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Expanding Wisconsin's Approach to the Business Records Exception

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EXPANDING WISCONSIN'S APPROACH TO THE BUSINESS RECORDS EXCEPTION

This Comment analyzes Wisconsin's application of the business records exception when a litigant seeks the admission of third-party records. In 2010, the Wisconsin Court of Appeals, in Palisades Collection LLC v. Kalal*, applied a narrow interpretation of the exception's requirements that stands in contrast to manner in which federal jurisdictions apply the exception in the same context. This Comment addresses the question of whether Wisconsin's narrower construction of the exception is the best approach to the evidentiary rule. In doing so, this Comment first reviews the federal business record exception, its requirements, and federal courts' treatment of the foundational requirement for third-party records. This Comment then does the same for the Wisconsin exception, discussing the challenges and harms created by Wisconsin's narrow approach. Finally, it suggests that Wisconsin adopt an approach similar to that of a growing number of federal courts.*

I. INTRODUCTION

A newly married middle class couple—let's call them Jim and Pam—purchased their first home in Janesville, Wisconsin, in 2007 with no down payment. Pam was employed as a stylist at a local salon and spa; Jim worked the assembly line at the local General Motors plant. Although money was tight, they met their monthly obligations and were still able to eat out occasionally. In early 2008, the couple announced they were expecting their first child. In anticipation of being a stay-at-home mom, Pam left her job at the salon. Unfortunately, later that year, Jim received notice that General Motors planned to close the Janesville plant, leaving him without a job.

As shifts were cut back and production slowed, financial pressures increased. Medical bills for the new baby girl, Cece, mounted. Jim and Pam struggled to meet their monthly financial obligations. They began to miss their mortgage payments. Credit card payments were reduced to the minimum. By the time the plant closed in April of 2009, Jim and Pam were swimming in debt and seemingly unable to find relief.

One of the couple's original creditors, Sabre Bank, frustrated in its attempts to collect on the debts, sold the debts to third-party creditors for five cents on the dollar, writing off the remainder. Jim and Pam then received collection notices from the new creditors. In 2013, the couple was unable to make suitable arrangements with one of the new creditors—Dunder Mifflin Financial (Dunder Mifflin). Dunder Mifflin, the purchaser of Jim and Pam's credit card debt, served the couple with a summons and complaint. Dunder Mifflin moved for summary judgment. To support the motion, Dunder Mifflin submitted its own financial records, which included the records acquired from Sabre Bank. To meet the foundational requirements of the business records exception, Dunder Mifflin also submitted an affidavit from its records custodian, Kelly Kapur, declaring that she fully understood Dunder Mifflin's process for creating the records and could attest to the records' accuracy. How will the court rule? How *should* the court rule? What is the proper application of the business records exception when parties rely on third-party records as part of their own business records?

The issue presented in the above hypothetical is arising in courtrooms across the country with increasing frequency. "Across the nation, there is a surge in lawsuits against people who aren't paying their bills, driven by the debt-buying industry that has boomed . . . as a sea of

souring loans and credit-card obligations have become cheaper and cheaper to buy amid hard economic times."[1] The lawsuits are not coming from the original debt holders but from debt purchasers.[2] Debt purchasers can buy debts for pennies on the dollar and commence the collection process.[3] When the collection process fails, these companies turn to the courts.[4] Wisconsin has not proved immune to these types of lawsuits.[5] The surge of debt collection suits being brought by successors in interest to the debt brings with it the question of whether the business records exception in Wisconsin is appropriately interpreted to protect both creditors and debtors.

In 2010, the Wisconsin Court of Appeals addressed the application of the business records exception in its opinion in *Palisades Collection LLC v. Kalal*.[6] The case raised the question of what a debt purchaser must do to lay a foundation for the records of the original debt holder in order for the business records exception to apply.[7] The court held that, absent a qualified witness who could attest to the creation of the original

1. Jessica Silver-Greenberg, *Boom in Debt Buying Fuels Another Boom—In Lawsuits*, WALL ST. J., Nov. 29, 2010, at A1.

2. *Id.* ("The big explosion in lawsuits is coming not from lenders but from firms who buy debt.").

3. Karen Weise, *The Debt Collection Business Isn't Pretty*, BLOOMBERG BUSINESSWEEK (Feb. 1, 2014), http://www.businessweek.com/articles/2013-02-01/the-debt-collection-business-isn-t-pretty, *archived at* http://perma.cc/GKU3-Q5S6 ("On average, a buyer will pay 4¢ on the dollar.").

4. Silver-Greenberg, *supra* note 1, at A16 (describing the involvement of courts in the debt-buying industry as an "explosion").

5. *See, e.g.*, Wells Fargo Bank, N.A. v. Alexander, No. 2012AP002236, 350 Wis. 2d 506, 838 N.W.2d 137 (Wis. Ct. App. Aug. 15, 2013) (unpublished table decision); Bank of Am. N.A. v. Minkov, No. 2012AP2643, 350 Wis. 2d 507, 838 N.W.2d 137 (Wis. Ct. App. Aug. 8, 2013) (unpublished table decision); Dow Family, LLC v. PHH Mortg. Corp., 2013 WI App 114, 350 Wis. 2d 411, 838 N.W.2d 119; Bank of Am. NA v. Neis, 2013 WI App 89, 349 Wis. 2d 461, 835 N.W.2d 527; Cent. Prairie Fin. LLC v. Yang, 2013 WI App 82, 348 Wis. 2d 583, 833 N.W.2d 866; PNC Bank, N.A. v. Bierbrauer, 2013 WI App 11, 346 Wis. 2d 1, 827 N.W.2d 124; Arch Bay Holdings, LLC-Series 2010A v. Gartland, No. 2012AP756-FT, 344 Wis. 2d 299, 821 N.W.2d 414 (Wis. Ct. App. Aug. 30, 2012) (unpublished table decision); Lyon Fin. Servs., Inc. v. Dr. Manelle Fernando Med. Clinic, Inc., No. 2011AP222, 338 Wis. 2d 212, 808 N.W.2d 175 (Wis. Ct. App. Nov. 10, 2011) (unpublished table decision); BAC Home Loan Servicing, L.P. v. Williams, No. 2010AP002334, 337 Wis. 2d 557, 806 N.W.2d 269 (Wis. Ct. App. Sept. 29, 2011); Bank of N.Y. v. Cano, No. 2010AP000477, 331 Wis. 2d 731, 795 N.W.2d 493 (Wis. Ct. App. Jan. 20, 2011) (unpublished table decision); HSBC Bank Nev. NA v. Griswold, Nos. 2010AP759, 2010AP1826, 331 Wis. 2d 489, 795 N.W.2d 64 (Wis. Ct. App. Dec. 30, 2010) (unpublished table decision).

6. 2010 WI App 38, 324 Wis. 2d 180, 781 N.W.2d 503.

7. *Id.* ¶¶ 8, 11, 13.

debt records, the records were hearsay.[8] The holding in *Palisades*, which is a narrow interpretation of the exception's requirements, stands in contrast to various federal jurisdictions' application of the exception in the same context.[9] These contrasting interpretations and applications of the business records exception invite the question of whether Wisconsin's narrower construction of the exception is the best approach to the evidentiary rule.

This Comment contends that Wisconsin's foundational requirements for third-party records to qualify for the business records exception are too restrictive. In doing so, this Comment first reviews the federal business record exception, its requirements, and federal courts' treatment of the foundational requirement for third-party records.[10] This Comment then does the same for the Wisconsin exception, discussing the challenges and harms created by Wisconsin's narrow approach.[11] Finally, it suggests that Wisconsin adopt an approach similar to that of a growing number of federal courts.[12]

II. THE BUSINESS RECORDS EXCEPTION

"Since the early nineteenth century, the law of evidence has carved an ever broadening hearsay exception for records of regularly conducted activities."[13] "Widespread acceptance of [the] . . . exception followed a 1927 study that proposed" it be codified in every jurisdiction.[14] The exception was included when Congress passed the Federal Rules of Evidence in 1975.[15] "Today the business records exception is codified in virtually every jurisdiction, with most codifications patterned on [Rule] 803(6)."[16] This rule describes records of a regularly conducted activity as

8. *See id.* ¶¶ 23, 26.

