APPLICATION OF THE BUSINESS RECORDS EXCEPTION TO THE HEARSAY RULE IN THE CONTEXT OF RECORDS MAINTAINED BY MORTGAGE LOAN SERVICERS

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A. Overview

A recent decision from the District Court of Appeal in Florida, Hunter v. Aurora Loan Services, LLC[1], underscores a troubling legal trend affecting a mortgage loan servicer's ability to admit documents into evidence pursuant to the longstanding business records exception to the hearsay rule. Specifically, the central issue in Hunter was whether the business records exception could be utilized by the current holder of a note and mortgage to admit records into evidence that were necessary to conduct a foreclosure. The documents at issue, however, were not generated by the current holder of the note and mortgage, but instead, by the prior holder. The District Court of Appeals held that the current holder of the note and mortgage could ***not*** use the business records exception to admit these documents into evidence.

The pertinent facts in Hunter are as follows: A homeowner appealed a final judgment of foreclosure entered against him, asserting that Aurora Loan Services (the current holder of his note and mortgage) lacked standing to sue for foreclosure.[2] Aurora contended that, as rightful owner of the promissory note and mortgage, the foreclosure judgment was properly awarded.[3]

[1] 137 So.3d 570 (Fla. 1st DCA 2014).
[2] Id. at 571.
[3] Id.

Admittedly, the original owner of the note and mortgage was MortgageIT, which assigned both to Aurora prior to the foreclosure proceeding.[4]

In order to establish that it had the right to foreclose, Aurora sought to put into evidence certain loan records that were created by MortgageIT.[5] To do so, Aurora relied upon the testimony of Mr. Martin, an employee of the loan's current servicer, Rushmore Loan Management Service, to lay the necessary foundation for admitting the records into evidence under the business records exception to the hearsay rule.[6] Mr. Martin had never worked for MortgageIT, but testified as to how the records were transferred from one entity to the next and how it was consistent with industry standards.[7]

The court ultimately held that the mortgage records that Aurora relied on to foreclose "were incorrectly admitted into evidence as business records, and therefore, could not serve as to establish Aurora's standing to sue."[8] The court summarized the basis for this holding as follows:

> Here, Mr. Martin's testimony failed to establish the necessary foundation for admitting the Account Balance Report and the consolidation notes log into evidence under the business records exception. Mr. Martin was neither a current nor former employee of MortgageIT, and otherwise lacked particular knowledge of MortgageIT's record-keeping procedures. ***Absent such personal knowledge***, he was unable to substantiate when the records were made, whether the information they contained derived from a person with knowledge, whether MortgageIT regularly made such records, or, indeed, whether the records belonged to MortgageIT in the first place. His testimony about standard mortgage industry practice only arguably established that such records are generated and kept in the ordinary course of mortgage loan servicing.[9]

Unfortunately, the ruling in Hunter is not an anomaly. In fact, numerous other courts have also refused to apply the business records exception in the context of admitting financial

[4] Id.
[5] Id. at 571-572.
[6] Id. at 572.
[7] Id.
[8] Id. at 574.
[9] Id. at 573 (Emphasis added).

records, primarily on the grounds that the party seeking to admit the evidence allegedly did not have "personal knowledge" of the accuracy of its contents.[10] As detailed below, an analysis of the history behind the business records exception, as well as numerous other cases applying the exception, reveal that the cases consistent with Hunter are in direct conflict with the long-standing exception to the hearsay rule.

B. History of the Business Records Exception and Fed. Rules Evid. Rule 803(6)

The Federal Rules of Evidence define hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."[11] Hearsay is inadmissible unless it falls within an enumerated exception. One such exception is the "business records" exception.

