The Pasts Fickle Shadow A California Divide over the Business Records Exception.pdf

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I. INTRODUCTION

In the last year, a war has unexpectedly erupted over the business records exception (“BRE”) to the hearsay rule. In light of the BRE’s frequent utilization, the outcome could dramatically affect the way banks and others prove claims in bankruptcy cases. Fittingly, like so many of the rows over the common law’s moss-covered canons engendered by modernity’s advent, this dispute harkens back to a famed iteration of an old proscription and one of its more paltry exceptions. Seeing it as worse than any other sort of evidence, Sir William Blackstone heaped unflinching disdain on hearsay generally—long defined as out-of-court statements offered to prove the truth of the matter asserted therein—and on a kind of hearsay specifically—entries in “books of account, or shop-books” inscribed by nameless clerks and third persons. Of course, such entries sometimes constituted the best available proof, and the wary jurist conceded their rare admissibility if “accompanied with … proofs of fairness and regularity.” Still, they remained a “dangerous species of evidence,” their status as “full proof” in other realms nothing less than the civil law’s maleficient “distortion.”

In such terms, Blackstone sanctified the hearsay doctrine, “that most characteristic rule of the Anglo-American Law of Evidence, … the greatest contribution of that eminently practical legal system to the world’s methods of procedure,” and damned the BRE, a meager exemption regnant wisdom strove to circumscribe.

Centuries later, the laws of a newer world still honored this stern creed. Ever faithful, early American courts employed a straitened BRE, demanding that every entry be written by one with personal knowledge of the facts set forth within and attested to by its maker before its admission could be secured. At the same time, in a country in which business was “largely done on credit,” more and more records were admitted, and more and more convoluted exclusions were concocted. Eventually, this haphazard structure elicited an onslaught of disdain amongst scholars and practitioners. Devotees of this jaded view, the authors of the modern BRE, as originally codified in the Federal Business Records Act (“FBRA”) and later enacted as Federal Rule of Evidence 803(6) (“Rule 803(6)”), refined the exception and discarded its historical detritus. At present, under Rule 803(6), a business record’s admission depends on a demonstration of only five elements, verified by a qualified witness’ testimony or a statutorily authorized certification, a formulation soon implemented by thirty-seven states. Cognizant of this correspondence, state and federal courts have similarly construed and broadly interpreted the contours of the current era’s expansive BRE, “probably the most important hearsay exception” in today’s legal landscape. Although California based its BRE, inputted into Section 1271 of its Evidence Code, on the Uniform Business Records as Evidence Act (“UBRE”), its version greatly resembles Rule 803(6), leading to the same interpretive penchants’ manifestation.

In 2015, the interpretive tranquility that had come to this jurisprudence was suddenly ruptured. In that year, in Sierra Managed Asset Plan, LLC v. Hale (“Hale”), and Unifund CCR, LLC v. Dear (“Unifund”), two appellate divisions of the Superior Court of California issued conflicting opinions as to whether a debt assignee may demonstrate the BRE’s...
elements under § 1271, thereby conclusively proving its *prima facie* case, with no more than a declaration by the assignee’s custodian of records. *Hale*, soon followed by others, answered in the negative; *Unifund* concluded otherwise. Despite the state law focus of these opinions, for two reasons—language nearly identical to § 1271 appears in Rule 803(6), and federal and state courts have long accorded some respect to each other’s interpretations of similarly-worded evidentiary strictures—uncertainty has now been cast upon a rule pivotal to the smooth operation of the Bankruptcy Code (“Code”), the means by which countless claims are often proven. To assess the possible import of these two decisions on Rule 803(6)’s construction, the past must be parsed, as it sets the stage upon which text and theory clash.

II. APPLICABLE LAW: RULES AND CASES

A. Prelude: The Role of Rule 803(6) in Bankruptcy Litigation

Pursuant to Bankruptcy Rule 9017, the Rules govern evidentiary matters in bankruptcy cases and proceedings. For this reason, the viability of innumerable Code-cognizable claims, as embodied in an infinite variety of loan documents, depends upon their holder’s compliance with the BRE set forth in Rule 803(6). Indeed, in nearly every bankruptcy case, business writings play some decisive role, their speedy admission helping to ensure the efficient distribution of an estate’s assets and a prompt fresh start for the honest debtor, the Code’s primary ends, and to eliminate “unjustifiable expense and delay” without endangering a matter’s “just determination,” evidence law’s overarching goal. In short, a debtor’s resurgence and creditors’ recompense can ride on the BRE’s scope, an exception oft-invoked in business litigation and in bankruptcy court.

B. The Federal BRE

1. Brief History

At the dawn of the twentieth century, “a great deal of perplexity” enshrouded the hearsay doctrine and its BRE, with critics decrying its needless opacity and unpredictability. The rule itself, one court observed, had “become so circumscribed by so many petty and confusing limitations that lawyers often found it extremely difficult to get their clients’ ordinary business records into evidence”; its exceptions were deemed too numerous, “the resultant of conflicting considerations.” “Many large financial institutions, as well as industrial and commercial concerns” specifically disparaged the BRE, this “impossible” standard’s “unwield[iness]” turning “many of the simplest things of life, transactions so common as the sale and delivery of merchandise,” into “the most difficult to prove” despite the seeming rarity of irregularities. Sometimes, the courts’ stringent application of this cabined exception, one attorney general even contended, led to the exclusion of unimpeachable records in criminal cases and the “handicapp[ing]” of sundry prosecutions. So as “[t]o facilitate the admission of business documents,” “confusing restrictions” would need to fall, and “wearisome preliminaries” supplanted by a leaner norm. Convinced by these critiques, federal courts responded by fashioning just such a rule. Within this growing assembly, a novel verity took hold: “[T]he records of modern industrial activities” were “in effect the best … evidence of the transaction” upon confirmation of their identification, correctness, and regularity.

