

KEEPING DOCUMENTS OUT WITH A HEARSAY OBJECTION

My Last Video on beating a Sallie Mae Bank lawsuit I introduced a couple of Bill of Sales and Assignments.

The use of the debt buyer by these documents was part of your defense and offense.

But, how does the debt buyer get these in as “evidence” as opposed to being exhibits attached to the lawsuit. **With the use of an Affidavit.**

Account Stated Cases are largely Affidavit cases.

The biggest hurdle is overcoming the Hearsay Rule.

EDITOR:

So, here is what Hearsay is:

An Out of Court Statement Offered to Prove the Matter Asserted.

He said that She said that He’s got Halitosis (Bad Breath).

End EDITOR

So really, everything is Hearsay. Unless you find an Exception. With Records like Assignments and Bills of Sale, the collection companies rely upon the Business Record Exception. FRE 803(6).

Before you fall asleep, please Like Love and Subscribe and then go get a comfy pillow.

WARNING THIS IS GOING TO BE BORING VIDEO

EDITOR:

Three things to ask yourself when examining a document for hearsay:

Is the Document an Out of Court State Offered to Prove the Matter Asserted

Is there an Exception to the Hearsay Rule.

Was the document entered AFTER the litigation for self serving purposes.

END EDITOR

It is all about the perceived credibility and reliability of the evidence being presented.

Here are some fun exceptions just to keep you awake:

Editor:

Present Sense Impression. A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.

“The car is on fire!” while witnessing a car engulfed in flames, this statement may be admitted as evidence.

Excited Utterance. A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.

“I can’t believe he just robbed the bank!” immediately after witnessing a bank robbery, this statement may be admitted.

Family Records. A statement of fact about personal or family history contained in a family record, such as a Bible, genealogy, chart, engraving on a ring, inscription on a portrait, or engraving on an urn or burial marker.

Reputation Concerning Personal or Family History. A reputation among a person’s family by blood, adoption, or marriage — or among a person’s associates or in the community — concerning the person’s birth, adoption, legitimacy, ancestry, marriage, divorce, death, relationship by blood, adoption, or marriage, or similar facts of personal or family history.

EDITOR STOP

There are exceptions to the Hearsay Rule based upon a person’s unavailability:

EDITOR SHOW:

Rule 804 of the Federal Rules of Evidence outlines exceptions to the hearsay rule that apply when the declarant (the person who made the statement) is “unavailable” to testify in court, allowing certain out-of-court statements to be admitted as evidence even though the declarant is not present to be cross-examined.

Key points about Rule 804:

- **Unavailability requirement:**

To use an exception under Rule 804, the proponent of the statement must first establish that the declarant is unavailable to testify, which can include

situations like death, illness, memory loss, refusal to testify, or inability to be located.

- **Specific exceptions:**

Some key exceptions under Rule 804 include:

- **Former testimony:** If a witness previously testified at a hearing or deposition and is now unavailable, that testimony can be admitted if the opposing party had an opportunity to cross-examine them at the prior proceeding.
- **Dying declaration:** A statement made by a person who believes they are about to die, concerning the cause of their death, can be admissible.
- **Statement against interest:** A statement made by a declarant that was against their own interest at the time it was made can be admitted.
- **Statement of personal or family history:** Statements about a person's birth, marriage, or other family facts can be admitted.

END EDITOR

Important considerations:

- **Wrongful procurement of unavailability:**

If the party offering the hearsay statement is responsible for causing the declarant's unavailability, they cannot use the exception.

- **Burden of proof:**

The party seeking to use a Rule 804 exception must prove the declarant's unavailability and the reliability of the statement.

Here is the first Bill of Sale we looked at.

They name it the Bill of Sale and Assignment just to give it extra punch and meaning. However, whenever a debt collector adds more stuff to make up for their insecurity, we pounce on that to show less ownership.

Here is the first document we looked at from my video on beating a Sallie Mae Bank lawsuit.