An excellent history of the business records exception to the hearsay rule can be found in the American Law Reports article, "Admissibility of Records Other than Police Reports, Under Rule 803(6), Federal Rules of Evidence, Providing for Business Records Exception to the Hearsay Rule,"[12] which states:

> Under English common law, a litigant's books of account were not admissible into evidence unless kept by a disinterested person who was available to testify as to their accuracy. When the person who kept the books was unavailable to testify, an exception developed which allowed such books into evidence if they were made in the regular course of business. However, where the litigants were themselves the keepers of the books, they could not testify due to the common-

[10] See, e.g., Glarum v. LaSalle Bank Nat'l Ass'n, 83 So.3d 780, 782-83 (Fla. 4th DCA 2011) (holding affidavit of loan servicer's employee offered to prove amount debtor owed was inadmissible as business record where employee did not know who entered the data he relied on, whether the computer entries were accurate when made or how incorporated data from prior loan servicer was derived); NationsBanc Mortg. Corp. v. Eisenhauer, 49 Mas. App. Ct. 727, 734 (2000) (refusing to apply the business records exception when the lender "failed to offer any evidence that the person initially reporting the [loan] information had personal knowledge or a business duty to report the material accurately"); FDIC v. Keating, 690 A.2d 429 (1997) (holding that credit specialist could not testify as to the amount of outstanding indebtedness because he did not personally enter the data in question and had no opinion concerning the accuracy of the underlying financial records); New England Sav. Bank v. Bedford Realty Corp., 238 Conn. 745, 758 (1996) (setting aside foreclosure judgment on the grounds that the individual testifying to the amount of the outstanding debt "had no personal knowledge concerning the terms or status of the debt" and the underlying documents were not offered into evidence).

[11] Fed. R. Evid. 801(c).

[12] 61 A.L.R. 359, § 2[a] (2014).

law rule that parties were incompetent witnesses, and thus these records were denied admission.

In response to these limitations, most American jurisdictions adopted, as a rule of evidence, the so-called "shopbook rule" which enables litigants to testify to the accuracy of books of account they themselves kept. Further, at an early date many American jurisdictions enacted statutes providing for the admissibility of a party's books of account on a proper showing. The federal version of such a statute was former 28 U.S.C.A. § 1732(a) which provided for the admission into evidence of any writing made as a record of an act if it was made in the regular course of business and it was the regular course of such business to make the writing at, or near the time of, the recorded event.

The United States Supreme Court interpreted this statute in the landmark case of Palmer v Hoffman (1943) 318 US 109, 87 L Ed 645, 63 S Ct 477, reh den 318 US 800, 87 L Ed 1163, 63 S Ct 757. In that case, involving a railroad accident, the court refused to allow into evidence a statement of the train engineer made at a freight office where he was interviewed by an assistant superintendent of the railroad and a representative of the state Public Utilities Commission. The court found that the statement was not made in the regular course of business because, according to the court, the business of the railroad was railroading, and not obtaining accident reports. The court believed that a contrary ruling would mean that the business records exception to the hearsay rule would cover any system of recording events or occurrences provided it was "regular" and though it had little or nothing to do with the management or operation of the business as such. The court felt that the probability of trustworthiness of records, because they were a routine reflection of the day-to-day operations of the business, would be forgotten as the basis of the rule, and regularity of preparation would become the test rather than the character of the records and their earmarks of reliability acquired from their source and origin and the nature of their compilation.

On July 1, 1975, the Federal Rules of Evidence became effective, and 28 U.S.C.A. § 1732(a) was amended and replaced by Rule 803(6) of the Federal Rules of Evidence.

(Internal citations omitted.)

Fed. Rules Evid. Rule 803(6) states that "Records of a Regularly Conducted Activity" (i.e. business records) are admissible as evidence if:

(A) the record was made at or near the time by -- or from information transmitted by -- someone with knowledge;

(B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and

(E) neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness.

C. A Party's Ability to Admit Business Records Via Testimony of "Custodians or Another Qualified Witness" is Well-Established

The central reason that the business records at issue in Hunter, supra, as well as the other cases cited in Section A, were held inadmissible, was because the courts determined that the individual proffering the documents lacked "personal knowledge" of how the records in question were originally made. As a result, the courts concluded that these individuals could not establish their "trustworthiness." For the reasons discussed below, these holdings fail to properly apply Rule 803(6), which explicitly permits business records to be admitted via the testimony of "custodians or another qualified witness."