In 1936 and 1948, Congress inscribed this judicial criterion into statute. Henceforth, business records would be admissible as evidence of “any act, transaction, occurrence, or event … if made in the regular course of business, and if it was the regular course of such business to make such … records at the time … or within a reasonable time of the transaction or occurrence.” Exalting a new presumption, the test for admissibility would be “the character of the records and their earmarks of reliability … acquired from their source and origin and the nature of their compilation,” and “the common-law prerequisite to admission of a business record that a party call the entrant as a witness to
authenticate the record” was abandoned. 44 “All other circumstances of the making of such writing or record,” including lack of personal knowledge by “the entrant or maker,” would retain their significance, but they would now bear solely on credibility. 45 Notwithstanding the federal BRE’s recent codification, 46 these earliest “statutory relaxation[s] of … [a] rigid common law rule[ ]” 47 would prove “salutary” and “decisive” in an increasingly “complex and specialized” commercial world 48 and earn the steadfast support of varied “business interests.” 49

2. Rule 803(6)
In 1975, Congress adopted Rule 803(6), “a revised, but not necessarily more liberal, version” of the existing BRE patterned on the UBRE. 50 In fact, in the form submitted by the Court for Congress’ review, Rule 803(6) had been more broadly written, as it omitted the “business” and “regular practice” requirements then enumerated in § 1732 51 and covered any records produced “in the course of a regularly conducted activity.” 52 Unhappy with the proposed text’s “insufficient guarantees of reliability,” the House of Representative incorporated the extirpated limitations, 53 changes firstly rejected 54 but later accepted by the Senate. 55 Thusly narrowed to reflect such “serious misgivings about possible overbreadth,” 56 Rule 803(6) mostly adhered to § 1732’s plain text. 57

The new Rule 803(6) imposed six admission requirements on a business record’s proponent: (1) that record must be a “memorandum, report, or data compilation, in any form, of an act, event, condition, opinion, or diagnosis”; (2) it must have been “made at or near the time” of the event’s occurrence; (3) it must have been made “from information transmitted by … someone with knowledge”; (4) it must have been “kept in the course of a regularly conducted business”; (5) such record’s making must be “a regular practice of that activity”; and (6) all of these requirements must be shown by “the testimony of a custodian or another qualified witness” or “a certification that complies with Rule 902(11) or (12) or with a statute permitting certification.” 58 Consistent with this sextet, “[a] document prepared by a third party” can be “properly admitted as part of… [an] entity’s records if th[at] business integrated the document into its records and relied upon it,” 59 and a particular business record need not be prepared by the party seeking to introduce it. 60 Furthermore, as the Rule allows and in line with its spotlight on efficacy, certifications under Rule 902(11) now frequently serve as ready substitutes for the live testimony otherwise required to establish the BRE’s foundation. 61 Once a record’s proponent demonstrates Rule 803(6)’s prerequisites, an opponent may nevertheless defeat its admission by showing “that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.” 62

Justified on the grounds of reliability and necessity, 63 with the former virtue most often emphasized, 64 Rule 803(6) has been “construed generously in favor of admissibility.” 65 Consequently classified as “among the safest of the hearsay exceptions,” 66 Rule 803(6)’s BRE has seldom impeded admission of the commercial documents central to demonstrating a debt’s existence and an asset’s magnitude. 67 Rather, if the record exhibits even an iota of probative value, its exclusion rarely follows, dollars and cents duly pegged. 68

C. California’s BRE
1. Overview: Elements and Proof
In 1965, four years after the Judicial Conference of the United States described the development of federal rules of evidence as “meritorious” 69 but four years before the Rules were formally proposed, 70 California framed § 1271 on the preexisting “remedial” and “liberaliz[ing]” UBRE. 71 Per § 1271, for a proponent to demonstrate the four elements necessary to secure a record’s admission—that “(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.”

More simply, § 1271 requires that the foundational witness be someone who (a) possesses personal knowledge of either the facts in the record or the record-keeping system and (b) has a business duty to observe and report the facts recorded or received the recorded facts from someone with a business duty to observe and report those facts. In clarion terms, this section ultimately predicates a business record’s admission on its trustworthiness, the “chief foundation” of these writings’ “special reliability … the requirement that they … be based upon the first-hand observation of someone whose job it is to know the facts recorded.”

Although some inapposite but major difference exist, § 1271 and Rule 803(6) differ but meagerly and cohere overwhelmingly as to their foundational elements. Crucially, under the former, a record’s proponent bears the burden of demonstrating its trustworthiness; under the latter, an opponent must prove a record’s untrustworthiness. But, in other ways, statute and rule overlap. Both “define a business broadly and require the entry to be made in the regular course of business at or near the time the recorded event took place.” Neither rule nor statute compels testimonial evidence by a “custodian,” and each backs the use of a “qualified witness.” And “both dispense with the need to call a witness to identify the record and testify about the record’s mode of preparation under specified circumstances.” Pursuant to Section 98 of the California Code of Civil Procedure, such a person’s declaration or affidavit can provide sufficient foundation for admission in limited civil actions. Not so curbed, Rule 803(6) also permits such proof by incorporating Rule 902(11) and blessing the use of state approved certification requirements.

