BUSINESS RECORDS EXCEPTION MAY FOIL CREDITOR ASSIGNEES

By: Ellen Kaufman Wolf [1]

In 2015, conflicting opinions were issued on the issue of whether an assignee can prove its prima facie case on a debt by declaration of the assignee's custodian of records using the business records exception of Evidence Code Section 1271. The cases were decided by the Second District (Los Angeles/Ventura) *Sierra Managed Asset Plan, LLC v. Hale* (2015) 240 Cal.App.4th Supp.1, ("Hale" case) and the Fourth District (Riverside/San Bernardino) Courts of Appeal (2015 WL 9302796) *UNIFUND CCR, LLC, Plaintiff and Respondent, v. John C. DEAR*, Defendant and Appellant ("Unifund" case).

Both cases were limited jurisdiction cases which provided for proof by declaration under Code of Civil Procedure Section 98, which provides: "A party may, in lieu of presenting direct testimony, offer the prepared testimony of relevant witnesses in the form of affidavits or declarations under penalty of perjury. The prepared testimony may include, but need not be limited to, the opinions of expert witnesses, and testimony which authenticates documentary evidence. To the extent the contents of the prepared testimony would have been admissible were the witness to testify orally thereto, the prepared testimony shall be received as evidence in the case, provided that either of the following applies:

> "(a) A copy has been served on the party against whom it is offered at least 30 days prior to the trial, together with a current address of the affiant that is within 150 miles of the place of trial, and the affiant is available for service of process at that place for a reasonable period of time, during the 20 days immediately prior to trial.
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> "(b) The statement is in the form of all or part of a deposition in the case, and the party against whom it is offered had an opportunity to participate in the deposition. "The court shall determine whether the affidavit or declaration shall be read in to the record in lieu of oral testimony or admitted as a documentary exhibit."

"Section 98 is a noted departure from the hearsay rule as declarations are generally not admissible at trial." (*Target Nat. Bank v. Rocha, supra*, 216 Cal.App.4th Supp. at p. 7.) So long as the opposing party has the opportunity to serve the declarant with a deposition or trial subpoena as provided in section 98, subdivision (a), a declaration may be received as evidence at trial as against a hearsay objection because the declarant is subject to cross-examination concerning the contents of the declaration. (*Ibid.)(Accord, Cach LLC v. Rodgers*, s*upra*, 229 Cal.App.4th Supp. at p. 6.)

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Both cases affirmed that a declaration was a proper procedure; the question was whether the declarations were sufficient under the business records exception of Evidence Code Section 1271, which provides as follows:
"Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the act, condition, or even if:
"(a) The writing was made in the regular course of a business;
"(b) The writing was made at or near the time of the act, condition, or event;
"(c) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and
"(d) The sources of information and method and time of preparation were such as to indicate its trustworthiness."

"In order for business records to meet the above elements for admission as an exception to the hearsay rule, either the person who created the documents, or an authorized custodian of the documents, or some "other qualified witness" must testify "as to the identity and mode of preparation of the documents." The trial court has wide discretion in determining whether a "qualified witness" possesses sufficient personal knowledge of the "identity and mode of preparation" of documents for purposes of the business records exception. (*Aquimatang v. California State Lottery* (1991) 234 Cal.App.3d 769, 797.) That foundation may be met, however, by ". . . any 'qualified witness' who is knowledgeable about the documents . . . – the witness need not be the custodian or the person who created the record." (*Jazayeri v. Mao* (2009) 174 Cal.App.4th 301, 324.)

The declarations in both cases were very similar, attaching credit card account documents created and maintained by assignee's predecessor in interest. The documents were not created by assignee, nor was the declarant the authorized custodian of the original creditor documents. The declaration (and in one case but not the other, testimony on cross-examination) provide the following as the purported foundation for admission of the documents as business records:
(1) Declarant is an authorized agent of assignee who is "thoroughly familiar with the manner and method by which [assignee] maintains its business books and records for its outstanding credit card accounts."
(2) He is the duly authorized custodian of assignee's business books and records.
(3) The documents, created by the original creditor prior to assignment of the account to assignee, are electronically stored on digital computer media by assignee.
(4) The documents reflect the creation, charges, billing and balances due on the account while The original creditor was the creditor.
(5) He has personal knowledge that the original creditor's business practice is that the original credit application and acceptance forms, which are sent to and signed by the cardholders, contain the terms and conditions of the account agreement.
(6) "It is the regular business practice" of the original creditor to mail monthly account

statements to its cardholders.
(7) He has never worked for the original creditor.
(8) He does not have personal knowledge about the account or charges in question, other than what he knows as a result of acquiring the documents from the original creditor.