9. *Compare infra* Part II.B., *with infra* Part III.

10. *See infra* Part II.

11. *See infra* Parts III & IV.

12. *See infra* Part V.

13. 7 DANIEL D. BLINKA, WISCONSIN PRACTICE SERIES: WISCONSIN EVIDENCE § 803.6, at 764 (3d ed. 2008) ("At its inception the rule was a relatively narrow 'shop book' exception that evolved into the broader 'business records' provision by the early twentieth century. Reliability and convenience fueled the rule's expansion." (footnote omitted)).

14. Sidney Kwestel, *The Business Records Exception to the Hearsay Rule—New Is Not Necessarily Better*, 64 MO. L. REV. 595, 595 (1999) (footnote omitted).

15. *Id.* at 596.

16. *Id.* at 596–97 (footnote omitted).

> a record of an act, 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 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.[17]

The rule was created because of the difficulty, and sometimes impossibility, of identifying and calling every person involved in creating business records.[18] This exception, commonly known as the business records exception, comprises a data compilation made and kept in the ordinary course of business by a person with personal knowledge or from information supplied by a person with personal knowledge of the event at or near the time when the recorded event occurred.[19]

Generally, hearsay exceptions, like the business records exception, "are based on some circumstantial guarantee of trustworthiness that is thought to warrant admissibility notwithstanding the lack of cross-examination."[20] The basis for the business records exception is that the records are sufficiently reliable because they are systematically created, maintained, and relied upon by the entity for conducting business.[21]

17. FED. R. EVID. 803(6).

18. CLIFFORD S. FISHMAN, A STUDENT'S GUIDE TO HEARSAY § 8.39 (2d ed. 1999) ("The necessity for such a rule is obvious. It is often impractical and inconvenient, and sometimes impossible, to identify, let alone call as a witness, every person who participated in making a typical business record.").

19. ANTHONY J. BOCCHINO & DAVID A. SONENSHEIN, A PRACTICAL GUIDE TO FEDERAL EVIDENCE: OBJECTIONS, RESPONSES, RULES, AND PRACTICE COMMENTARY 218 (7th ed. 2005).

20. PAUL C. GIANNELLI, UNDERSTANDING EVIDENCE § 33.02 (2003) (emphasis omitted).

21. 10 TED M. WARSHAFSKY, FRANK T. CRIVELLO II, WISCONSIN PRACTICE SERIES: TRIAL HANDBOOK FOR WISCONSIN LAWYERS § 6:13, at 421 (3d ed. 2005) ("The rationale for the exception is that such records are sufficiently reliable due to the systematic checking of the records, the regularity with which they are kept, the reliance placed upon them by the enterprise or persons engaged in the activity, and the duty of the preparer to keep the records accurately.").

Therefore, the exception is based on an assumption of self-interest; most businesses cannot operate without accurate records.

> The federal drafters echoed this rationale, writing that the reliability of business records "is said variously to be supplied by systematic checking, by regularity and continuity which produce habits of precision, by actual experience of business in relying upon them, or by a duty to make an accurate record as part of a continuing job or occupation."[22]

Because a business has a duty to create accurate records and consistently relies on such records to conduct business, there is an implicit guarantee of trustworthiness to the records.[23] Triers of fact can rely on the records based upon the business's reliance on the records, routine practice of creating the records, and duty to produce such records.[24] Thus, "[t]he exception is premised on the notion that if the record is good enough to do business on, then it ought to be reliable enough for admissibility in court where issues regarding the business are litigated."[25] Following this reasoning, we see that "[t]he federal rules and practice favor the admission of evidence" of probative value rather than the exclusion of such evidence.[26]

A. Requirements to Meet the Exception

To qualify for the exception, records must meet several requirements. The records can take almost any form and can even include opinions, as long as they meet the five statutory requirements.[27]

22. GIANNELLI, *supra* note 20, § 33.10[B] (quoting FED. R. EVID. 803 advisory committee's note); s*ee also* BLINKA, *supra* note 13, § 803.6, at 764 ("Reliability stemmed from the recording of recurring, relatively routine events by employees paid to keep track of them. Convenience inhered in the impracticality of requiring the proponent to produce all such employees, a burden unlikely to produce more accurate information than the record itself.").

23. GIANNELLI, *supra* note 20, § 33.10[E] ("The trustworthiness guarantee that supports the exception is [the business duty requirement].").

24. FISHMAN, *supra* note 18, § 8.39 ("The reliability of business records is based on three considerations: reliance, routine practice, and duty.").

25. BOCCHINO & SONENSHEIN, *supra* note 19, at 219–20.

26. United States v. Carranco, 551 F.2d 1197, 1200 (10th Cir. 1977).

27. BOCCHINO & SONENSHEIN, *supra* note 19, at 218 ("A record of regularly conducted activity, known in common law as a business record, is a writing or data compilation which records activities or happenings, including opinions, which are made in the ordinary course of a regularly conducted activity, kept in the course of such activity, and created by or from a person with personal knowledge of the contents of the record, at or near the time of the event recorded."); *see also* FED. R. EVID. 803(6).

First, the records must be made at or near the time of the recorded event by a person with knowledge of the event, or from information transmitted by a person with knowledge of the event.[28] The entry does not have to be created by the person with knowledge.[29] It is sufficient that the entry be created by another person via information provided by the person with knowledge.[30] "This provision does not require that the 'person with knowledge' be produced at trial or even identified."[31] Rather, the phrase "person with knowledge" implies that it is enough for the party "to show that it was the regular practice of the activity to base such memorandums, reports, records, or data compilations upon a transmission from a person with knowledge."[32]

This leads to the second and third requirements—the record must be kept in the course of a regularly conducted activity of the business, and the making of the record must have been a regular practice of that activity.[33] Every codified version of the statute requires that the document be made in the regular course of business for the exception to apply.[34] However, not every activity of a business is a regularly conducted activity. For instance, "[i]f the activity is an irregular occurrence, or single transaction, records engendered thereby will not qualify for this exception to the hearsay rule."[35] This means that the entity must regularly conduct its business in the manner recorded, and the creation of the record must be a regular practice for the business. "If 'the supplier of the information . . . does not act in the regular course, an essential link is broken; the assurance of accuracy does not extend to the information itself, and the fact that it may be recorded

28. FED. R. EVID. 803(6)(A).

29. DAVID F. BINDER, HEARSAY HANDBOOK, 4TH, § 16:8, at 443 (2014–2015 ed. 2014)

30. *Id.* ("In short, the entry need not have been made by a person with knowledge, so long as the information was transmitted to the entrant, directly or indirectly, by a person with knowledge.").

31. GIANNELLI, *supra* note 20, § 33.10[D], at 472.

32. Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 505 F. Supp. 1190, 1237 (E.D. Pa. 1980) (quoting S. REP. NO. 93-1277, at 17 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7063), *aff'd in part*, *rev'd in part sub nom*. *In re* Japanese Elec. Products Antitrust Litig., 723 F.2d 238 (3d Cir. 1983), *rev'd sub nom*. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986); *see also* FED. R. EVID. 803 (6)(B)–(C).

33. FED. R. EVID. 803 (6)(B)–(C).

34. Kwestel, *supra* note 14, at 602 ("Each codified version of the business records exception expressly conditions admissibility on a showing that the document was made in the regular course of business . . . .").

35. BINDER, *supra* note 29, § 16:3, at 421.

with scrupulous accuracy is of no avail.'"[36] The record making must be a regular practice.[37]

The fourth requirement is that the first three requirements must be shown by the testimony of the custodian or other qualified witness.[38] This witness lays the foundation for the records and may be anyone with personal knowledge of how the records are created for the entity.[39] Accordingly, "The phrase 'other qualified witness' should be given the broadest interpretation; the witness need not be an employee of the entity so long as the witness understands the system."[40] Foundation for the records may also be laid in other ways.