2. Unifund and Hale’s Opening Consensus

Prior to any discussion of these cases’ evidentiary discord, one obvious fact must be acknowledged: as to the governing standard and paradigm, the Hale and Unifund courts did not entirely disagree. Principally, both affirmed the propriety of the plaintiff-assignee’s utilization of § 98. Provided a party adhered to its predicate conditions by providing an opponent with timely service and an opportunity for the declarant’s cross-examination, each clarified, this section would always render “prepared testimony in lieu of direct testimony … admissible at trial” for purposes of satisfying § 1271. The Hale and Unifund courts thus viewed § 98 in the same way: “a noted departure from the hearsay rule, as declarations are generally not admissible at trial,” utilitarian efficiencies animated its formation and validate its application. The Unifund court even explicitly endorsed two more principles limned in Hale. First, to comply with § 98, “some other qualified witness other than a custodian or the person who created the record” may properly “testify as to the identity and mode or preparation of the documents.” Second, a trial court retains “wide discretion in determining whether a qualified person possesses sufficient personal knowledge for purposes of the business records exception.” For these two divisions, § 1271 and § 98 spoke clearly and operated in tandem, creating the same type of flexible and economical regime envisioned by the Rules’ drafters.

3. Unifund versus Hale

Two similar declarations by an assignee’s sworn custodian, submitted pursuant to § 98 and § 1271, constituted the crux of these tribunals’ subsequent divergence. In both cases, assignees attached credit card documents created and maintained by their predecessor in interest; as both creditors conceded, the declarants were neither the creators nor the authorized custodians of the original creditor documents. Subjected to cross-examination in Hale but not in Unifund, these declarations attested to the same general facts for the purposes of establishing the BRE’s requisite foundation, including:
(1) the declarant’s status as the assignee’s authorized agent and custodian; (2) his or her familiarity with the manner and method by which the assignee maintains its business books and records; and (3) his or her personal knowledge of the original creditor’s regular business practices, including its standard terms and conditions, with which the relevant credit card account documents complied. 96 Both declarants, however, disavowed any personal knowledge regarding the account and charges in question. 97

In the Hale court’s view, this kind of declaration could not satisfy § 1271. Even if his words were generously construed, the assignee’s affiant attested to no more than that his employer had received records originating from a creditor concerning the account in question, yet he was now being utilized so as to authenticate the unfamiliar assignor’s business practices. 98 Such a statement, sworn by such a relatively removed functionary, was “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,” as required by § 1271(d), 99 and thus “fell short of the foundation necessary for admission of business records as against a hearsay objection.” 100 True, § 98 “provides efficiencies to minimize the costs to the parties of litigation,” 101 and it would surely be expensive to force a remote assignee to obtain testimony from an original creditor’s custodian of records in every case. Even so, § 1271’s every prerequisite must be thoroughly shown, and only one result could follow the assignee’s failure to craft a declaration compatible with its immutable command: the striking of its declaration—and judgment in the borrower’s favor. 102

The Unifund panel recoiled from this outcome. 103 To explain its aversion, this division advanced three distinct propositions. First, § 1271(c) provides for a declaration by “other qualified witnesses,” a category into which its declarant appeared to fit. 104 Second, as a matter of law, “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,” it being “common knowledge that bank statements on checking accounts are prepared daily and that they consist of debit and credit entries based on the deposits received, the checks written and the service charges to the account.” 105 Finally, because an obligor can raise the same defense against an assignee as an assignor under California law, “little effort” would normally be “required by a defendant to deny the debt or challenge the accuracy of the records.” 106

Guided by these assumptions, the Unifund court faulted Hale’s holding for being “too rigid in the consumer debt collection action setting,” defying the “commonsense understanding of how credit card records are electronically generated.” 107 The Hale holding’s “restrictive interpretation of the business records exception for bank credit card collection account records,” the Unifund trio concluded, “would undoubtedly lead to more discovery, more court intervention burdening our already crowded trial courts, and more attorney fees incurred by both parties,” results “antithetical to the limited civil collection action.” 108 Presented with a declaration similar to the one struck down in Hale, permissive policy and liberal precedent impelled Unifund to validate it.

III. ANALYSIS
In light of present practice, the interpretations of California’s BRE advanced in Hale and Unifund may yet be extended to Rule 803(6)’s more recent version. 109 Indeed, the similarities in the pertinent statutes’ history and text almost compel congruence. Because these contrary opinions may influence Rule 803(6)’s future parameters, their reasoning must be viewed through that provision’s lens and dissected in accordance with “the traditional tools of statutory construction.” 110

In general, Unifund’s strengths mirror Hale’s weaknesses, and vice versa. One “seem[s] to gloss over difficulties that would arise from a more faithful application of the exception’s requirements,” 111 and the other utilizes “an abstract concept[]” with “little or no relation to differentiating good hearsay from bad” as a practical matter. 112 One almost
blindly fastens upon the text, a tactic inconsistent with both contemporary principles and the Rules’ discrete interpretive schematic. The other, in contrast, adopts “a more pragmatic approach” that arguably “relaxe[s]” a statutory requirement, though no court enjoys such leeway. Standing alone, neither quite conforms to the words and quiddity of Rule 803(6).