As an initial matter, it should be noted that common law previously required that all participants who were involved in the process of gathering, transmitting, and recording business records be produced in order to admit those records (or their unavailability accounted for). This process proved to be unduly burdensome, if not completely insurmountable.[13] Accordingly, Rule

[13] Obviously, employees routinely come and go, often making it impossible to track down the person who may have actually created a particular business record. Other records are created by entire groups of people, each of who played just a small part in the overall record. See, e.g., Massachusetts Bonding & Insurance Co. v. Norwich Pharmacal Co., 18 F.2d 934, 937 (C.C.A. 2d Cir. 1927) (Hand, J.) ("The question is in what cases it is necessary to supplement proof of the way in which the business is carried on and the entries are made, by the testimony of the entrants themselves. It is a matter in which the sluggishness of the law is especially disastrous .... The routine of modern affairs, mercantile, financial and industrial, is conducted with so extreme a division of labor that the transactions cannot be proved at first hand without the concurrence of persons, each of whom can contribute no more than a slight part, and that part not dependent on his memory of the event. Records, and records alone, are their adequate repository, and are in practice accepted as accurate upon the faith of the routine itself, and of the self-consistency of their contents. Unless they can be used in court without the task of calling those who at all stages had a part in the transactions recorded, nobody need ever pay a debt, if only his creditor does a large enough business ....

803(6)(D) adopted the more practical approach of allowing the foundation for a business record to be provided by the "custodian or another qualified witness."[14] This is particularly true with respect to computer records, which the 4th Circuit has held are in the "custody" of each and every entity that properly has access to them.[15]

Ultimately, Rule 803(6) is based upon the realization that the dependability of regular business entries rests upon proof of a routine of making accurate records, rather than upon the testimony of each participant that he himself was accurate.[16] While lack of personal knowledge of the entrant or maker may be shown to affect the weight to be given to the record, it does ***not*** affect the record's admissibility.[17] This point is detailed in the cases below.

Cockrell v. Republic Mortgage Ins. Co.,[18] is particularly instructive. In Cockrell, certain loan histories and foreclosure documents were admitted into evidence via the affidavits of two individuals who worked for a lender's mortgage insurer, RMIC. The plaintiff objected to the

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[T]o continue a system of rules, originally designed to relieve small shopkeepers from their incompetence as witnesses into present day transactions is to cook the egg by burning down the house.").

[14] See generally U.S. v. Console, 13 F.3d 641, 657 (3d Cir. 1993) ("We have recognized that the term 'other qualified witness' should be construed broadly, and that a qualified witness ' "need not be an employee of the [recordkeeping] entity so long as he understands the system." ' Pellulo, 964 F.2d at 201 (quoting 4 Jack B. Weinstein & Margaret A. Berger, Weinstein's Evidence ¶803(6)[02], at 803-178). Thus, a qualified witness only need 'have familiarity with the record-keeping system' and the ability to attest to the foundational requirements of Rule 803(6). Id. at 201–02.").

[15] U.S. v. Bowers, 920 F.2d 220, 223 (4th Cir. 1990) ("The persons in Philadelphia had access to the computer data stored in Martinsburg. Traditional notions of physical 'custody' in hearsay rules make little sense when applied to computer data. We will not impose on a public agency a requirement to send a witness from the physical location of the agency's mainframe computer every time data from that computer must be presented in court. The real custodian is the agency, and those who signed the certifications had the agency's authority to search the records. So long as the sponsoring witness has full access and authority to search the public agency's computer data, conducts the search diligently, and is available for cross-examination about his access, authority, and diligence, the concern for trustworthiness embedded in the rules of evidence is satisfied.").

[16] See "Federal Practice & Procedure, Federal Rules of Evidence," Kenneth W. Graham, Jr. and Michael H. Graham, 30 Fed. Prac. & Proc. Evid. § 7047 (2014 ed.).

[17] See United States v. Wables, 731 F.2d 440, 449 (7th Cir. 1984) (stating that "[i]t is clear that, in admitting documents under the business records exception to the hearsay rule, 'the testimony of the custodian or otherwise qualified witness who can explain the record-keeping of his organization is ordinarily essential'"); NLRB v. First Termite Control Co., 646 F.2d 424, 427 (9th Cir. 1981) (noting that through the custodian or "other qualified witness" requirement, Rule 803(6) "insures the presence of some individual at trial who can testify to the methods of keeping the information"); United States v. Hathaway, 798 F.2d 902, 906 (6th Cir. 1986) (stating that "[w]hen a witness is used to lay the foundation for admitting records under Rule 803(6), all that is required is that the witness be familiar with the record keeping system").

