THE NEW MORAL HAZARD
(Robo-testifiers and the Myth of Trustworthy Bank Records)

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The transformation of robo-signers into robo-testifiers.

The greatest threat to due process in foreclosure litigation since the days of robo-signing is at full tilt in courtrooms across the state. While the nation was appalled at the discovery that financial institutions were regularly foreclosing on homes with summary judgment affidavits that were not based on personal knowledge, it has taken little notice of the fact that this same flippant disregard of the Rules of Evidence has simply moved into the courtroom. The robo-signer of yesteryear has merely become a robo-testifier—a person who testifies live at trial about every aspect of the case, including recordkeeping practices about which they often admit to having no personal knowledge.

The bank that services the loan hires these witnesses and holds classes to train them what to say in response to programmed questions by the bank's attorney. Like a robo-signer who signed thousands of documents a day, a robo-testifier appears at hundreds of trials, sometimes averaging more than one every other day.

The courts routinely permit these witnesses to testify, over objection, to the contents of documents created by the servicer, the original lender, the trust that owns the promissory note, and even third party banks not involved in the litigation. The witnesses shuttle these documents into evidence even though they never worked for any of these companies other than the servicer (and may not have worked for the servicer during the relevant time period). Incredibly, the courts often allow them to

testify from proposed judgments drawn up by the banks' attorneys themselves.

The robo-testifier's only function is to communicate the hearsay within bank-generated documents—many specifically generated for use at trial—to the trier of fact, the judge. The witness's only connection with these documents is that he or she read them after the bank assigned the witness to testify in that particular case sometime shortly before trial. In short, the only competence the robo-testifier offers the trier of fact was that he or she is sufficiently literate in the English language to read the documents to the court. And because they are paid to do this as their primary job function, they are, in essence, "professional readers"—the likes of which, until now, have never before been permitted to testify in a court of law.

The business records exception to hearsay.

According to the Rules of Evidence, to authenticate documents before admitting them as exhibits, a witness must be presented who is sufficiently familiar with them to testify that they are what the bank claims them to be. § 90.901, Fla. Stat. Moreover, to overcome the rank hearsay of the documents and its contents, the bank must first lay the predicate for a hearsay exception. Usually, the exception cited by the banks is the "business records" exception, for which there are five requirements:

1) the record was made at or near the time of the event;
2) the record was made by or from information transmitted by a person with knowledge;
3) the record was kept in the ordinary course of a regularly conducted business activity; and
4) it was a regular practice of that business to make such a record.
5) the circumstances do not show a lack of trustworthiness.[1]

But to even be permitted to testify to these thresholds facts, the witness must be a "qualified" witness—one who is in charge of the activity constituting the usual business

practice or well enough acquainted with the activity to give the testimony.[2]

In *Specialty Linings, Inc. v. B.F. Goodrich Co.*, 532 So. 2d 1121 (Fla. 2d DCA 1988) the court addressed the admissibility of computerized records like those proffered by the bank to prove a payment history. There, the court held that the testimony of a general manager of one department of the business did not lay the proper predicate for admission of monthly billing statements prepared in another department. The testimony was insufficient under the business records exception to hearsay because the manager, like the robo-testifiers in nearly every foreclosure trial, admitted that he was not the custodian and did not prepare the statements, nor supervise anyone who did:

> [The manager] Darby was not the custodian of the statement. He was not an otherwise qualified witness. Darby was not "in charge of the activity constituting the usual business practice." He admitted that neither he nor anyone under his supervision prepared such statements. Darby was not "well enough acquainted with the activity to give the testimony." He admitted that he was not familiar with any of the transactions represented by the computerized statement.

Id. at 1122. (internal citations omitted). The court held that the trial court had abused its discretion in admitting the evidence because the manager was not a qualified witness to lay the necessary predicate. It reversed and remanded the case for a new trial. *Id*.