A. Hale’s Oversights

Though favorably regarded by several courts, Hale’s beguilingly spartan logic obscures its principal weakness as guidance to the construction of the federal BRE: a hyper-technical reading of § 1271 incompatible with the latter’s specific and general context. True, textualism continues to be every interpreters’ mantra. However, in construing the various federal rules, precedent disfavors a rigid and unblinking literalism. Instead, in this inescapably “holistic endeavor,” a rule’s text, background, and purpose must be consulted so as to divine its plain and unambiguous meaning.

As written, Rule 803(6) does not compel a party to “produce, or even identify, the specific individual upon whose first-hand knowledge the … [relevant record] was based.” The record must be “made at or near the time by—or from information transmitted by—someone with knowledge,” “kept in the course of a regularly conducted activity,” and prepared in accordance with the business’ “regular practice.” Still, “[a] sufficient foundation” is laid if a proponent demonstrates “that it was the regular practice of the activity to base such … records … upon a transmission from a person with knowledge.” The “qualified witness” has never needed to “be in control of or have individual knowledge of the corporate record” or “personally gather, input, and compile the information memorialized in a business record”; “familiar[ity] with the company’s recordkeeping practices” has alone remained essential.

Hale, however, mandated far more than this bare minimum when it struck the assignee’s declaration due to its witness’ dearth of “personal knowledge about the account or charges in question, other than what he knows as a result of acquiring the documents from” its originator. As federal courts have consistently noted, such a requirement of “personal knowledge” cannot be mined from Rule 803(6)’s plain text. In fact, in a report whose unusual unambiguity merits some deference, the Senate expressly disavowed any such interpretation. As such, due to the lack of a textual anchor for its “personal knowledge” criterion, the extension of Hale to Rule 803(6) would effectively engraft an absent standard onto an unambiguous text, a forbidden interpretive tack.

A contextual analysis of Rule 803(6) raises a different set of doubts about Hale’s possible extension. Unquestionably, due to Congress’ conservative emendations, its BRE was “not substantially different from that of the common law hearsay doctrine.” Yet, while Congress “did not intend to make the business record exception more restrictive than it had previously been,” it did design Rule 803(6) to “relax[] the requirement of producing witnesses, or accounting for nonproduction of, all participants in the process of gathering, transmitting and recording information which the common law had evolved.” Consistent with the Rules’ stress on fairness of procedure and curtailment of “unjustifiable” expenditure and dilatoriness, Rule 803(6) aimed to minimize “the expense and inconvenience of producing time-consuming foundation witnesses” in response to “the complex nature of modern business organizations.” Thus, the juridical “tendency to unduly to emphasize a requirement of routineness and repetitiveness” was condemned by Rule 803(6)’s drafters and their successors, and the demands imposed upon a business record’s foundation witness were explicitly and repeatedly lowered. Just as Rule 803(6)’s drafters privileged these factors in its creation, so too must courts consider these themes in its construal.
But, as the Unifund court recognized, Hale’s conclusion gives no weight to such concepts. Inevitably, Unifund conjectures, the evidentiary obligation Hale thrusts unto a record’s proponent would trigger “more discovery, more court intervention … , and more attorney fees incurred by both parties,” hindering the realization of Rule 803(6)’s well-known objectives. By requiring “that a witness testify about the various stops in the recording process to properly authenticate the record,” its version would revive the common-law’s “burdensome and crippling” restrictions, scorned even now. In point of fact, modern criticism of Rule 803(6) has focused on the seemingly accidental revival of precisely such confusing and proliferating constraints, a troublesome trend that would only be hastened by Hale’s embrace. Because the extirpation of these past constrictions always constituted “obvious and dominating general purpose” of Rule 803(6) and the Rules in toto, Hale does not just contravene Rule 803(6)’s text. With equal definitiveness, it defies its federal counterpart’s well-known spirit, a flaw nearly as fatal to its broader appeal.

B. Unifund’s Problems
Unifund, in turn, seemingly exhibits only one, albeit potentially dispositive, interpretive defect: in relying heavily on the utilitarianism embedded in Rule 803(6) and implicit in § 1271, that division may have waded beyond its rightful function. The reasons are twofold. First, § 1271(c) has always required testimony verifying the precise record’s “identity and the mode of its preparation.” Second, unlike Rule 803(6), a record’s proponent has always been bound to prove its trustworthiness pursuant to § 1271(d). Under California’s plain law, then, “it is not necessary that the person making the entry have personal knowledge of the transaction,” but if a custodian cannot identify a specific document’s “sources of information and … mode of preparation,” that record’s reliability and trustworthiness cannot be ascertained. In Hale’s view, its declaration proved no such truth; indeed, once cross-examined, its affiant appeared to admit the opposite. If so, no concerns regarding its holding’s cost or inefficiency could negate § 1271’s unambiguous command, as no court may refuse to abide by a law’s “chosen words” based on their impractical or harsh effects. Of course, § 1271’s history, like that of Rule 803(6), does contain some evidence supporting Unifund’s policy-based conclusion that the BRE’s interpretation should account for practical, most surely financial, factors. Nonetheless, no legislated text, as precedent expects and as other laws suggestively contain, says as much, with only California’s legislature, not its courts, singularly empowered to formulate a special evidentiary rule for bulk buyers’ sake.