> A foundation for admissibility may at times be predicated on judicial notice of the nature of the business and the nature of the records as observed by the court, particularly in the case of bank and similar statements. Alternatively, the parties may stipulate that the records were filed and prepared in the regular course of business, or an admission of a party may establish that the records were ones of regularly conducted activity, or the records may be admissible pursuant to the residual hearsay exception of Rule 803(24).[41]

Finally, the fifth requirement is that "neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness."[42] This allows for judicial discretion in applying the business records exception.

36. GIANNELLI, *supra* note 20, § 33.10[E] n.104 (quoting Fed. R. Evid. 803 advisory committee's note).

37. Kwestel, *supra* note 14, at 603 ("Regularity of record making, therefore, is an integral part of the business records exception, regardless of the precise statutory language.").

38. FED. R. EVID. 803 (6)(D).

39. G. MICHAEL FENNER, THE HEARSAY RULE 231 (2003) ("The sponsoring witness can be anyone who has first-hand knowledge of the routine record-keeping practices of the business activity in question."); *see also* BINDER, *supra* note 29, § 16:11, at 463 ("['Other qualified witness'] has generally been interpreted to include, at the least, anyone who understands and can articulate the record making and record keeping system of the business or businesses involved.").

40. Thomas P. Egan & Thomas J. Cunningham, *Admission of Business Records into Evidence: Using the Business Records Exception and Other Techniques*, 30 DUQ. L. REV. 205, 212 (1992).

41. *Id.* at 212–13 (quoting 4 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 803(06)[2], at 178–79 (Matthew Bender & Co.1990)) (internal quotation marks omitted).

42. FED. R. EVID. 803 (6)(E).

B. The Federal Business Records Exception and Third-Party Records

In applying the business records exception to entities submitting third-party records, federal courts have taken a broad view of the exception.[43] It appears there is "[a] growing circuit consensus suggest[ing] that the . . . business record exception to the hearsay rule can easily incorporate records maintained by a third party."[44]

As part of this broad approach to the exception, some courts are requiring less of a foundational showing in certain contexts.[45] For example, in *United States v. Johnson*, a man convicted of money laundering argued that the district court erred by admitting into evidence bank receipts that reflected money transfers to and from the defendant because the receipts were admitted through the testimony of the individual investors that had received the receipts and not the custodian of records from the bank.[46] On appeal, the defendant argued that the individuals were not qualified witnesses under the business records exception, thus the transfers lacked foundation.[47]

The Tenth Circuit disagreed, stating first that the decision to admit or exclude evidence is within the trial court's discretion and therefore receives a high level of deference.[48] The court reasoned that "[a] foundation for admissibility may at times be predicated on judicial notice of the nature of the business and the nature of the records as observed by the court, particularly in the case of bank and similar statements."[49] The court reviewed the record as a whole and found that the circumstances surrounding the transactions demonstrated that the records were trustworthy.[50] Further, the court stated that

43. *See infra* Part II.B.

44. *Applying the FRE 803(6) Business Records Exception to Third Party Record Keepers*, FED. EVIDENCE REV. (Aug. 14, 2013), http://federalevidence.com/blog/2013/august/third-party-record-keepers-under-fre-8036-business-records-exception, *archived at* http://perma.cc/E3GU-KTLU.

45. *See* Conoco Inc. v. Dep't of Energy, 99 F.3d 387 (Fed. Cir. 1996); United States v. Johnson, 971 F.2d 562 (10th Cir. 1992).

46. *Johnson*, 971 F.2d at 570–71.

47. *Id.* at 571.

48. *Id.*

49. *Id.* (quoting Fed. Deposit Ins. Corp. v. Staudinger, 797 F.2d 908, 910 (10th Cir. 1986)) (internal quotation marks omitted).

50. *Id.* ("The record is replete with circumstances demonstrating the trustworthiness of the documents. There is simply no dispute that the transactions shown by the receipts took place as recorded.").

> bank records are particularly suitable for admission under Rule 803(6) in light of the fastidious nature of record keeping in financial institutions, which is often required by governmental regulation. The nature of the documents themselves as bank statements together with the testimony of the investors established that the records were made at the time of the transactions in question and were made in the course of a regularly conducted business activity.[51]

In *Johnson*, the foundation for the third-party records was laid by the circumstances surrounding the records more so than by the individuals that testified regarding the records.[52] It therefore appears that a sufficient foundation for the documents "depends in part on the nature of the documents at issue. Documents that are standard records of the type regularly maintained by firms in a particular industry may require less by way of foundation testimony than less conventional documents proffered for admission as business records."[53]

Another example of relaxed foundational requirements is found in *Residential Funding Co. v. Terrace Mortgage Co.*[54] In that case, Residential Funding sued Terrace Mortgage for breach of contract when Terrace "refused to repurchase thirteen loans Residential had purchased from Terrace."[55] The district court granted summary judgment in favor of Residential.[56] In appealing the decision, one of the issues raised by Terrace was the award of damages based upon third-party records.[57] Terrace alleged inconsistencies regarding when the records were created and further argued that Residential did not create all the records itself.[58] In rejecting Terrace's argument, the Eighth Circuit declared that "a record created by a third party and used as part

51. *Id.*

52. *Id.* at 572 ("In short, the record as a whole shows a sufficient foundation for the admission of the documents under Rule 803(6). *Under the circumstances*, the investors were 'qualified witness[es]' whose testimony, together with the other evidence, was sufficient to show a foundation for the admission of the documents. The district court did not abuse its discretion in admitting the evidence." (alteration in original) (emphasis added) (footnote omitted)).

53. 5 JOSEPH M. MCLAUGHLIN, JACK B. WEINSTEIN, & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 803.08[8][a] (2d ed. 2009), *as quoted in* State v. Fitzwater, 227 P.2d 520, 532 (Haw. 2010).

54. 725 F.3d 910 (8th Cir. 2013).

55. *Id.* at 913.

56. *Id.*

57. *Id.* at 920.

58. *Id.* at 921.

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."[59] The *Residential Funding* court relied on *Brawner v. Allstate Indemnity Co.*, which was issued only three years earlier.[60] In *Brawner*, the Eighth Circuit addressed the question of the use of third-party records for the first time:

> Although this court has not addressed the precise argument raised here by the Brawners, we have established that the "custodian or other qualified witness need not have personal knowledge regarding the creation of the document offered, or personally participate in its creation, or even know who actually recorded the information." Several other courts have held that a record created by a third party and integrated into another entity's records is admissible as the record of the custodian entity, so long as the custodian entity relied upon the accuracy of the record and the other requirements of Rule 803(6) are satisfied.[61]

In that case, Allstate was not required to produce a representative of the third party that created the records it relied on to establish a foundation for admission of the documents.[62] Rather, the court held that third-party records that are integrated into the records of another entity are admissible as a record of the entity that integrated them, so long as the integrating entity relied on the record's accuracy and the other requirements of Rule 803(6) are satisfied.[63]

As these cases demonstrate, federal courts have found that "[a] business record that is created by one business, but is thereafter obtained and kept by a second business, is often qualified by a custodian from the second business."[64] As referenced in *Brawner*, the Eighth Circuit is not the only federal jurisdiction to base the foundation for admission of third-party records into evidence on a business's reliance

59. *Id.* (citing Brawner v. Allstate Indem. Co., 591 F.3d 984, 987 (8th Cir. 2010)).

60. *Id.*

61. *Brawner*, 591 F.3d at 987 (quoting Resolution Trust Corp. v. Eason, 17 F.3d 1126, 1132 (8th Cir. 1994)) (citing United States v. Franks, 939 F.2d 600, 602–03 (8th Cir. 1991)).

62. *Id.*

63. *Id.*; *see also* Don Zupanec, *Evidence—Third Party Business Records—Admissibility*, 25 FED. LITIGATOR 12 (2010).

