

Business Records Exception May Foil Creditor Assignees

By: Ellen Kaufman Wolf and Robin Mashal**

In 2015, the Second District and Fourth District courts of appeal issued conflicting opinions on whether a debt assignee who brings a limited jurisdiction collection action may prove its prima facie case with a declaration of the assignee's custodian of records, using the business records exception of California Evidence Code Section 1271.

The two cases were *Sierra Managed Asset Plan, LLC v. Hale*, 240 Cal. App. 4th Supp. 1 (2d Dist. 2015) (“*Hale*” case) and *Unifund CCR, LLC, v. Dear*, 243 Cal. App. 4th Supp. 1 (4th Dist. 2015) (“*Unifund*” case). The underlying actions in both cases were filed in limited jurisdiction. For limited jurisdiction actions, California Code of Civil Procedure Section 98 allows proof by declaration:

“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.

(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 departure from the hearsay rule as declarations are generally not admissible at trial. *Target Nat'l Bank v. Rocha*, 216 Cal. App. 4th Supp. 1, 7 (2013). 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. *Id.*; *Cach LLC v. Rodgers*, 229 Cal. App. 4th Supp. 1, 6 (2014).

Hale and *Unifund* courts both affirmed that use of Section 98 declaration was a proper procedure. The question was whether the declarations were sufficient under the business records exception of California Evidence Code Section 1271, which provides:

“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.” (emphasis supplied).

“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*, 234 Cal. App. 3d 769, 797 (1991). 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*, 174 Cal. App. 4th 301, 324 (2009).

The declarations in *Hale* and *Unifund* 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 held that a declaration or testimony from the assignee's custodian of records, at best, establishes that the assignee 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 *Unifund* court disagreed saying the *Hale* holding is too rigid in the consumer debt collection action setting. Evidence Code section 1271 allows the declaration to be made by the custodian or other qualified witness. Bank credit card statements are admissible as the mode and method of preparation can be inferred from the circumstances and the identity of the documents themselves. Since 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 "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." In unlimited civil actions, substantial discovery is conducted, and issues related to authentication, foundation and admissibility of records are generally resolved before trial. By contrast, in limited jurisdiction little or no discovery is conducted and the Section 98 declaration is the first opportunity the defendant has to view the evidence against him or her. Taking a restrictive interpretation of the business records exception for bank credit card collection account records would force the parties to conduct more discovery, and seek more court intervention, which would cause a burden on the trial courts, and increase the parties' attorney fees.

Notably, the underlying debts in *Hale* and *Unifund* were both purchased before The Fair Debt Buying Practices Act (California Civil Code Sections 1788.50, et. seq.) became operative. Effective January 1, 2014, The Fair Debt Buying Practices Act imposes a number of requirements on purchasers of charged-off consumer debt, before such purchasers may commence collection efforts.

*** Ellen Kaufman Wolf is the founding partner of Wolf Group L.A., a business law boutique for matters involving business, real estate, and estates, and emphasizing creditors' rights and remedies. With more than thirty years' experience, Ms. Wolf is the 2015-16 presiding Chair of the Executive Committee for the LACBA Remedies Section and the author of Matthew Bender Practice Guide: California Debt Collection and Enforcement of Judgments annual updates.*

*** Robin Mashal is the managing shareholder of Century City Law Group, APC. He currently serves as the Second Vice Chair of the LACBA Remedies Section.*