The Fourth District recently reaffirmed and clarified the requirements for a qualified witness to introduce documents in *Lassonde v. State*, 112 So. 3d 660 (Fla. 4th DCA 2013). In this criminal case, the trial court had permitted a store clerk to testify regarding how a store receipt showing the value of the goods stolen was generated. The Fourth District held that it was reversible error to admitting the receipt as a business record because the clerk was not qualified to testify concerning the receipt. *Id*. at 661.

After outlining the basic requirements of the business records hearsay exception, the court noted that "[i]n order to prove a fact of evidence of usual business practices, it must first be established that the witness is either in charge of the activity constituting the usual business practice or is well enough acquainted with the activity to give the testimony." *Id.* at 662. The court went further to say that, to be a qualified person to introduce business records, the person must be someone who "by the very nature of that person's job responsibilities and training, knows and understands the business records sought to be introduced." *Id*. at 663. Thus, because the store clerk "had no responsibilities regarding the business practices of the [store]" he was not qualified to introduce the receipt as a business record. *Id*. The appellate court sympathized with the plight of the prosecution—in that the qualified witness, the manager, did not appear to testify (and was, as a result, held in contempt)—but steadfastly decreed that "the rules of evidence must be observed." *Id*.

The multiple servicer problem.

Because promissory notes backed by mortgages were traded with wild abandon in the heyday of securitization, most loans in foreclosure have passed through the hands of different servicers, such that payment records may be spread out over several different institutions and servicing platforms. Each transfer adds an additional layer of hearsay because the servicer at trial is telling the trier of fact what another servicer said about the state of the borrower's account.

In the case of *Glarum v. LaSalle Bank Nat. Ass'n,* 83 So. 3d 780 (Fla. 4th DCA 2011), the Fourth District specifically disapproved of testimony from one servicer's employee about the records of a previous servicer when the witness had no

personal knowledge as to when or how the entries were made:

> He relied on data supplied by Litton Loan Servicing, with whose procedures he was even less familiar. Orsini could state that the data in the affidavit was accurate only insofar as it replicated the numbers derived from the company's computer system. Orsini had no knowledge of how his own company's data was produced, and he was not competent to authenticate that data. Accordingly, Orsini's statements could not be admitted under section 90.803(6)(a), and the affidavit of indebtedness constituted inadmissible hearsay.

Id. at 783.

The remarkable similarity of the affidavit testimony in the *Glarum* summary judgment case to the trial testimony of the banks' live witnesses today, illustrates how the robo-signers—to avoid *Glarum*—have moved into the courtroom to become robo-testifiers.

But the Fourth District recently confirmed that *Glarum* applies in the context of a foreclosure bench trial. *Yang v. Sebastian Lakes Condo. Ass'n, Inc.*, 4D12-3363, 2013 WL 4525318 (Fla. 4th DCA 2013). In *Yang*, the plaintiff's witness had testified about account balances found in the records of a prior management company, even though she had never been employed there. *Id*. at *1. As in this case, on direct examination (and over objection), the witness "employed all the 'magic words'" of the business record exception to hearsay. As in this case, cross-examination revealed a different story—that she did not know the prior management company's practice and procedure and "had no way of knowing" whether the data obtained from that company was accurate. *Id*. at *3-4. The District Court reversed the trial court's final judgments of foreclosure and remanded for entry of a directed verdict in favor of the condo owners. *Id*. at *4.[3]

The overlooked fifth prong of the business record hearsay exception and the trustworthiness myth.

The fifth prong of the business record hearsay exception—that the circumstances do not show a lack of

trustworthiness—is rarely mentioned. Sometimes, the proponent of the records will turn this requirement on its head, arguing that, because bank records have been commonly viewed as particularly trustworthy, the remaining criteria may be ignored. Therefore, argue the banks, they should not be subjected to hearsay rules applicable to other litigants.