64. BINDER, *supra* note 29, § 16:11, at 469–70 (citing United States v. Parker, 749 F.2d 628, 633 (11th Cir. 1984); *In re* Ollag Constr. Equip. Corp., 665 F.2d 43, 46 (2d Cir. 1981); United States v. Colyer, 571 F.2d 941, 947 (5th Cir. 1978); United States v. Pfeiffer, 539 F.2d 668, 670–71 (8th Cir. 1976)).

on the records.[65] In *United States v. Duncan*, the Fifth Circuit addressed the issue.[66] There the defendant claimed the trial court had erred in admitting records of insurance companies into evidence.[67] The Fifth Circuit disagreed, finding that there is neither a "requirement that the witness who lays the foundation . . . of the record . . . be able to personally attest to the record's accuracy,"[68] nor a requirement that the record be created by the entity having custody of the records.[69] Rather, the court stated that the emphasis of the business records exception is on "reliability or trustworthiness of the records sought to be introduced."[70] Accordingly, district courts should be afforded deference in exercising discretion as to trustworthiness.[71] Other circuits have taken similar approaches, and district and state courts outside these circuits have followed suit.[72] Wisconsin has not.

65. *Brawner*, 591 F.3d at 987.

66. United States v. Duncan, 919 F.2d 981, 985–87 (5th Cir. 1990).

67. *Id.* at 985.

68. *Id.* at 986 (citing United States v. Iredia*,* 866 F.2d 114, 119–20 (5th Cir. 1989), *cert. denied,* 492 U.S. 921 (1989); Theriot v. Bay Drilling Corp*.,* 783 F.2d 527, 533 (5th Cir. 1986)).

69. *Id.* (citing Miss. River Grain Elevator, Inc. v. Bartlett & Co., Grain, 659 F.2d 1314, 1319 (5th Cir. Unit A Oct. 1981); United States v. Veytia-Bravo, 603 F.2d 1187, 1189 (5th Cir. 1979), *cert. denied*, 444 U.S. 1024 (1980)).

70. *Id.* (quoting *Veytia-Bravo*, 603 F.2d at 1189) (internal quotation mark omitted).

71. *Id.*

72. *See, e.g.*, United States v. Adefehinti, 510 F.3d 319, 326 (D.C. Cir. 2007), *judgment entered*, 264 F. App'x 16 (D.C. Cir. 2008) ("Further, several courts have found that a record of which a firm takes custody is thereby 'made' by the firm within the meaning of the rule (and thus is admissible if all the other requirements are satisfied). We join those courts."); Air Land Forwarders, Inc. v. United States, 172 F.3d 1338, 1344 (Fed. Cir. 1999) ("[Third-party] testimony is not necessary where an organization incorporated the records of another entity into its own, relied upon those records in its day-to-day operations, and where there are other strong indicia of reliability."); *In re* Sagamore Partners, Ltd., No.11–37867–BKC–AJC, 2012 WL 3564014, at *5 (Bankr. S.D. Fla. Aug. 17, 2012) ("Absent specific evidence of an error in the prior servicer's records, the Court finds that [a party's] practice of relying on and integrating into [its] own records the records and information of a prior loan servicer is appropriate."); BP Amoco Chem. Co. v. Flint Hills Res., LLC, 697 F. Supp. 2d 1001, 1021 (N.D. Ill. 2010) ("A document prepared by a third party may qualify as another business entity's business record under Rule 803(6) if that entity integrated the third-party record into its records and relied upon it in its day-to-day operations. The proponent also must satisfy the other requirements of Rule 803(6)."); Pizza Corner, Inc. v. C.F.L. Transp., Inc., 792 N.W.2d 911, 915 (N.D. 2010) ("Several courts have held a witness from one company can provide the foundation for a record created by a third party if that company integrated the record into its own records and relied on it, and if the record meets the other requirements of Rule 803(6). . . . We adopt the position of these courts.").

III. THE WISCONSIN BUSINESS RECORDS EXCEPTION

Wisconsin is not among those jurisdictions that have taken a broader view of the business records exception when it comes to admissibility.[73] Rather, Wisconsin seems to have stuck to the letter of the law.[74] This approach has not yielded positive results in many cases.[75]

A. The Requirements of the Business Records Exception in Wisconsin

Wisconsin Statute section 908.03(6) lays out the business records exception in Wisconsin. The language of the Wisconsin business records exception tracks closely with the business records exception in the federal rules.[76] Wisconsin Statute section 908.03(6) states:

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, all in the course of a regularly conducted activity, as shown by the testimony of the custodian or other qualified witness, or by certification that complies with s. 909.02(12) or (13), or a statute permitting certification, unless the sources of information or other circumstances indicate lack of trustworthiness.[77]

Before a document can be admitted into evidence, it must meet seven requirements.[78] The first two requirements are that the document must fall within the definition of a writing listed under the statute and must

73. *See infra* Part III.

74. *See infra* Part III.

75. *See, e.g.*, *infra* notes 102–20 and accompanying text.

76. *Compare* WIS. STAT. § 908.03(6) (2013–2014), *with* FED. R. EVID. 803(6).

77. WIS. STAT. § 908.03(6).

78. *See id.*; *see also* WARSHAFSKY & CRIVELLO, *supra* note 21, § 16:13, at 421–22 ("The specific requirements which must be met before a writing or document will be admitted into evidence pursuant to the regularly conducted activity exception to the hearsay rule are that: (1) it must consist of a memorandum, report, record, or data compilation in any form; (2) it must record acts, events, conditions, opinions, or diagnoses; (3) it must have been prepared at or near the time of the act, event, condition, etc., which it records; (4) it must have been prepared by a person with personal knowledge of the recorded item, or from information transmitted by such a person; (5) the recording of the act, event, condition, etc. and the transmission of information by the person with knowledge, where such is the case, must occur in the course of a regularly conducted activity; (6) these requirements must be established through the testimony of a custodian of the writing or document or other qualified witness; and (7) the sources of information or other circumstances surrounding the creation of the writing or document must not otherwise indicate a lack of trustworthiness.").

record applicable information.[79] These two requirements are relatively easy to satisfy because of the broad categorical language with which the statute is drafted.[80] The third requirement is that the record be created at or near the time of the instance recorded.[81] The timing requirement is dependent on the circumstances, with the key inquiry being whether too much time has elapsed for the record to be accurate.[82] Fourth, the record must be created from personal knowledge.[83] Fifth, the record must be created in the course of a regularly conducted activity.[84] In other words, the entity must be in the regular practice of creating such records.[85] The sixth requirement is that the foundation must be laid by the record custodian or other qualified witness.[86] The essential question related to the qualified witness requirement is whether the witness is familiar with how the records were created.[87] Finally, the court must deem the record trustworthy.[88] This means that even if all the other elements of the exception are met, the judge may still exclude the

79. WARSHAFSKY & CRIVELLO, *supra* note 21, § 16:13, at 421.

80. *See* BLINKA, *supra* note 13, § 803.6, at 765 ("The rule embraces 'records' regardless of form, including memoranda, reports, records, or data compilations 'in any form.' Computer generated records are expressly within the rule, regardless of whether they exist in electronic form (stored by computer software) or as 'hardcopy.'"); s*ee also* 3B JAY E. GRENIG & DANIEL D. BLINKA, WISCONSIN PRACTICE SERIES: WISCONSIN CIVIL RULES HANDBOOK § 908.03:6 (2014 ed. 2014) ("The records, etc. can take literally 'any form.' Computer-generated records are expressly within the rule.").

81. WIS. STAT. § 908.03(6); *see also* WARSHAFSKY & CRIVELLO, *supra* note 21, § 16:13, at 421.

82. BLINKA, *supra* note 13, § 803.6, at 767 ("The key is whether the time span creates a significant danger of distortion or inaccuracy, yet a lengthy or unexplained delay also suggests a troubling lack of regularity. The permissible length of elapsed time will depend upon the nature of the underlying activity, the record keeping procedures, and the facts of the case." (footnote omitted)).

83. WIS. STAT. § 908.03(6); *see also* WARSHAFSKY & CRIVELLO, *supra* note 21, § 16:13, at 421.

84. WIS. STAT. § 908.03(6); *see also* WARSHAFSKY & CRIVELLO, *supra* note 21, § 16:13, at 421–22.

85. BLINKA, *supra* note 13, § 803.6, at 769 ("There must be some indication that the record of the event is one that is 'regularly' prepared. The regularity of the *record* should not be confused with the frequency with which the *event* occurs. The key is whether an employee has an obligation or 'business duty' to observe and to report the matters described in the record, regardless of how often they recur.").