The *Hale* court concluded: "While the trial court has broad discretion in determining whether a witness is "qualified" to testify concerning "the identity and mode of preparation" of business records, [the assignee's custodian of records] declaration and testimony at trial simply do not meet the necessary foundation. At best, all [the] declaration and testimony establish is that assignee, as assignee from the creditor, received records originating from the original creditor concerning the account in question. This falls short of the foundation necessary for admission of business records as against a hearsay objection. The declaration and testimony are insufficient to permit any court to determine that "[t]he sources of information and method and time of preparation were such as to indicate its trustworthiness." (Evid. Code, § 1271, subd. (d).)

The *Unifund* court however, "respectfully" disagreed: "[T]he Hale court then concluded that the declarant did not have personal knowledge about the account or charges in question other than what he knew as a result of acquiring the documents from the original creditor, and that this falls short of the necessary foundation. In our view, the holding of Hale is too rigid in the consumer debt collection action setting. Our conclusion is consistent with the authorities relied upon in Hale, including Target National Bank v. Rocha (2013) 216 Cal.App.4th Supp. 1, which cknowledges that section 98 is already a noted departure from the hearsay rule, as declarations are generally not admissible at trial. Evidence Code section 1271 further provides for a declaration by the custodian or other qualified witness.Also, credit card statements issued by the bank are admissible as the mode and method of preparation can be inferred from the circumstances and the identity of the documents themselves. (People v. Dorsey, supra, 43 Cal.App.3d at p. 961.)

Moreover, because an assignee stands in the shoes of the assignor and the obligor can raise any defenses the obligor has against the assignor as against the assignee (1 Witkin Summary of Cal. Law (10th ed. 2005) Contracts, § 735, p. 810), we believe little effort is required by a defendant to deny the debt or challenge the accuracy of the records, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. (People v.. Lee (2011) 51 Cal.4th 620, 632.) We are also persuaded by the nature of limited civil actions themselves. In an unlimited civil action, the parties typically engage in pretrial discovery seeking facts and evidence in support of the allegations in the complaint and defenses in the answer. Documents to support the allegations are frequently requested and produced. The issues of authentication, foundation and admissibility of records are generally resolved before trial. Contrast this with a limited civil action, in which the statute provides for limited discovery. Although a request for production of documents or subpoena for records is not precluded, the nature of these actions and a collection action in particular, generally leads to a trial without discovery conducted by either party. The section 98

declaration is the first opportunity the defendant has to view the evidence against him or her.1 To require a restrictive interpretation of the business records exception for bank credit card collection account records would undoubtedly lead to more discovery, more court intervention burdening our already crowded trial courts, and more attorney fees incurred by both parties. All of these are antithetical to the limited civil collection action."

The *Unifund* court asked the legislature to address this issue:

"We note that after the complaint in this action was filed, the legislature addressed the issue of persons or entities who regularly engage in the business of purchasing charged-off consumer debt for collection purposes in The Fair Debt Buying Practices Act [Civ.Code § 1788.50 et seq.] In enacting the Fair Debt Buying Practices Act, the Legislature observed that the collection of debt purchased by debt buyers had become a significant focus of public concern due to the inadequacy of requirements for documentation to be maintained by the industry in support of collection activities and litigation. Until January 1, 2014, state law did not prescribe the specific nature of documentation that a debt buyer must maintain and produce in a legal action on the debt. Documentation used to support the collection of a debt must be sufficient to prove the individual who is being asked to pay the debt is in fact the individual associated with the original contract or agreement, and that the amount of indebtedness is accurate. Setting specific documentation and process standards will protect consumers, provide needed clarity to courts, and establish clearer criteria for debt buyers and the collection industry."