It is this underlying premise—that bank records are inherently trustworthy—that is comically false. While bank records of loan payments and escrow expenses may have been fastidious in the time of the Bailey Building and Loan Association in Bedford Falls,[4] those days are long gone, at least in the context of foreclosure litigation. Now, the banking industry's flagrant abuse of the judicial system with robo-signed affidavits,[5] falsified assignments,[6] and expense padding[7] has become common knowledge—so much so that its betrayal of the public trust may be judicially noticed. Nor do the banks seem governed by any business incentive to be truthful and accurate in its dealings with the public and other banks.[8]

Strictly following the hearsay exception rule,[9] this known lack of trustworthiness is enough to hold that banks can never qualify for the business records hearsay exception in a foreclosure case. While the courts may balk at this strict application of the rule, at a minimum, the banks cannot be told that they may skip bringing a qualified witness to trial to establish the criteria of the business-record exception because banks are somehow worthy of the court's trust.

The myth that providing admissible evidence from qualified witnesses is "impractical."

The foreclosing banks often argue that the court should not follow binding precedent (*Glarum*, *Yang*, and *Lassonde*) because it would be impractical for the banks to comply with the Florida hearsay

exception rule when the paperwork has been prepared by many different entities and departments located far from the courthouse. Ignoring for the moment the impropriety of making evidentiary rulings based on the unproven impact it would have on non-parties, Florida law has already provided a practical, efficient means for the bank to introduce records from far-flung departments or corporate affiliates.

Section 90.902(11) Fla. Stat. provides that the records custodian or qualified person need not be present in court to lay the business record foundation for documentary evidence. Instead, their testimony may be admitted through an affidavit (a "certification or declaration"):

> (11) An original or a duplicate of evidence that would be admissible under s. 90.803(6), which is maintained in a foreign country or domestic location and is accompanied by a certification or declaration from the custodian of the records or another qualified person certifying or declaring that the record:
>
> (a) Was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person having knowledge of those matters;
>
> (b) Was kept in the course of the regularly conducted activity; and
>
> (c) Was made as a regular practice in the course of the regularly conducted activity,
>
> provided that falsely making such a certification or declaration would subject the maker to criminal penalty under the laws of the foreign or domestic location in which the certification or declaration was signed.
>
> § 90.902, Fla. Stat.

See also § 90.803(6)(c), Fla. Stat. (providing the procedure for using such an affidavit, which includes notice sixty days before trial and, if opposed, a pre-trial motion); *Yisrael v. State*, 993 So. 2d at 957. Indeed, the courts have already suggested that foreclosing banks can meet the hearsay exception requirements in exactly this manner. *Mazine v. M & I Bank*, 67 So. 3d at 1132.

It is telling that the banks generally choose not to avail themselves of these rules which seems specifically designed to simplify the procedure by which the records of modern, highly departmentalized and geographically dispersed corporations may be admitted into evidence. Accordingly, even if were proper for the trial court to concern itself with the ramifications of evidentiary rulings on the economic well-being of the litigants or non-parties, the court need not ignore binding precedent or rewrite the rules of evidence, because they already contemplate the constraints faced by modern financial entities.

Conclusion

It is ironic that the catch-phrase most often used by the banks during the upswing of the foreclosure crisis was "moral hazard"—that upside down homeowners should not be given assistance because it would encourage others to walk away from their homes and the accompanying debt. The real moral hazard, however, is to a judicial system that turns a blind eye to evidentiary rules (crafted and honed over decades) in a misguided effort to clear its dockets of a glut of foreclosure cases—a surfeit that is symptomatic of a deteriorated business ethic and a causally related economic downturn.

Not only does this diminish the moral authority of, and public confidence in, the judiciary, it erodes the professionalism of the practice of law. A new generation of attorneys is being led to believe that the

rules of court are to be overlooked when inconvenient or when they lead to unpopular results—that courts will abdicate their truth-seeking function for bureaucratic expediency. The effects of this inculcation of our future judges and leaders will be felt for years to come.