[18] 817 S.W.2d 106 (Tex. App. 1991).

admissibility of these records, claiming that only the lender, TriTexas, could verify the contents of the records. The court disagreed, holding as follows:

> Texas Rule of Evidence 803 requires that the prerequisites of the business records exception to the hearsay rule may be "shown by the testimony of the custodian ***or other qualified witness*** ... unless the source of information or method or circumstances of preparation indicate lack of trustworthiness." Tex. R. Civ. Evid. 803(6) (emphasis added). A document can comprise the records of another business if the second business determines the accuracy of the information generated by the first business. See Duncan Dev., Inc. v. Haney, 634 S.W.2d 811, 812–13 (Tex. 1982) (subcontractor's invoices became integral part of builder's records where builder's employees' regular responsibilities required them to verify subcontractors' performance and accuracy of the invoices). In this case, persons with knowledge swore that these records were kept in the regular course of RMIC's business as a mortgage insurer and formed the basis of its payment to TriTexas. Nothing in the record or the circumstances concerning the generation of these records indicates a lack of trustworthiness.[19]

Similarly, in WAMCO XXVII, Ltd. v. Integrated Electronic Environments, Inc.,[20] WAMCO purchased various loans from Bank of America, including several loans that Bank of America had made to Integrated Electronic Environments, Inc. ("Integrated"). When Integrated defaulted on their loans, WAMCO filed suit. At trial, Integrated argued that WAMCO was not permitted to rely on Bank of America's records concerning the balance of Integrated's loan, as WAMCO had not collected or created the records.[21] WAMCO argued that the records were admissible pursuant to the business records exception.[22]

The Court of Appeals agreed with WAMCO, explaining that WAMCO presented sufficient evidence to admit Bank of America's records under the business records exception. The court summarized the evidence as follows:

> The record reflects that Robert Grauer testified for WAMCO. He is a vice president of WAMCO and a vice president of its related company, First City Servicing, which services loans for WAMCO. Grauer's duties include overseeing

[19] Id. at 112-13 (Tex. App. 1991).
[20] 903 So.2d 230 (Fla. 2d DCA 2005).
[21] Id. at 232.
[22] Id.

> collections of loans that WAMCO purchases, and he was personally involved in servicing the March and October loans. Grauer testified that the beginning numbers on the outstanding balances were the numbers received from Bank of America at the time WAMCO purchased the loans. The numbers were put into First City's computer system, on WAMCO's behalf, and kept in the normal course of business. Entries related to payments and balance adjustments were made and maintained in the ordinary course of First City's business.
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> Grauer testified that the loan payment histories reflected payments at the time they were made and the outstanding balances. He stated that WAMCO relied on the documentation and balance information that it received from Bank of America at the time WAMCO purchased the loans. He indicated that while he did not know the specific person at Bank of America who would have put information into the Bank of America system, he knew how bank loan accounting systems worked and that the procedures were "bank-acceptable accounting systems." He added that he reviewed the records that WAMCO and First City received from Bank of America, and he described the process that WAMCO and First City use to verify the accuracy of information received in connection with loan purchases. He explained that at the time of a loan purchase "we put it on our system, the files that are delivered to us. We go through the files, check for the accuracy, anything that seems out of line, go through the file, reading it to get a good idea of the history of the loan, look at the payment histories, et cetera, and then make an initial contact with the customer."[23]

First Union Nat. Bank v. Woermer,[24] includes an another excellent explanation for why business records may be admitted even though the qualifying witness lacks personal knowledge of all the underlying documents:

> "The requirements for authenticating a business record are identical to those for laying a foundation for its admissibility under the hearsay exception. It is generally held that business records may be authenticated by the testimony of one familiar with the books of the concern, such as a custodian or supervisor, who has not made the record or seen it made, that the offered writing is actually part of the records of the business." (Internal quotation marks omitted.) [ ] The [Supreme Court of Connecticut] noted that establishing a chain of custody should not be a requirement for authentication for persuasive policy considerations. Present day foreclosure actions often involve failed banks and mortgage loans that have been assigned several times. "To require testimony regarding the chain of custody of such documents, from the time of their creation to their introduction at trial, would create a nearly insurmountable hurdle for successor creditors attempting to collect loans originated by failed institutions." [ ]

[23] Id. at 232-33.