EDITOR SHOW:

BILL OF SALE AND ASSIGNMENT

The undersigned Sallie Mae Bank, as a seller (the "*Bank Seller*"), each of the SMB Trusts listed named below (each a "*Trust Seller*", collectively, the "*Trust Sellers*" and together with the Bank Seller, the "*Sellers*"), and Deutsche Bank Trust Company Americas, as trustee (the "*Trustee*") for the benefit of each Trust Seller, for value received and pursuant to the terms and conditions of the Charged-Off Educational Loan Portfolio Purchase and Sale Agreement dated as of July 27, 2023, as amended or amended and restated from time to time (the "*Sale and Purchase Agreement*") among the SMB Trusts Party thereto from time to time, as Trust Sellers, Sallie Mae Bank, as Servicer, as a Seller, and as Administrator of the SMB Trusts, and UMB Bank, National Association, not in its individual capacity but solely as trustee on behalf of Southwood Financial Trust I ("*Buyer*"), effective as of the December 21, 2023 (the "*Closing Date*"), the Sellers named below and, in the case of the Trust Sellers, the Trustees for the benefit of each such Trust Seller, do hereby sell, assign and convey to the Buyer and its assignees, without recourse except as provided in the Sale and Purchase Agreement, all right, title and interest of such Seller, and in the case of the Trust Sellers, the Trustee for the benefit of each such Trust Seller, in the Accounts and Related Security identified on Annex I attached hereto. The portfolio of the Accounts accepted for purchase by the Buyer are listed on Annex I attached hereto (the "*Account Schedule*"). Any capitalized terms used herein and not defined herein shall have the meaning set forth in the Sale and Purchase Agreement.

Amounts due to the Sellers by Buyer pursuant to the Sale and Purchase Agreement shall be paid in U.S. Dollars by a wire transfer to be received by the Administrator by 1:00 p.m. Eastern time on the Closing Date, pursuant to wire instructions that are to be provided under separate cover by the Sellers.

This Bill of Sale and Assignment is executed without recourse except as stated in the Sale and Purchase Agreement. No other representation of or warranty of title or enforceability is expressed or implied.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date first written above.

SALLIE MAE BANK, as Administrator for the SMB Trusts named on Schedule I hereto

By: Leanne Carson
Name: Leanne Carson
Title: Vice President

SALLIE MAE BANK, as Servicer for the SMB Trusts named on Schedule I hereto

By: Leanne Carson
Name: Leanne Carson
Title: Vice President

SALLIE MAE BANK, as Bank Seller

By: Leanne Carson
Name: Leanne Carson
Title: Vice President

UMB Bank, National Association, not in its individual capacity but solely as trustee on behalf of Southwood Financial Trust I, as Buyer

By: Kristin L. Moore
Name: Kristin L. Moore
Title: Senior Vice President

Southwood Financial LLC, in its capacity as Trust Manager and Buyer Administrator

By: Matt Murray
Name: Matt Murray
Title: Chief Financial Officer

SMB PRIVATE EDUCATION LOAN GRANTOR TRUST 2015-A,
SMB PRIVATE EDUCATION LOAN GRANTOR TRUST 2015-B,
SMB PRIVATE EDUCATION LOAN GRANTOR TRUST 2015-C,
SMB PRIVATE EDUCATION LOAN GRANTOR TRUST 2016-A,
SMB PRIVATE EDUCATION LOAN GRANTOR TRUST 2016-B,
SMB PRIVATE EDUCATION LOAN GRANTOR TRUST 2016-C,
SMB PRIVATE EDUCATION LOAN GRANTOR TRUST 2017-A,
SMB PRIVATE EDUCATION LOAN GRANTOR TRUST 2017-B,
SMB PRIVATE EDUCATION LOAN GRANTOR TRUST 2018-A,
SMB PRIVATE EDUCATION LOAN GRANTOR TRUST 2018-B,
SMB PRIVATE EDUCATION LOAN GRANTOR TRUST 2018-C,
SMB PRIVATE EDUCATION LOAN GRANTOR TRUST 2019-A,
SMB PRIVATE EDUCATION LOAN GRANTOR TRUST 2019-B,
SMB PRIVATE EDUCATION LOAN GRANTOR TRUST 2020-A,
SMB PRIVATE EDUCATION LOAN GRANTOR TRUST 2020-B,
SMB PRIVATE EDUCATION LOAN GRANTOR TRUST 2020-TL-A,
SMB PRIVATE EDUCATION LOAN GRANTOR TRUST 2020-PT-A,
SMB PRIVATE EDUCATION LOAN GRANTOR TRUST 2020-PT-B,
SMB PRIVATE EDUCATION LOAN GRANTOR TRUST 2021-A,
SMB PRIVATE EDUCATION LOAN GRANTOR TRUST 2021-B,
SMB PRIVATE EDUCATION LOAN GRANTOR TRUST 2021-C,
SMB PRIVATE EDUCATION LOAN GRANTOR TRUST 2021-D,
SMB PRIVATE EDUCATION LOAN GRANTOR TRUST 2021-E,
SMB PRIVATE EDUCATION LOAN GRANTOR TRUST 2022-A,
SMB PRIVATE EDUCATION LOAN GRANTOR TRUST 2022-B,
SMB PRIVATE EDUCATION LOAN GRANTOR TRUST 2022-C,
SMB PRIVATE EDUCATION LOAN GRANTOR TRUST 2022-D,
SMB PRIVATE EDUCATION LOAN GRANTOR TRUST 2023-A,
SMB PRIVATE EDUCATION LOAN GRANTOR TRUST 2023-B