86. WIS. STAT. § 908.03(6); *see also* WARSHAFSKY & CRIVELLO, *supra* note 21, § 16:13, at 422.

87. BLINKA, *supra* note 13, § 803.6, at 771 ("The important factor is whether the witness is familiar with how records of this type are prepared by the organization.").

88. *See* WIS. STAT. § 908.03(6); *see also* WARSHAFSKY & CRIVELLO, *supra* note 21, § 16:13, at 422.

evidence.[89] Wisconsin courts' application of the foundational requirement will be the focus of our discussion going forward.

B. The Business Records Exception and Reliance on Third-Party Records in Wisconsin

Wisconsin's interpretation and application of the business records exception, where a party relies on third-party records, is laid out in *Palisades Collection LLC v. Kalal*.[90] In *Palisades*, the defendants, Ralph and Jackie Kalal, appealed the circuit court's grant of summary judgment "that they owe[d] Palisades Collection LLC $27,343.47, plus costs, for the balance due on Jackie Kalal's credit card account with Chase Manhattan Bank."[91] Palisades had purchased the debt from Chase and, after unsuccessful attempts to collect on the debt, filed a complaint as the holder of the credit account.[92] The Kalals' answer denied the allegations and Palisades moved for summary judgment.[93]

Supporting Palisades' motion for summary judgment was an affidavit from Marie Oliphant.[94] In the affidavit, Oliphant averred that "she was 'a duly authorized representative'" of Palisades, that Palisades owned the account, and that the documents accompanying her affidavit were "true and correct" copies of the credit card statements mailed to Jackie Kalal.[95] Attached to the affidavit were five pages titled "Chase . . . MasterCard Account Summary" that "identifie[d] Jackie Kalal as the cardholder, and state[d] amounts due for the time periods identified."[96]

Oliphant's affidavit further stated that, in her capacity as Palisades' authorized representative, she had "control over and access to records regarding the account."[97] She further stated that the original owner of the account

89. BLINKA, *supra* note 13, § 803.6, at 772 ("Hearsay that satisfies the foundational elements of Wis.Stat. § 908.03(6) is not automatically admissible. The trial judge has the power to exclude the evidence where the 'sources of information or other circumstances indicate lack of trustworthiness.'").

90. 2010 WI App 38, 324 Wis. 2d 180, 781 N.W.2d 503.

91. *Id.* ¶ 1.

92. *Id.* ¶ 3.

93. *Id.* ¶¶ 3–4.

94. *Id.* ¶ 4.

95. *Id.*

96. *Id.*

97. *Id.* ¶ 5.

> maintained records pertaining to its business [and] that the records were prepared in the ordinary course of business, at or near the time of the transaction or event, by a person with knowledge of the event or transaction, that such records are kept in the ordinary course of the original creditor's business and that of the Plaintiff.[98]

Oliphant also stated she had personally reviewed the records and statements regarding the account balance.[99]

In opposing the summary judgment motion, "the Kalals asserted that the affidavit did not show that Oliphant had personal knowledge of the amount owed and the attached documents were inadmissible to show that amount because the affidavit did not establish the foundation requirements of . . . the hearsay exception for records of regularly conducted activity."[100] Essentially, the Kalals argued Oliphant was not a qualified witness. The Dane County Circuit Court rejected the argument and granted Palisades' summary judgment motion, finding Oliphant's affidavit demonstrated personal knowledge and the records were admissible.[101] The Kalals appealed the circuit court's judgment.

On appeal, the Wisconsin Court of Appeals held that Oliphant's affidavit could not reasonably be viewed to "show that she is qualified to testify that (1) the records were made at or near the time by, or from information transmitted by, a person with knowledge; and (2) this was done in the course of a regularly conducted activity."[102] The court of appeals relied on *Bergzimmer and Associates, Inc. v. Central Manufacturing Corp*.[103]

In *Bergzimmer*, the court concluded that "a manager for a company that had paid a supplier was not a qualified witness with respect to invoices and supporting documentation prepared by the supplier."[104] The manager testified that "he had reviewed the invoices and supporting documentation, separated out certain charges, and totaled those."[105] The court in *Bergzimmer* found that manager could not be a

98. *Id.*

99. *Id.*

100. *Id.* ¶ 6.

101. *See id.* ¶ 7.

102. *Id.* ¶ 15.

103. *Id.* ¶¶ 16–17 (citing Berg-Zimmer & Assocs., Inc. v. Cent. Mfg. Corp., 148 Wis. 2d 341, 434 N.W.2d 834 (Ct. App. 1988)).

104. *Id.* ¶ 16 (citing *Berg-Zimmer*, 148 Wis. 2d at 348–50).

105. *Id.* ¶ 16 (citing *Berg-Zimmer*, 148 Wis. 2d at 350).

qualified witness because "[h]e did not possess knowledge to testify concerning the contemporaneousness of the entries, by whom they were transmitted or whether they were made in the course of a regularly conducted activity."[106] It was not enough for the manager to have possession of the records and understand their contents.[107]

The basis for the court's decision in *Bergzimmer* regarding what constitutes a qualified witness "was that the witness was not qualified to testify on how the invoices and supporting documentation were prepared."[108] The *Palisades* court followed this reasoning, stating that, while it is unnecessary for the affiant to be the originator of the records,

> under the plain language of this exception, being a present custodian of the records is not sufficient. The language is "as shown by the testimony of the custodian *or other qualified* witness." The only reasonable reading of this language is that a testifying custodian must be *qualified* to testify that the records (1) were made at or near the time by, or from information transmitted by, a person with knowledge; and (2) that this was done in the course of a regularly conducted activity.[109]

Without knowledge of how the records were made, the witness is not qualified to testify that the records "were made 'at or near the time [of the event] by, or from information transmitted by, a person with knowledge' and 'in the course of a regularly conducted activity.'"[110]

Applying this reasoning to the Oliphant affidavit, the court of appeals in *Palisades* stated that for Oliphant to be a qualified witness she must have "personal knowledge of how the account statements were prepared and that they were prepared in the ordinary course of Chase's business."[111] In reversing the circuit court's grant of summary judgment, the court reasoned that "[t]he averment that [Oliphant], as a representative of Palisades, now has control over the records of Jackie Kalal's accounts and has 'personally inspected said account and statements regarding the balance due,' does not reasonably imply that

106. *Berg-Zimmer*, 148 Wis. 2d at 350–51.
107. *See id.*
108. *Palisades*, 2010 WI App 38, ¶ 19.
109. *Id.* ¶ 20 (quoting WIS. STAT. § 908.03(6) (2013–2014)).
110. *Id.* ¶ 22 (alteration in original) (quoting WIS. STAT. § 908.03(6)).
111. *Id.* ¶ 21.

she has personal knowledge of how Chase prepared the account statements."[112]

Palisades and subsequent cases have helped to spell out what is required of a party that wishes to successfully rely on third-party records.[113] Unfortunately, parties have had trouble laying a foundation under the Wisconsin rule. In *Arch Bay Holdings, LLC-Series 2010A v. Gartland*, Gartland appealed the grant of summary judgment to Arch Bay—the successor in interest to his mortgage.[114] To support its motion for summary judgment, Arch Bay submitted an affidavit from Susan Ceduc.[115] Ceduc was neither an employee of Arch Bay nor of GMAC, the original debt holder.[116] Rather, she worked as "Contested Foreclosure Liaison" for a third party.[117] Ceduc's affidavit stated that "'as a custodian of the businesses records' [she] has 'possession, control, and responsibility for the accounting and other mortgage loan records relating to the defendants' mortgage loan[,]' including those records attached to the affidavit."[118] Further, Ceduc averred she had personally inspected the records and that she had personal knowledge of how the records were created and maintained.[119] In reversing the circuit court, the Wisconsin Court of Appeals held that Ceduc's affidavit did not meet the qualified witness requirement because it did not state facts that showed she had personal knowledge of how the records were prepared or that the records were prepared in the ordinary course of GMAC's business.[120]

Similarly, in *Bank of America N.A. v. Minkov*, Bank of America filed the foreclosure action as "'the loan servicer which collects and tracks payments . . . and pursues legal action when necessary,' for the Bank of New York which '[was] the current mortgagee of record.'"[121] The Bank of New York was a successor in interest to the mortgage.[122]

112. *Id.* ¶ 23.