[24] 92 Conn. App. 696, 708, 887 A.2d 893, 901-02 (2005) (citing New England Savings Bank v. Bedford Realty Corp., 246 Conn. 594, 717 A.2d 713 (1998)).

(Internal citations omitted.)

First Union and other cases have also discussed the business records exception in the context of computer records. First Union notes that in the case of computer records, "[t]he witness who authenticates a business record need not have prepared the report. The witness need only testify as to his familiarity with the computer system and its reliability, that the record was produced in the regular course of business and that it was the regular course of business to produce the records for the document to be admitted properly."[25]

In Midfirst Bank, SSB v. C.W. Haynes & Co., Inc.,[26] the United States District Court for District of South Carolina discussed the business records exception under Rule 803(6). In Midfirst Bank, two entities, Chemical Bank and Participants Trust Company ("PTC"), had an arrangement in which Chemical Bank provided PTC with data through input by Chemical Bank's employees into a transaction journal.[27] As a result, PTC's computer records were entirely based on Chemical Bank's records.[28] A witness for PTC testified that he did not have any knowledge regarding how Chemical Bank's records were produced.[29] The defendants in the case argued that PTC's records were inadmissible hearsay because they were actually just replications of information from Chemical Bank.[30] The District Court first stated, citing numerous authorities, that it was immaterial that the records were not actually produced by PTC, as Rule 803(6) allows the admission of business records prepared by another entity.[31] The court also noted that an employee of the entity preparing the documents, in this case, Chemical Bank,

[25] Id. at 92 Conn. App. 708-09, 887 A.2d 902.
[26] 893 F.Supp. 1304 (D.S.C. 1994).
[27] Id. at 1310.
[28] Id.
[29] Id.
[30] Id.
[31] Id.

is not required to lay the foundation for the business records in order for them to be admissible.[32] The court further stated that Rule 803(6) "does not require the testifying witness to have personally participated in the creation of the document or to know who actually recorded the information."[33] Instead, the court stated, under the business records exception, the witness must merely be familiar with the record keeping system.[34]

The Northern District of Alabama recently held that "when business records pass from a predecessor entity to a successor entity under a merger or receivership, the successor entity is able to authenticate the business records of its predecessor."[35] The district court explained that this assessment of FRE 803(6) is based on the practical consideration that "it would be extremely difficult for a successor bank to recover debt owed to a failed bank, ... since the custodian of the failed bank's records may no longer be able or willing to participate in efforts to recover debts owed to the bank that went into receivership. Such a standard would inhibit the FDIC in its receivership role when it must find solvent banks to take over insolvent banks."[36] As such, the district court denied a motion to strike an affidavit of a bank representative even though the representative relied on records of predecessor banks with whom he had "no apparent employment or agency relationship."[37]

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[32] Id.
[33] Id. at 1311.
[34] Id. (citing United States v. Keplinger, 776 F.2d 678, 694 (7th Cir. 1985)).
[35] Phillips v. Mortg. Elec. Registration Sys., Inc., No. 5:09–cv–2507, 2013 WL 1498956, at *2 (N.D. Ala. Apr. 5, 2013).
[36] Id. (quoting FirstMerit Bank, N.A. v. Balin, No. 11 C 8809, 2012 WL 4017948, at *4 (N.D. Ill. Sept. 11, 2012)).
[37] Id. (citing U.S. Bank Nat. Ass'n v. Am. Screw & Rivet Corp., No. 09 C 7312, 2010 WL 3172772, at *3 (N.D. Ill. Aug. 10, 2010) (holding a witness from successor bank could authenticate records of bank that went into receivership); Krawczyk v. Centurion Capital Corp., No. 06–C–6273, 2009 WL 395458, at *5 (N.D. Ill. 2009) (indicating a bank can rely on its predecessor's business records and that "[u]ltimately, the primary emphasis of Rule 803(6) is on the reliability or trustworthiness of the records sought to be introduced").