Aside from this slip, even the complications feared by Unifund and key to its opposition to Hale may prove minimal in reality, further undercutting its allure. Unquestionably, Hale compels debt buyers to obtain affidavits executed by the original issuer’s custodian of records, and much expense and delay that Unifund’s holding avoids may follow upon its widespread dissemination. Yet, the assignment of consumer debts often occurs in huge bundles as part of an ongoing relationship between the assignor and the assignee. In such cases, one extensive master declaration from the assignor may satisfy Hale without yielding the exponentially “more discovery, more court intervention. . . , and more attorney fees” postulated in Unifund. So viewed, Hale scrupulously heeds a textual command at a minor inconvenience’s likely cost, a trade-off less extreme—and thus more palatable—than Unifund dared grant.

C. Bankruptcy’s Favorite?
In comparing Unifund and Hale, one more detail cannot be dismissed: seemingly, albeit not certainly, bankruptcy law’s most cherished principles correspond more with Unifund’s pragmatism than Hale’s ratiocination. Axiomatically, no procedural rule may be interpreted so as to defeat the realization of a statute’s plainly enunciated and entrenched purposes. As a result of this venerable tenet, whenever two viable constructions of the same procedural language can be posited, precedent compels adoption of the reading most consonant with the germane statutory scheme, for only such a route respects both rule and statute. As drafted and explicated, the Code prizes alacrity in a debtor’s liquidation
and reorganization, an impetus reinforced by Bankruptcy Rule 1001. Whatever its defects as an explication of § 1271 or § 98, Unifund’s logic serves these bankruptcy-specific ends without necessarily running afoul of Rule 803(6)’s fixed text. In other words, in the midst of a bankruptcy proceeding, the purpose behind the Code and the Bankruptcy Rules may boost Unifund’s pull and dampen Hale’s.

IV. CONCLUSION

In a world plagued by far fewer records, a stultifying formalism was abandoned, and a broadened BRE was forged. In only slightly different garb, this modern BRE would emerge in § 1732 and Rule 803(6), in the UBRE and § 1271, with simplicity and efficiency of operation its foremost aims. With centuries’ passage, as the records that it covered gained in legal import, the BRE has eased their admission as evidence, becoming one of the most commonly asserted hearsay exceptions. Certainly, in bankruptcy, an area of law in which proof of debt accumulated and credit given must be provided, the BRE’s functionality has determined the course of myriad cases. Fundamentally, Unifund esteems an invigorated exception, and Hale revives an almost forsaken wisdom. Regardless of their merits as a matter of California law, Unifund adheres more closely to Rule 803(6)’s tenor, as illuminated by a more formal past and as devised for a more amorphous present. Here at least, what’s past partly foretells, but does not wholly compel.


Footnotes

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1 The term “claim” encompasses any possible right to payment, 11 U.S.C. § 101(5); Mazzeo v. United States (In re Mazzeo), 131 F.3d 295, 302 (2d Cir. 1997), and the term “debt” is read as “coextensive” with “claim,” Pennsylvania Dep’t of Public Welfare v. Davenport, 495 U.S. 552, 558, 110 S. Ct. 2126, 2130, 109 L. Ed. 2d 588, 595 (1990). Consequently, any document essential to prove a debt is equally critical to a claim’s substantiation.


4 2 William Blackstone, Commentaries *368; see also Ganahl v. Shore, 24 Ga. 17, 28 (Ga. 1858) (McDonald, J., dissenting) (quoting this language).

5 In its later common-law form, the BRE was actually an amalgam of two exceptions. Thomas G. Dignan, Jr., Note, Evidence: Hearsay—Admissibility of Accident Reports Under the Federal Business Records Act, 61 Mich. L. Rev. 1369, 1370 (1963). The older exception was the “shop-book rule,” which facilitated the introduction of the small tradesman’s shop records into evidence. 61 Mich. L. Rev. at 1370. The second provided that records made in the regular course of business would be admissible when the entrant was unavailable to testify in person. 61 Mich. L. Rev. at 1370.


8 2 William Blackstone, Commentaries *368; see also Kent v. Garvin, 67 Mass. (1 Gray) 148, 150 (1854) (“To permit the books of a party to be competent proof under such circumstances, would be extending the rule applicable to this anomalous and dangerous species of evidence quite too far.”).

9 2 William Blackstone, Commentaries *368; see also Conklin v. Stamler, 8 Abb. Pr. 395, 399-400 (N.Y. C.P. 1858) (quoting Blackstone’s language but questioning his conclusion).


Bohan, 15 Kan. at 419-20.

United States v. Graham, 391 F.2d 439, 447 (6th Cir. 1968); Gordon v. Robinson, 210 F.2d 192, 198 (3d Cir. 1954); Kenneth W. Barton & Richard G. Cowart, The Enigma of Hearsay, 49 Miss. L.J. 31, 81 (1978). In 1813, for example, Chief Justice John Marshall reflected the consensus view: “Hearsay evidence is in its own nature inadmissible. … Its intrinsic weakness, its incompetency to satisfy the mind of the existence of the fact, and the frauds which might be practiced under its cover, combine to support the rule that hearsay evidence is totally inadmissible.” Queen v. Hepburn, 11 U.S.(7 Cranch) 290, 295-96, 3 L. Ed. 348, 350 (1813).