each as a Trust Seller

By: Deutsche Bank Trust Company Americas, not in its individual capacity but solely as Trustee for each above-named Trust Seller under the Grantor Trust Agreements

By: Timothy Johnson
Name: Timothy Johnson
Title: Assistant Vice President

By: Richard Vieta
Name: Richard Vieta
Title: Associate

Look at the copy of the Signature page. Look at the lines. See how it appears to be put together. Did all of the signors really stand around and sign that signature page. Hell No!

Rule 803(6) is the most used and abused. Lazy Judges let stuff in.

EDITOR

Remember the Definition of Exception: An *exception* is something that is left out or not done on purpose. An *exception* to a rule does not follow that rule

There must be strict compliance with an exception for it to come in against the general rule.

Key Elements of Rule 803(6):

Records of a Regularly Conducted Activity. A record (which includes a memorandum, report, or data compilation in any form) of an act, event or condition if:[,]

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

Above, no date of signatures

(B) the record was kept in the course of a regularly conducted activity of a “business”, which term includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit;

None of that mentioned

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

None of that mentioned

(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 opponent does not show that the source of information [n]or other circumstances indicate a lack of trustworthiness.

EDITOR STOP

So, the key in most of these cases is that the debt collector will show up with an Affidavit during the case to support the documents or proof. That must meet the 803(6) exception to come in. Here is an example of an Affidavit a Plaintiff brought in after the case was started and the Plaintiff knew my defenses. Trustworthy and reliable? Lets see.

EDITOR USE THE BUSINESS RECORDS ONE ATTACHED

So, the problem with the Affidavit that is offered to show the credibility of the document they are trying to enter as evidence under the Hearsay Exception, Business Records 803(6) is that it itself is Hearsay. Why,

First, look at the date it is signed: **There is none**. Why do that. Because Affidavits signed after the litigation has started are not considered trustworthy or credible but really signed for litigation purposes.

Second, it is not notarized. To still come in, the Affiant signor has to swear “under penalty of perjury” that the thing signed is the truth. There is nothing that says that.

Also, you have to show “personal knowledge” of the documents you are swearing to. There is nothing stated in the Affidavit that says this so this could be eliminated as hearsay.

HERE IS ANOTHER AFFIDAVIT:

EDITOR SHOW THE AFFIDAVIT OF ACCOUNT ATTACHED

BUSINESS RECORDS AFFIDAVIT

STATE OF OHIO
CITY OF COLUMBUS

Borrower Name: E

Loan No: *****

The undersigned, Donte Haley, being duly sworn, states and deposes as follows:

1. That Affiant is employed by Upstart Network, Inc. ("Upstart") in the position of Affidavit Support Specialist, whose duties and responsibilities include the management and preservation of electronic records of Upstart in relation to consumer loans and/or related participation interests acquired by Velocity Investments, LLC ("Purchaser") and previously serviced by Upstart and is duly authorized to make this affidavit.
2. Upstart acquired consumer loans and/or related participation interests from FinWiseBank and either Upstart, serviced such loans and/or participation interests for FinWiseBank prior to the transfer thereof from FinWiseBank to Upstart.
3. Velocity Investments, LLC acquired such loans and/or participation interests from Upstart Pass-Through Trust, Series 2021-ST8 Upstart, and Upstart has serviced such loans and/or participation interests for its own account and for the account of Upstart Pass-Through Trust, Series 2021-ST8 at all times when any such person has owned such loans and/or participation interests.
4. That attached hereto are 307 pages of business records from the computerized books and records of Upstart relating to the consumer loan of the above-referenced Borrower and bearing the account number listed above, including copies of the related promissory note or account agreement relating to said Loan.
5. That these 307 pages of records are kept by Upstart in the regular course of business, and it was part of the regular course of business of Upstart for an employee or representative with knowledge of the act, event, condition, opinion, or diagnosis, recorded to make the record or to transmit information thereof to be included in such record; and the record was made at or near the time of the act, event, condition, opinion or diagnosis.
6. That the computerized records of Upstart are kept and maintained on a computer system that is reliable, pursuant to a routine procedure designed to assure their accuracy, and the computer system was operating reliably at the time the record was made.
7. That Upstart does not create or keep hard copy originals of any such records in the ordinary course of its business.
8. That the records attached hereto are exact duplicates of the computer records maintained by Upstart

FURTHER AFFIANT SAYETH NOT.

By: 

Title: Affidavit Support Specialist

EXHIBIT

AFFIDAVIT OF ACCOUNT

STATE OF Virginia
COUNTY OF Chesapeake City

MaKayla Reaves, being first duly sworn, deposes and says:

- 1. That he/she is the Agent for Plaintiff, Spring Oaks Capital SPV, LLC ("Plaintiff"), is of legal age, is familiar with the facts made in this Affidavit and, if sworn as a witness, is competent to testify to them;
- 2. That in the ordinary course of business, Plaintiff regularly purchases contracts from the original creditor or their assignees;
- 3. That he/she is authorized to make this affidavit based on Plaintiffs behalf;
- 4. That he/she makes this Affidavit based upon Plaintiff's books and/or records of account in existence and thus far discovered in the course of preparing this Affidavit.
- 5. That Defendant, § ser ("Defendant"), is justly indebted to Plaintiff in the amount of \$7, including interest of \$.00 as of May 1, 2024, on Account Number : *****6
- 6. That there are no set-offs, credits, by payment or return, or allowances due Defendant by Plaintiff.

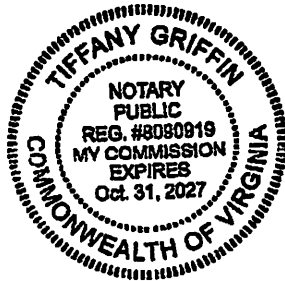
Spring Oaks Capital SPV, LLC

By: MaKayla Reaves
[Signature]
Its: Custodian of Records

COMMONWEALTH OF VIRGINIA
COUNTY OF CHESAPEAKE CITY

Sworn to (or affirmed) and subscribed to before me, this
20th day of May, 2024 by MaKayla Reaves

[Signature]
Notary Signature
Oct. 31, 2027
Notary Commission Expiration Date
8090919
Notary Registration Number



I laughed when I saw this one in a case. See the Smelly SOCS video I did above:

(6) Record of a Regularly Conducted Activity. A record of an act, transaction, occurrence, event, condition, opinion, or diagnosis 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 a rule prescribed by the Supreme Court or with a statute permitting certification; and

(E) the opponent does not show that the source of information or the method or circumstances of preparation indicate a **lack of trustworthiness**.

The document does not state it was made by a person with knowledge. There is nothing personal about this document. It is all he/she and talks about Plaintiff' experience and not her own. Also, she is an agent and not a member or employee of the Plaintiff.

If done during litigation, not trustworthy. Also, how come nothing mentioned on how the Plaintiff received the debt and from whom.

Nothing mentioned in the Affidavit about the Affidavit being made as a regular practice of Affiant. What is her job?