In Beal Bank, SSB v. Eurich,[38] Beal Bank, an assignee of the mortgage at issue, brought an action against Eurich to recover a deficiency on a mortgage note after a foreclosure sale. Beal Bank employed Electronic Payment Systems ("EPS") to service the loan.[39] At trial, Beal Bank introduced two computer printouts created by EPS to prove the amount of the deficiency.[40] Eurich first contended that the computer printouts were improperly admitted under the business records exception to the hearsay rule.[41] Eurich argued that Beal Bank failed to lay the proper foundation because Beal Bank did not present testimony concerning the business practices of EPS because Beal Bank's loan default manager merely testified that EPS serviced the note at issue. In rendering its decision, the Court made the following observations about the business records exception in Massachusetts:

> The statute states that a record made in the regular course of business "shall not be inadmissible ... because it is hearsay." G.L. c. 233, § 78. Rather, "[s]uch a record is presumed to be reliable and therefore admissible because entries in these records are routinely made by those charged with the responsibility of making accurate entries and are relied on in the course of doing business" (citations omitted). *Wingate v. Emery Air Freight Corp.*, 385 Mass. 402, 406, 432 N.E.2d 474 (1982). Furthermore, the "statute makes clear that the record is admissible even when the preparer has relied on the statement of others, by providing that 'personal knowledge by the entrant or maker' is a matter affecting the weight (rather than the admissibility) of the record." *Id.*, and cases cited. Although the preparer's hearsay sources must carry the same indicia of reliability and be shown to have been reported as a matter of business duty or business routine, this can be accomplished by presenting evidence of normal business practice, rather than by producing each speaker.[42]

In applying the above reasoning to the case at bar, the Court concluded that a representative of EPS did not have to testify before the printouts could be admitted as business records.[43] The

[38] 831 N.E.2d 909, 910 (2005).
[39] Id. at 911.
[40] Id.
[41] Id.
[42] Id. at 912.
[43] Id. at 912-13.

Court further noted that "EPS, as the bank's servicing agent, had a business duty accurately to maintain such records for the bank."[44]

Eurich further argued that, even assuming Beal Bank offered sufficient proof as to EPS's business practices, the printouts were still inadmissible because Beal Bank failed to establish the loan balance at the time it was acquired from its predecessors.[45] In observing general bank practices, the Court recognized that

> "[t]he problem of proving a debt that has been assigned several times is of great importance to mortgage lenders and financial institutions." *New England Sav. Bank v. Bedford Realty Corp.*, 246 Conn. 594, 607, 717 A.2d 713 (1998). Given the common practice of banks buying and selling loans, we conclude that it is normal business practice to maintain accurate business records regarding such loans and to provide them to those acquiring the loan. *See Wingate v. Emery Air Freight Corp.*, supra at 406, 432 N.E.2d 474. *See also United States v. Samaniego*, 187 F.3d 1222, 1224 n. 1 (10th Cir.1999) (including bank records in "class of records commonly viewed as particularly trustworthy"); *Federal Deposit Ins. Corp. v. Staudinger*, 797 F.2d 908, 910 (10th Cir.1986), quoting Weinstein's Evidence at 803–178 (1985) ("foundation for admissibility may at times be predicated on judicial notice of the nature of the business and the nature of the records ... particularly in the case of bank and similar statements"). Therefore, the bank need not provide testimony from a witness with personal knowledge regarding the maintenance of the predecessors' business records. The bank's reliance on this type of record keeping by others renders the records the equivalent of the bank's own records. To hold otherwise would severely impair the ability of assignees of debt to collect the debt due because the assignee's business records of the debt are necessarily premised on the payment records of its predecessors.[46]

D. The Business Records Exception in the Mortgage Servicing Industry

According to the FDIC, 341 banks failed in the United States between January 2010 and July 2014.[47] Once a bank fails or is acquired, it is incumbent upon the successor entity to be able to introduce the records of the predecessor bank. Similarly, the cases below address the common situation in the mortgage servicing industry in which a successor or assignee bank retains a third-

[44] Id. at 913.
[45] Id.
[46] Id. at 914.
[47] https://www.fdic.gov/bank/individual/failed/banklist.html.

party vendor to service its mortgage loans. Recognizing that documents can be admissible under the business records exception even if they were not "created" by the entity introducing the records, these courts properly apply the hearsay exception to situations involving mortgage servicing.