Barner v. Rule, 77 So. 521, 605-06 (Miss. 1917); Ganahl, 24 Ga. at 26.


28 U.S.C. § 695 (1936) (recodified in 28 U.S.C. § 1732 (1948)). With immaterial changes in language, 28 U.S.C. § 695 was reenacted in 1948 as 28 U.S.C. § 1732. Brucey v. Herrinda, 466 F.2d 702, 704 n.5 (7th Cir. 1972). In this article, any reference to “Section 1732” or “§ 1732” is to this law, also known as the Commonwealth Fund Act and One Shop Act, as passed in 1936 and reenacted in 1948.

In this article, any reference to “Rule” or “Rules” is to the Federal Rules of Evidence unless otherwise noted, and any reference to “Bankruptcy Rule” or “Bankruptcy Rules” is to the Federal Rules of Bankruptcy Procedure unless otherwise noted.

Adopted pursuant to the Rules Enabling Act, the various federal rules are treated as statutes enacted by Congress. 28 U.S.C. § 2072; see, e.g., Primiano v. Cook, 598 F.3d 558, 563 (9th Cir. 2010); Sims v. Great Am. Life Ins. Co., 469 F.3d 870, 878-79 (10th Cir. 2006); Amir Shachmurove, Purchasing Claims and Changing Votes: Establishing Cause under Rule 3018(a), 89 Am. Bank. L.J. 511, 528 n.31 (2015).


Cal. Evid. Code § 1271. The full exception appears in §§ 1271 through 1273. (§ 1271 defining “business,” and § 1273 governing absence of an entry in a business record). In this article, any and all references to “Section 1271” or “§ 1271” are to this particular California enactment.

Sidney Kwestel, The Business Records Exception to the Hearsay Rule—New is Not Necessarily Better, 64 Mo. L. Rev. 595, 599 (1999) (comparing Rule 803(6) and UBRE). For the relevant differences, see infra note 79.


James Bradley Thayer, A Preliminary Treatise on Evidence at the Common Law 521; see also 2 Kenneth S. Braun, et al., McCormick on Evid. § 286 (7th ed. 2013) (“[S]ome of the common law requirements were incompatible with modern conditions.”); Garcia v. Portuondo, 459 F. Supp. 2d 267, 283 n.84 (S.D.N.Y. 2006) (describing New York’s BRE as “enacted to overcome what were seen as deficient and overly technical common law rules”).

United States v. New York Foreign Trade Zone Operators, Inc., 304 F.2d 792, 796 (2d Cir. 1962); see also Edmund M. Morgan & John MacArthur Maguire, Looking Forwards and Backward at Evidence, 50 Harv. L. Rev. 909, 921 (1937) (characterizing
the hearsay rule to “an old-fashioned crazy quilt made of patches cut from a group of paintings by cubists, futurists and surrealists”).


Benjamin N. Cardozo, A Ministry of Justice, 35 Harv. L. Rev. 113, 121-22 (1921); see, e.g., Cub Fork Coal Co. v. Fairmont Glass Co., 19 F.2d 273, 274 (7th Cir. 1927).


New York Foreign Trade Zone Operators, Inc., 304 F.2d at 796.

Benjamin N. Cardozo, A Ministry of Justice, 35 Harv. L. Rev. at 122.

E. I. Du Pont De Nemours & Co. v. Tomlinson, 296 F. 634, 640-41 (4th Cir. 1924); Wisconsin Steel Co. v. Maryland Steel Co., 203 F. 403, 407 (7th Cir. 1913); Reyburn v. Queen City Sav. Bank & Trust Co., 171 F. 609, 615 (3d Cir. 1909).

E. I. Du Pont De Nemours & Co., 296 F. at 640-41; see, e.g., Valli v. United States, 94 F.2d 687, 693 (1st Cir. 1938); United States v. Mammoth Oil Co., 14 F.2d 705, 724 (5th Cir. 1926).


28 U.S.C. § 1732(a); United States v. Thompkins, 487 F.2d 146, 150 (8th Cir. 1973).

United States v. Smith, 521 F.2d 957, 962-63 (D.C. Cir. 1975); see also Johnson v. Lutz, 170 N.E. 17, 517-19 (N.Y. 1930) (noting that the BRE was not recognized at common law). Doubts can be raised about this oft-made assertion. James Bradley Thayer, A Preliminary Treatise on Evidence at the Common Law 527-28 at 521.


Sidney Kwestel, The Business Records Exception to the Hearsay Rule—New is Not Necessarily Better, 64 Mo. L. Rev. at 596.

Colvin v. United States, 479 F.2d 998, 1000 n.2 (9th Cir. 1973).


United States v. Oates, 560 F.2d 45, 73 n.30 (2d Cir. 1977).


Air Land Forwarders, Inc. v. United States, 172 F.3d 1338, 1342 (Fed. Cir. 1999).

Jack B. Weinstein & Margaret A. Berger, Weinstein’s Evidence Manual § 16.07[2][c] (2016); see, e.g., United States v. Adefehinti, 510 F.3d 319, 325 (D.C. Cir. 2007) (“[T]he custodian [of the records] need not have personal knowledge of the actual creation of the document.”) (internal quotation marks omitted); United States v. Ray, 930 F.2d 1368, 1370 (9th Cir. 1990) (“The phrase ‘other qualified witness’ is broadly interpreted to require only that the witness understand the record-keeping system.”)


