civic Center Drive Santa Ana, CA 92701
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Clerk of the Court California Court of Appeal Fourth Appellate District Division Three 601 West Santa Ana Blvd Santa Ana, CA 92701	Office of the Comptroller of the Currency Litigation Department Attn: Douglas Jordan, Senior Counsel 250 E Street SW Washington, D.C. 20219-4515
Appellate Coordinator Office of the Attorney General Consumer Law Section 300 S. Spring Street Los Angeles, CA 90013-1230	David Arbogast Arbogast & Berns LLP 6303 Owensmouth Avenue, 10th Floor Woodland Hills, CA 91367-2262
J. Mark Moore Spiro Moss LLP 11377 W. Olympic Boulevard, Fifth Floor Los Angeles, CA 90064-1683	James R. McGuire Rita F. Lin Aaron D. Jones Morrison & Foerster LLP 425 Market Street San Francisco, CA 94105
Bruce E. Clark Sullivan & Cromwell LLP 125 Broad Street New York, NY 10004	Achyut J. Phadke Sullivan & Cromwell LLP 1870 Embarcadero Road Palo Alto, CA 94303

By U.S. mail. I enclosed the document in a sealed envelope or package addressed to the persons at the addresses above and

placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business' practice for collecting and processing correspondence for mailing. On the same day the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I am employed in the District of Columbia where the mailing occurred. The envelope or package was placed in the mail at Washington, D.C.

STATE: I, **Colin Holmes**, declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on September 1, 2011, at Washington, D.C.