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[1] § 90.803(6) Fla. Stat.; *Yisrael v. State*, 993 So. 2d 952, 956 (Fla. 2008).

[2] *Mazine v. M & I Bank*, 67 So. 3d 1129, 1132 (Fla. 1st DCA 2011) (judgment of foreclosure after bench trial reversed where bank's only witness "had no knowledge as to the preparation or maintenance of the documents offered by the bank"); *Snelling & Snelling, Inc. v. Kaplan*, 614 So. 2d 665, 666 (Fla. 2d DCA 1993) (witness who relied on ledger sheets prepared by someone else was neither the custodian nor sufficiently familiar with the underlying transactions to testify about them or to qualify the ledger as a business record); *Alexander v. Allstate Ins. Co.*, 388 So. 2d 592, 593 (Fla. 5th DCA 1980) (adjuster not qualified to testify about the usual business practices of sales agents at other offices). *See also Thomasson v. Money Store/Florida, Inc.*, 464 So. 2d 1309, 1310 (Fla. 4th DCA 1985) (statement that demonstrates no more than that the documents in question appear in the company's files and records is insufficient to meet the requirements of the business record hearsay exception); *Holt v. Grimes*, 261 So. 2d 528, 528 (Fla. 3d DCA 1972) (records properly excluded where there was "no testimony as to the mode of preparation of these records nor was the witness testifying in regard to the records in the relationship of 'custodian or other qualified witness'").

[3] *See also Thompson v. Citizens Nat. Bank of Leesburg, Fla.*, 433 So. 2d 32, 33 (Fla. 5th DCA 1983) (summary judgment reversed where affiant could not state that he had personal knowledge of matters contained in bank's business records, that the records were complete, or that they were kept under his supervision and control).

[4] *It's a Wonderful Life* starring James Stewart, 1946.

[5]Memorandum No. 2012-AT-1803 of the Office of the Inspector General of the Department of Housing and Urban Development, September 28, 2012 (concluding that the five largest servicers had "flawed control environments" which permitted robo-signing, the filing of improper legal documents, and, in some cases, mathematical inaccuracies in the amounts of the borrowers' indebtedness); Press Release of the Department of Justice Financial Fraud Enforcement Task Force, March 12, 2012 and related court filings, available at: http://www.nationalmortgagesettlement.com/.

[6] *See Pino v. Bank of New York Mellon*, 57 So. 3d 950, 954 (Fla. 4th DCA 2011) (regarding backdating of assignments; "…many, many mortgage foreclosures appear tainted with suspect documents.")

[7] *See*, 300 million dollar settlement of force placed insurance class action, *Salvatore Saccoccio v JP Morgan Chase Bank N.A. et al*, No. 13-cv-21107, US District Court, Southern District of Florida

[8] For example, the 13 billion dollar settlement between JP Morgan Chase and the Department of Justice regarding misrepresentations to Freddie Mac and Fannie Mae (*see*, *JPMorgan, U.S. in tentative $13 billion settlement, CNNMoney, Evan Perez and James O'Toole, http://money.cnn.com/2013/10/19/investing/*jpmorgan-settlement/index.html); the LIBOR rate fixing scandal (*see, U.S. and British Officials Fine ICAP in Libor Case,* DealBook-New York Times, Mark Scott and Julia Werdigier, http://dealbook.nytimes.com/2013/09/25/icap-to-pay-87-million-fine-in-libor-fixing-case/); the interest-rate swap scandal (*see, Libor Settlements Said to Ease CFTC Path in Rate-Swaps Probe*, The Washington Post with Bloomberg, Matthew Leising, http://washpost.bloomberg.com/Story?docId=1376-MR2CYI0D9L3701-3PIU9B5TJJGSOP47VUH8516G7A).

[9] Strict compliance with the hearsay exception rules is required. *Johnson v. Dep't of Health & Rehabilitative Services*, 546 So. 2d 741, 743 (Fla. 1st DCA 1989).