Fed. R. Evid. 803(6)(E). That the opponent bears this burden was not always clear. See Fed. R. Evid. 803 advisory committee’s note to 2014 amendments.

See, e.g., Parker v. Reda, 327 F.3d 211, 214-15 (2d Cir. 2003); Certain Underwriters at Lloyd’s, London v. Sinkovich, 232 F.3d 200, 204-05 (4th Cir. 2000); United States v. Lipscomb, 435 F.2d 795, 802 (5th Cir. 1970).
In truth, reliability may be Rule 803(6)'s true “touchstone.” Giles v. Rhodes, No. 94 Civ. 6385 (CSH), 2000 WL 1425046, at *8 (S.D.N.Y. Sept. 27, 2000). Reliability was the reason why the Supreme Court classified the BRE as a “firmly-rooted” exception, Ohio v. Roberts, 448 U.S. 56, 66 n.8, 100 S. Ct. 2531, 2539 n.8, 65 L. Ed. 2d 597, 608 n.8 (1980), and Rule 803 is generally considered to house exceptions predicated on reliability and Rule 804 on the basis of necessity, Sam Stonefield, Rule 801(d)'s Oxymoronic—“Not Hearsay” Classification: The Untold Backstory and a Suggested Amendment, 5 Fed. Cts. L. Rev. 1, 13 (2011).

Conoco Inc. v. Department of Energy, 99 F.3d 387, 391 (Fed. Cir. 1996); accord Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 163 n.8, 109 S. Ct. 439, 446 n.8, 102 L. Ed. 2d 445, 459 n.8 (1988) (citing Fed. R. Evid. 803 advisory committee’s note); see also United States v. Williams, 205 F.3d 23, 34 (2d Cir. 2000) (“We have stated that Rule 803(d) favors the admission of evidence rather than its exclusion if it has any probative value at all.”) (internal quotation marks omitted); Zenith Radio Corp. v. Mitsubishi Elec. Indus. Corp. (In re Japanese Elec. Prods. Antitrust Litig.), 723 F.2d 238, 289 (3d Cir. 1983) (“[T]he regular practice requirement should be generously construed to favor admission[].”)

In this regard, the BRE operates no more liberally than the modern hearsay doctrine, a fact that may explain the appearance of complaints once made against the common-law’s manifold exceptions and strict dogma. See David A. Sklansky, Hearsay’s Last Hurrah, 2009 Sup. Ct. Rev. at 13; Paul S. Milich, Hearsay Antinomies: The Case for Abolishing the Rule and Starting Over, 71 Or. L. Rev. 723, 725 (1992).

Ohio v. Roberts, 448 U.S. at 66 n.8 (quoting Comment, 30 La. L. Rev. 651, 668 (1970)); accord Ray, 920 F.2d at 566.


Hale, 193 Cal. Rptr. 3d at 271.


Two examples merit mention. First, Rule 803(6) burdens a proponent with the obligation of showing that it was the regular practice of the business to create the record, not just that it was created in the course of a regularly conducted business activity. Compare Fed. R. Evid. 803(6)(c), with Cal. Evid. Code § 1271(c). Second, Rule 803(6) expressly allows for the admission of opinions as business records. Fed. R. Evid. 803(6). Section 1271 does not do so, and an opponent may thus always object to such records as containing inadmissible opinion. Miguel A. Mendez, California Evidence Code-Federal Rules of Evidence: I. Hearsay and Its Exceptions: Conforming the Evidence Code to the Federal Rules, 37 U.S.F.L. Rev. 351, 374 (2003).


Cal. Civ. Proc. Code § 98. A “limited civil action” is defined by statute. Cal. Civ. Proc. Code § 86(a). In this article, any and all references to “Section 98” or “§ 98” are to this particular enactment.


Unifund, 197 Cal. Rptr. 3d at 451-52; Hale, 193 Cal. Rptr. 3d at 269-70.
88 CACH LLC v. Rodgers, 176 Cal. Rptr. 3d 843, 847 (Cal. App. Dep’t Super. Ct. 2014); accord Unifund, 197 Cal. Rptr. 3d at 450; Hale, 193 Cal. Rptr. 3d at 270.
89 Target Nat’l Bank, 157 Cal. Rptr. 3d at 159 (cited in Unifund, 197 Cal. Rptr. 3d at 451-52; Hale, 193 Cal. Rptr. 3d at 270).
90 Unifund, 197 Cal. Rptr. 3d at 452; Hale, 193 Cal. Rptr. 3d at 269.
91 Unifund, 197 Cal. Rptr. 3d at 451; accord Hale, 193 Cal. Rptr. 3d at 271; see also Jazayeri v. Mao, 94 Cal. Rptr. 3d 198, 218 (Cal. Ct. App. 2009).
92 Unifund, 197 Cal. Rptr. 3d at 448-49; Hale, 193 Cal. Rptr. 3d at 269-72.
94 See Unifund, 197 Cal. Rptr. 3d at 449; Hale, 193 Cal. Rptr. 3d at 271.
95 See Unifund, 197 Cal. Rptr. 3d at 449; Hale, 193 Cal. Rptr. 3d at 271.
96 See Unifund, 197 Cal. Rptr. 3d at 449; Hale, 193 Cal. Rptr. 3d at 271.
97 Hale, 193 Cal. Rptr. 3d at 272.
99 Hale, 193 Cal. Rptr. 3d at 272 (alteration in original) (internal quotation marks omitted).
100 Hale, 193 Cal. Rptr. 3d at 269.
101 Hale, 193 Cal. Rptr. 3d at 272.
102 The Unifund court ordered rehearing on its own motion to consider Hale after receiving requests for publication. Unifund, 197 Cal. Rptr. 3d at 451.
103 Unifund, 197 Cal. Rptr. 3d at 452.
104 Unifund, 197 Cal. Rptr. 3d at 449-50; see also People v. Dorsey, 118 Cal. Rptr. 3d 362, 366-67 (Cal. Ct. App. 1974).
105 Unifund, 197 Cal. Rptr. 3d at 452.
106 Unifund, 197 Cal. Rptr. 3d at 450-51.
107 Unifund, 197 Cal. Rptr. 3d at 452.
109 Beech Aircraft Corp., 488 U.S. at 163.
110 Sidney Kwestel, The Business Records Exception to the Hearsay Rule—New is Not Necessarily Better, 64 Mo. L. Rev. at 601.
111 Paul S. Milich, Hearsay Antinomies: The Case for Abolishing the Rule and Starting Over, 71 Or. L. Rev. at 747.
113 Fed. R. Evid. 102.
118 The implications of this distinction should not be overlooked, for even it does not fit Rule 803(6)’s jurisprudence, Hale may still have accurately analyzed § 1271.