For example, Bank of Am., Natl. Assn. v. Ly[48] involved a foreclosure action brought by the note and mortgage holder, Bank of America, against the homeowners. Bank of America was the assignee of the mortgage and Home Loan Services, Inc. serviced the loan.[49] The homeowners contested the admissibility of an affidavit of an employee of Home Loan Services, Inc., which attached copies of the note, mortgage, and assignment and averred as to the monthly payments that had not been made.[50] The Court found that the affidavit was admissible under Rule 803(6) because the affidavit referred to business records kept in the course of Home Loan Services, Inc.'s business as a loan servicer and the affiant averred based on his personal knowledge as the servicing agent for the loan at issue for Home Loan Services, Inc.[51]

Similarly, in Residential Funding Co., LLC v. Terrace Mortgage Co.,[52] Residential Funding Co., LLC ("Residential"), sued Terrace Mortgage Company ("Terrace"), alleging Terrace breached the parties' contract when it refused to repurchase thirteen loans Residential had purchased from Terrace. Terrace argued that the documents which Residential relied on to prove its damages were hearsay because it was not clear whether the documents were prepared by Residential or GMAC Mortgage, LLC ("GMAC"), the entity who oversaw Residential's loan operations.[53] In rejecting Terrace's argument, the Court noted that "a record created by a third

[48] 2011-Ohio-437.
[49] Id. at *1.
[50] Id. at * 3.
[51] Id. at *2-*3.
[52] 725 F.3d 910, 913 (8th Cir. 2013).
[53] Id. at 921.

party and used as part of another entity's records meets the business records exception, so long as the entity relied on the accuracy of that record and the remaining requirements of Rule 803(6) are met."[54] The Court found the requirements of Rule 803(6) were met because GMAC had access to all of Residential's and its services' accounting and business documents and there was no dispute that the records were made in the course of regularly conducted business activity at Residential and GMAC.[55]

In E. Sav. Bank v. Bucci,[56] the court permitted a mortgage lender to introduce documents under the business records exception that were not created by the lender itself, but rather, a non-employee who was merely hired by the lender. In its decision, the court focused on whether the phrase "making the record was a regular practice of that activity" (Rule 803(6)(C)) means that the business itself had to "internally make the document." The court held that Rule 803(6)(C) does not require a business to make all documents in order for them to be admissible as an exception to the hearsay rule, stating: "[s]ince person with knowledge is not modified by employee and since someone can make the document from information transmitted by such person with knowledge, the language of the rule (practice of the regularly conducted business activity to make) does not prohibit introduction of company documents merely because the business hired an independent contractor or outside agent to make the document for them."[57]

U.S. Bank, N.A. v. Lawson,[58] involved a foreclosure action brought by the note and mortgage holder, U.S. Bank, against the homeowners. U.S. Bank was the assignee of the mortgage and Homeward Residential, Inc. ("Homeward") serviced the mortgage loan on behalf

[54] Id.
[55] Id.
[56] 2008-Ohio-6363, 2008 WL 5124559, (Ct. App. Ohio Dec. 12, 2008).
[57] Id. at *17.
[58] 2014-Ohio-463 appeal not allowed, 2014-Ohio-2487, 139 Ohio St. 3d 1418.

of U.S. Bank.[59] Homeward contracted with a third-party vendor, G. Moss and Associates, to generate and send a default letter to the homeowners.[60] The homeowners contested the admissibility of the default letter as hearsay.[61] The Court cited to E. Sav. Bank v. Bucci and stated that "the admission of such a record is a discretionary decision wherein the trial court determines if the person making the document sufficiently satisfies the trustworthiness foundational element of having a self-interest served through accurate entry on behalf of the business recipient."[62] The Court found that the default letter was prepared by G. Moss and Associates with information from Homeward's monitoring system and that "the document was generated by an agency retained by the business to be kept in the regular course of the business and for the purpose of a regularly conducted business activity."[63] As such, the trial court did not abuse its discretion in admitting the default letter under the business records exception.[64]

E. Conclusion

As detailed above, the notion that one must have "personal knowledge" of a document in order to lay the proper foundation for its admissibility is an outdated and incompatible requirement within the current framework and realities of the mortgage loan servicing industry. Instead, the business records exception to the hearsay rule, Rule 803(6), permits the introduction of a document so long as the person moving to admit the document has knowledge of the record keeping policies and procedures of the company currently possessing the document at issue. As long as these policies and procedures can be established, the document's origin should not limit its admissibility into evidence.

[59] Id. at *1.
[60] Id.
[61] Id.
[62] Id. at *6.
[63] Id.
[64] Id.