113. *See supra* notes 90–112 and accompanying text.

114. Arch Bay Holdings, LLC-Series 2010A v. Gartland, 2012AP756-FT, slip op. ¶¶ 1–2 (Wis. Ct. App. Aug. 30, 2012).

115. *Id.* ¶ 3.

116. *Id.*

117. *Id.*

118. *Id.* ¶ 9 (second alteration in original) (quoting Affidavit of Susan Ceduc).

119. *Id.*

120. *Id.* ¶ 10.

121. Bank of Am. N.A. v. Minkov, No. 2012AP2643, slip op. ¶ 2 (Wis. Ct. App. Aug. 8, 2013) (first alteration in original) (quoting Complaint of the Plaintiff–Respondent).

122. *Id.* ¶ 3.

Bank of America moved for summary judgment, supporting its motion with two affidavits, both from Bank of America employees—Russell Karnes and Eileen Thiry.[123] Only the Thiry affidavit is relevant for our discussion.

The Thiry affidavit stated that Thiry was an officer of Bank of America and that Bank of America was the servicing agent of the mortgage.[124] She also averred that Bank of New York was the current note holder; that Bank of America was the servicer of the loan, had permission to act on Bank of New York's behalf, and maintained the records of the loan; and that it was her responsibility to be "familiar with the type of records maintained by [Bank of America] in connection with the loan."[125] Further, the affidavit stated,

> The information in this affidavit is taken from BANA's business records. I have personal knowledge of BANA's procedures for creating these records. They are: (a) made at or near the time of the occurrence of the matters recorded by persons with personal knowledge of the information in the business record, or from information transmitted by persons with personal knowledge; (b) kept in the course of BANA's regularly conducted business activities; and (c) it is the regular practice of BANA to make such records.[126]

In opposition to the summary judgment motion, Minkov argued Thiry was not a qualified witness.[127] The Milwaukee County Circuit Court granted Bank of America's motion.[128]

The Wisconsin Court of Appeals disagreed, reversing the circuit court.[129] The court held that Thiry failed to present any facts that would show she had personal knowledge of how the records were created.[130] The court declared that it is not enough to parrot the requirements of the statute and draw legal conclusions.[131] In the court's view, it was not enough for Thiry to know how Bank of America's records were created

123. *Id.* ¶ 4.
124. *Id.* ¶ 7.
125. *Id.*
126. *Id.* (quoting Affidavit of Eileen Thiry).
127. *Id.* ¶¶ 9, 11.
128. *Id.* ¶ 10.
129. *Id.* ¶ 40.
130. *Id.* ¶ 33.
131. *Id.* ¶ 38.

and maintained.[132] Rather, she must have knowledge of how the two previous debt holders' records were created and maintained.[133]

As the cases above demonstrate, the requirements of the Wisconsin records exception can be easily spelled out in theory, but meeting the requirements can prove difficult. Such examples raise the question of whether the current application of the records exception serves the purpose it was intended to serve.

IV. ISSUES WITH WISCONSIN'S BUSINESS RECORDS EXCEPTION

The Wisconsin business records exception—specifically the narrow interpretation of the foundation requirements as it pertains to third-party records—has led to an application of the rule inconsistent with the purpose of the exception.[134] This application frustrates summary judgment proceedings and results in harmful inefficiencies that overburden the courts and impose undue delay and cost to the litigants.[135]

A. Wisconsin's Application of the Business Records Exception Contravenes the Purpose of the Exception

Wisconsin courts have stated that "the rules of evidence favor making relevant evidence available to the trier of fact."[136] The business records exception was created because records that were regularly relied on for business purposes were deemed trustworthy enough to be relied on for litigation purposes as well.[137] The consistent theme of the stated purposes of the business records exception is admission of relevant evidence for the sake of fairness and efficiency.[138] According to the

132. *Id.* ¶¶ 35–36.

133. *Id.* ¶ 35 ("Thiry does not aver that she had personal knowledge as to the previous mortgagees' (Intervale and Decision One) record-keeping practices. Nor would it likely be possible for Thiry to make such an averment, because she, at least as an employee of Bank of America, would be expected to be familiar with the records only since the time Bank of New York acquired the note and mortgage and Bank of America commenced its role as servicer for that loan." (citation omitted)).

134. *Compare supra* notes 20–26, *with* notes 102–20 and accompanying text.

135. *See infra* Part IV.B.

136. Kuhlman, Inc. v. G. Heileman Brewing Co., 83 Wis. 2d 749, 762–63, 266 N.W.2d 382, 389 (1978).

137. *See supra* Part II.

138. *See, e.g.*, United States v. Kaiser, 609 F.3d 556, 574 (2d Cir. 2010) (commenting that the purpose of the business records exception was to avoid the falsification of documents and avoid a party creating records for the sole purpose of litigation).

Seventh Circuit, the purpose of the business records exception is "to permit the admission of records maintained in the regular course of business, unless 'the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.'"[139] Other courts have stated that the purpose of the exception is to broaden the sphere of admissible relevant evidence,[140] to ensure that the documents were not prepared for personal use or in preparation for litigation,[141] and to allow business records to be considered by the court without requiring firsthand testimony.[142] Wisconsin's overzealous foundation requirement for parties relying on third-party evidence creates an application of the exception inconsistent with this purpose. Wisconsin's approach to the business records exception also has negative procedural effects.

B. Wisconsin's Application of the Business Records Exception Frustrates Summary Judgment Proceedings

In Wisconsin, "[t]he well-established purpose of summary judgment procedure is to determine the existence of genuine factual disputes in order to 'avoid trials where there is nothing to try.'"[143] Summary judgment is granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if

139. Coates v. Johnson & Johnson, 756 F.2d 524, 549 (7th Cir. 1985) (quoting United States v. Chappell, 698 F.2d 308, 311 (7th Cir. 1983)).

140. Cavalry Portfolio Servs., LLC v. Kumbaris, No. DC–23345–10, 2011 WL 6057861, at *3 (N.J. Super. Ct. App. Div. Dec. 7, 2011) ("The purpose of the business records exception is to 'broaden the area of admissibility of relevant evidence where there is necessity and sufficient guarantee of trustworthiness.'" (quoting Liptak v. Rite Aid, Inc., 673 A.2d 309, 319 (N.J. Super. Ct. App. Div. 1996))).

141. *Kaiser*, 609 F.3d at 574 ("The purpose of the rule is to ensure that documents were not created for 'personal purpose[s] . . . or in anticipation of any litigation' so that the creator of the document 'had no motive to falsify the record in question.'" (alteration in original) (quoting United States v. Freidin, 849 F.2d 716, 719 (2d Cir. 1988))).

142. Beneficial Maine Inc. v. Carter, 2011 ME 77, ¶ 12, 25 A.3d 96, 101 ("[T]he purpose underlying the business records exception to the hearsay rule [is] to allow the consideration of a business record, without requiring firsthand testimony regarding the recorded facts.").