What is the source of the information and is it attached to the Affidavit. This Affidavit is really nothing and just about saying the Defendant owes a debt but with no reason why.

The person soon left their position when I asked to depose the witness. Maybe setting up an unavailable exception to hearsay.

THINGS TO LOOK FOR IN DOCUMENTS AGAINST YOU:

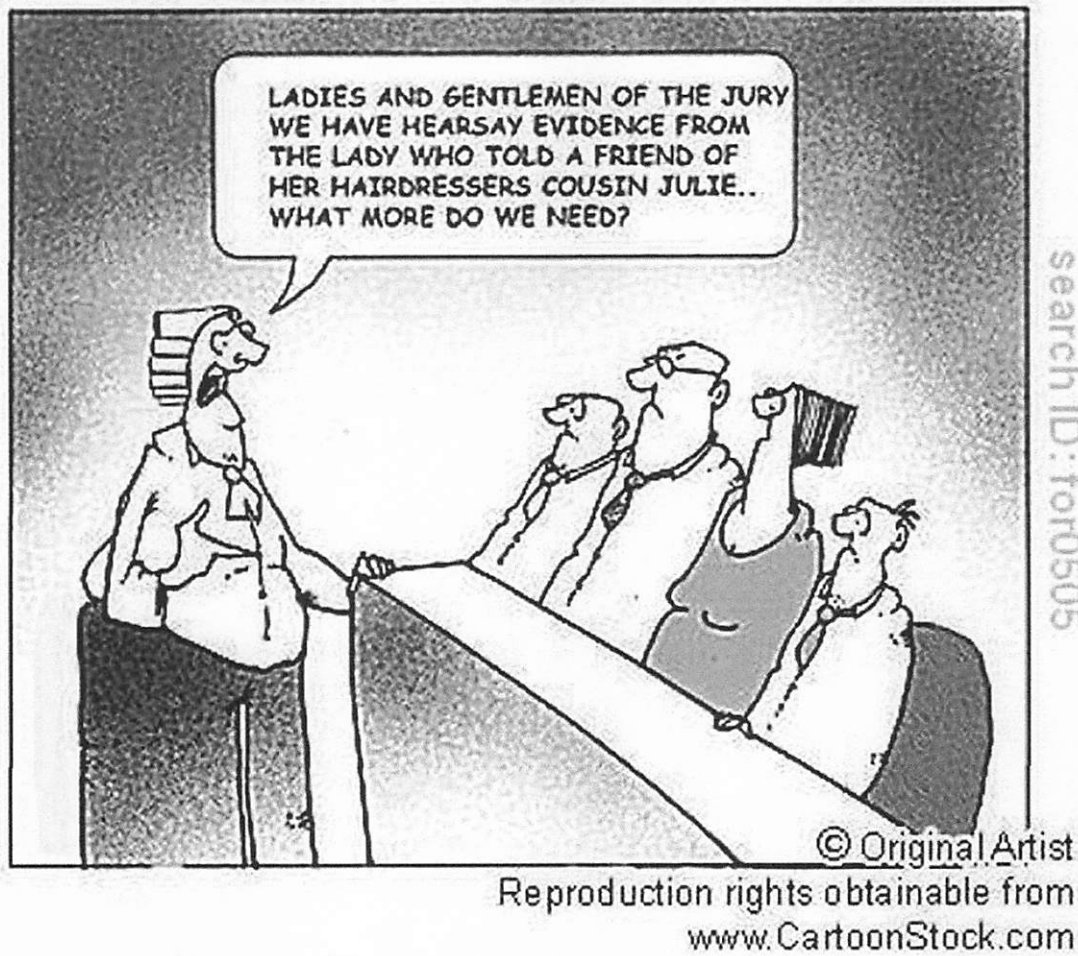
Always look at the claim of personal knowledge.

Look for credibility of document, how and when signed and by whom.

Is the document trustworthy or one sided and brought during the litigation: We talk about when the document is signed as being useful to us.

Is there an exception to the Hearsay Rule. Know the exceptions. Knock out the Affidavit. Account Stated Claim.

EDITOR SHOW:



Fran, Cartoonstock (available at <https://www.cartoonstock.com/cartoonview.asp?catref=for0505>)