United Sav. Ass’n v. Timbers of Inwood Forest, 484 U.S. at 371.


United States v. Weinstock, 153 F.3d 272, 276 (6th Cir. 1998); accord Phoenix Assocs. III v. Stone, 60 F.3d 95, 101 (2d Cir. 1995).

Weinstock, 153 F.3d at 276; see also Curtis v. Perkins, 781 F.3d 1262, 1268 (11th Cir. 2015) (“The testifying witness does not need firsthand knowledge of the contents of the records, of their authors, or even of their preparation.”).

Weinstock, 153 F.3d at 276; see also United States v. Box, 50 F.3d 345, 356 (5th Cir. 1995) (“A qualified witness is one who can explain the system of record keeping and vouch that the requirements of Rule 803(6) are met[,]”).

Hale, 193 Cal. Rptr. 3d at 271-72.

E.g., Curtis, 781 F.3d 1 at 1267; Box, 50 F.3d at 356; United States v. Iredia, 866 F.2d 114, 119-20 (5th Cir. 1989).

Beech Aircraft Corp., 488 U.S. at 165 n.9 (“As Congress did not amend the Advisory Committee’s draft in any way that touches on the question before us, the Committee’s commentary is particularly relevant in determining the meaning of the document Congress enacted.”); McDow v. Smith, 295 B.R. 69, 78 n.18 (E.D. Va. 2003) (“In some instances, … unambiguous, clear, uncontradicted, and specific legislative history can serve as a reliable interpretive guide.”).


United States v. Freidin, 849 F.2d 716, 720 (2d Cir. 1988).

Fed. R. Evid. 803(6) advisory committee’s note to 1972 proposed rule; see also, e.g., United States v. Palin, No. 1:14CR00023, 2015 WL 5602640, at *2 (W.D. Va. Sept. 23, 2015) (“A review of the advisory committee notes to Rule 806(3) shows that the committee sought to relieve proponents of business records of the cumbersome requirement to secure live testimony of records custodians.”).

Fed. R. Evid. 102. How to rank the themes collected in Rule 102 is a question for another day. Cf. Dartez v. Fibreboard Corp., 765 F.2d 456, 462 (5th Cir. 1985) (noting that Congress provided the residual exception “was designed … to facilitate the basic purpose of the Rules: ascertainment of the truth and fair adjudication of controversies”).

Fed. R. Evid. 803(6) advisory committee’s note to 2000 amendments (cited in United States v. Klinzing, 315 F.3d 803, 809 (7th Cir. 2003)).


See, e.g., Unifund, 197 Cal. Rptr. 3d at 451-52; see also Midland Funding LLC, 2016 WL 6781099, at *5 (describing Unifund as the more “pragmatic” decision).

Unifund, 197 Cal. Rptr. 3d at 452.


Fed. R. Evid. 803(6) advisory committee’s note to 1972 proposed rule.

Miller v. Amusement Enters., Inc., 394 F.2d 342, 350 (5th Cir. 1968) (cited in United States v. DuBose, 598 F.3d 726, 731 (11th Cir. 2010)).

Cal. Evid. Code § 1271(c); People v. Hovarter, 81 Cal. Rptr. 3d 299, 324-25 (Cal. 2008).

Cal. Evid. Code § 1271(d); People v. Champion, 39 Cal. Rptr. 2d 547, 566 (Cal. 1985).


Hale, 193 Cal. Rptr. 3d at 271.


See Stiffler v. Lutheran Hosp., 965 F.2d 137, 140 (7th Cir. 1992) (“It is a well-established principle of statutory construction that silence is not an invitation to embark on a path of judicial lawmaking.”).


Unifund, 197 Cal. Rptr. 3d at 452.


In such cases, a rule can still be plain even as it is ineluctably ambiguous. See, e.g., In re Asher, 488 B.R. at 64; Amir Shachmurove, Purchasing Claims and Changing Votes: Establishing Cause under Rule 3018(a), 89 Am. Bank. L.J. at 530.