143. Yahnke v. Carson, 2000 WI 74 ¶ 10, 236 Wis. 2d 257, 613 N.W.2d 102 (quoting Rollins Burdick Hunter of Wisconsin, Inc. v. Hamilton, 101 Wis. 2d 460, 470, 304 N.W.2d 752, 757 (1981); Caulfield v. Caulfield, 183 Wis. 2d 83, 91, 515 N.W.2d 278, 282 (Ct. App. 1994)); *see also* 12 ROBERT A. PASCH, WISCONSIN PRACTICE SERIES: WISCONSIN COLLECTION LAW § 6:23, at 180 (2d ed. 2006) ("The primary object of the statutes providing for summary judgment is to discourage dilatory pleading and practice, and to avoid delay and injustice. Summary judgment serves to end litigation when no triable issue exists in the pending action." (footnotes omitted) (citing Sullivan v. State, 213 Wis. 185, 251 N.W. 251 (1933))).

any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[144] Summary judgment is an instrument of judicial discretion and not a right of the parties.[145] As such, "[s]ummary judgment is a useful tool for the promotion of efficiency in the administration of justice, since it can be used to prevent sham pleadings and delay and to terminate the case on its merits."[146] When considering a motion for summary judgment, courts

> first examine the moving papers and documents to determine whether the moving party has made a prima facie case for summary judgment under sec. 270.635(2), Stats., and if he has, [courts] then examine the opposing party's affidavits and other proof to determine whether facts are shown which the court deems sufficient to entitle the opposing party to a trial. If the material facts are not in dispute and if the inferences which may reasonably be drawn from the facts are not doubtful and lead only to one conclusion, then there is presented only a matter of law, which should be decided upon the motion.[147]

In the context of parties that rely on third-party records to prove debt, summary judgment is appropriate where the party can establish a prima facie case for the validity of the debt.[148] This can often only be done using the third-party records.[149] Wisconsin sets the bar too high by requiring a person with personal knowledge of how records purchased from a third party were created by the third party in order to lay the foundation for the records. Because the evidentiary standard for foundation for the records is so high, summary judgment is often out of reach when it should not be. The result is inefficiency that harms our

144. WIS. STAT. § 802.08(2) (2013–2014).

145. Wozniak v. Local No. 1111 of the United Elec., Radio & Machine Workers of Am., 45 Wis. 2d 588, 592, 173 N.W.2d 596, 598 (1970) ("Summary judgment is not a matter of right, and a trial court may deny summary judgment if it determines that the opposite side is entitled to a trial."); Grognet v. Fox Valley Trucking Serv., 45 Wis. 2d 235, 240, 172 N.W.2d 812, 815 (1969) ("Summary judgment is not an absolute right nor a 'short cut to avoid a trial and to obtain quick relief at the expense of a searching determination for the truth.'" (quoting Schandelmeier v. Brown, 37 Wis. 2d 656, 658, 155 N.W.2d 659, 660 (1968))); Zimmer v. Daun, 40 Wis. 2d 627, 630, 162 N.W.2d 626, 627 (1968) ("A trial court need not decide a question of law on a motion for summary judgment . . . even though no conflict of material facts exists. There is no absolute right to summary judgment.").

146. Schnabl v. Ford Motor Co., 54 Wis. 2d 345, 350–51, 195 N.W.2d 602, 605 (1972).

147. Caraway v. Leathers, 58 Wis. 2d 321, 325–26, 206 N.W.2d 193, 196 (1973).

148. *See id.*

149. *See* Beneficial Maine Inc. v. Carter, 2011 ME 77, ¶¶ 5, 7, 11–13, 25 A.3d 96, 99–101.

courts and the parties involved. It costs the courts and the litigants unnecessary time, money, and energy. Such a result is harmfully inefficient. It is time to consider a different approach to the records exception.

V. CHANGING WISCONSIN'S APPROACH

The Wisconsin and federal records exceptions are extremely similar in language and requirement.[150] However, the two court systems have interpreted the statutory language differently.[151] Wisconsin's approach in successors-in-interest litigation has created harmful inefficiencies.[152] These inefficiencies could be remedied by reinterpreting the Wisconsin business records exception, aligning it more closely with the approach of some federal courts.[153]

A. Comparing the Statutory Language

The Wisconsin records exception is nearly identical to the federal exception. First, both jurisdictions require the record to be created at or near the time of the event by a person with knowledge of the event or from information transmitted by a person with knowledge of the event.[154] Second, both rules require that the making and keeping of such records must be part of the regularly conducted activity of the business.[155] Third, both rules require that the custodian of the records or other qualified witness must testify that the first two elements of the exception exist.[156] Finally, both rules provide for judicial discretion as to the trustworthiness of the records.[157] When considering the trustworthiness of the records, a judge may take into account the source of the information and other circumstances regarding the records

150. *Compare* WIS. STAT. § 908.03(6) (2013–2014), *with* FED. R. EVID. 803(6).

151. *Compare supra* Part III, *with supra* Part II.

152. *Supra* Part IV.

153. *See infra* Part V.B.

154. *Compare* § 908.03(6), *with* FED. R. EVID. 803(6)(A).

155. *Compare* § 908.03(6), *with* FED. R. EVID. 803(6)(B)–(C). Rule 803(6) also adds "an additional requirement—that it was the regular practice of the business to make the document." Kwestel, *supra* note 14, at 602.

156. *Compare* § 908.03(6), *with* FED. R. EVID. 803(6)(D).

157. *Compare* § 908.03(6), *with* FED. R. EVID. 803(6)(E).

creation.[158] However, despite these similarities between the two records exceptions, discrepancies exist in interpretation and application.[159]

B. Changing the Approach

Because Wisconsin's foundational requirement in the context of third-party records produces an application of the exception that is inconsistent with the exception's purpose and causes harmful inefficiency, the Wisconsin courts should adopt an approach more like that of the federal courts in the cases discussed above.[160] The foundational standard for third-party records should require that the records be integrated into the entity's own records, and the entity should be required to show it has a regular practice of buying, integrating, and relying on the records.[161]

The seeds for such a change may already exist in Wisconsin case law. In *Central Prairie Financial LLC v. Yang*, Yang appealed "from a summary judgment granted in favor of Central Prairie Financial LLC, the company that own[ed] Yang's indebtedness on a credit card account formerly owned by Chase Bank USA, N.A."[162] Yang's central argument on appeal was that the case should be "controlled by *Palisades*" and that the trial court erred.[163]

Like Palisades Collection,[164] Central Prairie Financial purchased the debt from Chase and attempted to collect on the debt through the courts.[165] After Yang's answer to the complaint failed to address the claims, Central Prairie Financial moved for summary judgment.[166] Accompanying the summary judgment motion was an affidavit from Central Prairie's records custodian.[167] In the affidavit the records custodian averred that

158. *See* § 908.03(6); FED. R. EVID. 803(6)(E).

159. *Compare supra* Part III, *with supra* Part II.

160. *See supra* notes 45–72 and accompanying text.

161. *See infra* notes 176–191 and accompanying text.

162. Cent. Prairie Fin. LLC v. Yang, 2013 WI App 82, ¶ 1, 348 Wis. 2d 583, 833 N.W.2d 866.

163. *Id.*

164. Palisades Collection LLC v. Kalal, 2010 WI App 38, ¶¶ 3–4, 324 Wis. 2d 180, 781 N.W.2d 503.

165. *Cent. Prairie*, 2013 WI App 82, ¶¶ 1, 2.

166. *Id.*

167. *Id.* ¶ 2.

> Central Prairie's business practices included purchasing defaulted credit card accounts from Chase Bank, that in such purchases Central Prairie obtains and integrates Chase's electronic records of those accounts into Central Prairie's own business records, and that review of those regularly kept records reflected that Yang was issued a credit card by Chase, failed to make payments and therefore defaulted on the terms of the Cardmember Agreement, and that Central Prairie thereafter acquired "all right and title" in Yang's account.[168]

Yang responded to the motion by arguing that Central Prairie Financial's records custodian did not have personal knowledge of how Chase Bank USA created the records and, under *Palisades*, the court should deny the summary judgment motion.[169] In reply, Central Financial argued that *Palisades* did not apply because Central Prairie Financial had produced affidavits from previous account holders attesting to the accuracy of the records *and that the "'records relating to Defendant's Account were transmitted by a person [with] personal knowledge in the regular course of a regularly conducted activity, a sale of a debt,' and thus were admissible evidence."*[170]

In its analysis, the court distinguished *Palisades*, stating that it "stands for the extremely narrow proposition that the hearsay exception for business records is not established when the only affiant concerning the records in question lacks personal knowledge of how the records were made."[171] The court noted that here, unlike in *Palisades*, there are multiple affidavits authenticating the records provided.[172]

The court then distinguished the case from *Palisades* in another, potentially more substantial way. The court pointed out that

> the affidavit of Central Prairie's own record custodian confirms his personal knowledge of Central Prairie's regular practice of purchasing defaulted Chase accounts and receiving transmission of "electronic account information at the time the accounts are assigned," along with the terms and conditions and account

168. *Id.*

169. *Id.* ¶ 3.

170. *Id.* ¶ 3 (alteration in original) (emphasis added).

171. *Id.* ¶ 9.

172. *Id.* ¶ 10 ("Here, in stark contrast, Central Prairie has produced documentation to validate the existence and amount of the indebtedness under a contract with the original creditor, Chase, and the transactions by which that indebtedness (and records of it) was assigned to Central Prairie.").

> statements, which records are regularly "integrated . . . from Chase Bank USA, N.A. into [Central Prairie's] own business records."[173]

In the court's view, "[t]his aspect alone, the custodian's explanation of the regular processes by which Chase's electronic account records are transmitted to its assignees, already differentiates this case from *Palisades*."[174]

The reasoning behind the court's finding that Central Prairie's record custodian had personal knowledge is significant. The court noted it was the record custodian's knowledge of the company's practice of purchasing defaulted accounts, receiving the account information electronically, and then integrating the information into Central Prairie's business records that gave the custodian the requisite personal knowledge under the exception.[175] This suggests that Central Prairie's records met the exception, even though the records incorporated the Chase records. While such a reading of the exception would not allow a successor in interest to bring the original debt holder's records before the court, it would allow the successor in interest to stand on its own records alone. This seems to suggest openness to another, similar argument found in *Air Land Forwarders, Inc. v. United States*.[176]

In *Air Land Forwarders*, the appellants were movers contracted to provide door-to-door moving services for members of the military.[177] Once the move was complete, the carrier would provide a document for a damage assessment.[178] If a service member's property was damaged in the move, he or she would submit a claim to the military claims office.[179] To support the claim, the service member could include repair estimates from third parties or receipts to prove the value of the damaged or lost property.[180] The military would compensate the service member and seek reimbursement from the carrier.[181] If the carrier did not respond or

173. *Id.* ¶ 10 (alteration in original).
174. *Id.*
175. *Id.* ¶¶ 10, 13.
176. 172 F.3d 1338 (Fed. Cir. 1999).
177. *Id.* at 1340.
178. *Id.*
179. *Id.*
180. *Id.*
181. *Id.*

no settlement was reached, the military would set off the amount demanded against payments due the carrier for other shipments.[182]

In the case, Air Land Forwarders sought a refund for some of the offsets.[183] On appeal "[t]he carriers argue[d] that the offsets not refunded were supported at trial by hearsay repair estimates made by third parties that were improperly admitted into evidence under Federal Rule of Evidence 803(6)."[184] Air Land Forwarders argued that the requirements for admissibility under Rule 803(6) were not met because the qualifying witness could not testify that "(1) the estimates had been prepared by persons with first hand knowledge of the damage; (2) the preparer of the estimate was engaged in the regular business of repairing damaged goods; and (3) the preparer provided estimates as part of a regular business activity."[185]

The government offered an alternative argument.[186] It proposed that the district court did not admit the documents as business records of the various repair shops; rather, the government argued that "the entire claims files were properly admitted under 803(6) as the 'business records' of the military . . . and as a whole constituted records of the regularly conducted activity of adjudicating a service member's claim."[187] Thus, the government contended that the only foundation that must be laid was that the military regularly received the records, integrated them into its own, and relied on them to be accurate.[188]

The court agreed, reasoning that "documents may be admitted as business records despite not being prepared by the entity offering them, as long as it was the entity's regular practice to obtain the documents from a third party, or the documents were integrated into the entity's records and relied on in its day-to-day operations."[189] The court's reasoning was based on two factors.[190] The first factor was the entity's

182. *Id.*
183. *Id.*
184. *Id.* at 1341.
185. *Id.*
186. *Id.*
187. *Id.*
188. *Id.*
189. *Evidence—Admissibility—Business Records*, 14 FED. LITIGATOR 196, 197 (1999).
190. *Air Land Forwarders*, 172 F.3d at 1343 ("The trial court found both reliance and additional assurances of credibility to be present in this case."); *Evidence—Admissibility—Business Record*, *supra* note 189, at 197.

reliance on the incorporated document.[191] The second factor was the circumstances that indicated reliability.[192]

The approach to the business records exception hinted at in *Central Prairie* and spelled out in *Air Land Forwarders* provides an exception that would remedy the issues with Wisconsin's current application of the rule. First, it requires that the records be integrated into the entity's own records.[193] It is insufficient to possess the records. Rather, the records must become a part of the records the entity uses to conduct its business. In *Air Land Forwarders,* it seems this integration converts the records from those of the third party to those of the entity seeking to use them.[194] Put in the language of the statute, it seems a new record is created from information (the third-party records) from a person with knowledge (the third party). Accepting this interpretation of the process opens the door for a lesser foundational requirement.

Second, the approach requires that the entity show it has a regular practice of obtaining, integrating, and relying on the records.[195] This is a lesser foundational requirement because the entity must only have knowledge of its own practices and not that of the third party. By lessening the foundational requirements in this manner, efficiency and fairness become more attainable.

Further, this approach has safeguards to ensure justice is done. The first safeguard is the requirement that the document be incorporated. This reaches back to the reason the exception was created—it is assumed that if the records are good enough for business, they are good enough for litigation.[196] If an entity is unwilling to make the records a part of its own business records, it suggests the records are not good enough for business and thus not reliable for litigation.

The second safeguard is that the court can look at the surrounding circumstances to determine the reliability of the records. In *Air Land*

191. *Air Land Forwarders*, 172 F.3d at 1343 ("First, the repair estimates at issue were clearly relied upon by the military during the claims adjudication process."); *Evidence—Admissibility—Business Record*, *supra* note 189, at 197.

192. *Air Land Forwarders*, 172 F.3d at 1343 ("Second, the trial court explained that there were other assurances of reliability. Military service members could be fined and/or imprisoned for submitting a false claim."); *Evidence—Admissibility—Business Record*, *supra* note 189, at 197.

193. *See Air Land Forwarders*, 172 F.3d at 1343.

194. *See id.*

195. *See id.* at 1343–44.

196. *See supra* notes 18–25 and accompanying text.

Forwarders the court recognized that military service members could face steep punishments for falsifying claims.[197] This made it more likely that the records of the claims would be legitimate. In regulated industries, such as banking and finance, a similar situation exists that suggests the records are reliable.[198]

The third safeguard is in the statute itself. The statute states that even if all the requirements of the exception are met, the records can still be denied admission if "the sources of information or other circumstances indicate lack of trustworthiness.[199] A judge can review the circumstances surrounding the documents creation such as the timing and purpose for which it was created. "The critical consideration is . . . the presence or absence of a motive to misrepresent or distort information."[200] Therefore, the courts still maintain the discretion, under this new approach, to deny the admission of third-party-provided records if the court finds the sources of the information indicate a lack of trustworthiness.

VI. CONCLUSION

Wisconsin's foundational requirement for the business records exception is too rigid in the context of third-party records and creates inefficiencies that harm both the parties to the litigation and the courts. Therefore, the Wisconsin business records exception should be expanded in a manner similar to some federal jurisdictions. The foundational requirement for the use of third-party records should first require that the records be integrated into the entitie's own records. The entity should then demonstrate it has a regular business practice of obtaining, integrating, and relying on the records. This approach will remedy Wisconsin's inefficiencies by opening the door to summary judgment in many contexts while still providing appropriate safeguards to protect the parties.

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197. *See Air Land Forwarders*, 172 F.3d at 1343–44.

198. United States v. Johnson, 971 F.2d 562, 571 (10th Cir. 1992).

199. WIS. STAT. § 908.03(6) (2013–2014).

200. BLINKA, *supra* note 13, § 803.6, at 773.

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