The *WAMCO*/*Calloway* Doctrine and the Business Records Landscape

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Getting business records into evidence at trial appears to be an easier, and less rigid process, according to a developing trend in Florida's appellate courts. The Fourth District Court of Appeal's decision in *Bank of New York v. Calloway*, 157 So. 3d 1064 (Fla. 4th DCA 2015), appears to expand the Business Records Exception to the Hearsay Rule, refining the process of having corporate records obtained from other companies into evidence. *Calloway* is not an expansion of the law, but instead is an evolution from a decade old decision of *WAMCO XXVIII, Ltd. v. Integrated Electronic Environments, Inc*., 903 So. 2d 230 (Fla. 2d DCA 2005). All counsel seeking to introduce (or exclude) business records evidence should be familiar with the doctrine, its evolution, and its application. I call these two cases and their progeny the *WAMCO*/*Calloway* Doctrine.

The doctrine started out with *WAMCO,* a Second District Court of Appeal opinion in 2005. Although the Second District did not go into great detail in its opinion, its holding was clear that a party seeking to introduce business records obtained from another company did not have to bring a witness from the prior company that created the business records to court to testify in order to lay the foundation necessary to have the records admitted. This decision was a departure from the practice of requiring a records custodian from the prior company to satisfy the business records requirements of the hearsay rule. According to The touchstone, as the Second District pointed out, was whether "the sources of information or other circumstances show lack of trustworthiness." *WAMCO*, 903 So. 2d at 233. Of note is the appellate court's discussion that the trial court properly admitted the records into evidence, and that the evidence was subject to cross-examination and admission of contrary evidence. *Id.* The records in controversy in *WAMCO* consisted of financial records of a prior company that had received payment to a condominium association, the accuracy of which the successor management company and proponent of the evidence had independently verified.

This principle was refined and explained in further detail by the Fourth District in *Calloway*. First, the court explained that business records may be admitted three ways: by stipulation, by having a representative of the company that created the records testify as to their admissibility, or through a certification or declaration pursuant to Florida Statute section 90.803. The *Calloway* court reviewed the opinions issued after *WAMCO*, and clarified that merely adopting the records of the prior business does not meet the Florida Evidence Code's requirement of reliability. However, the *Calloway* court held that the acquiring business could take certain steps to insure reliability of the records such as relying on the contract between the businesses or reviewing the records for reliability before integrating into the acquiring business' records, which process would demonstrate reliability of the records and satisfy the records exception to the hearsay rule, permitting their admissibility.

Several cases have followed or discussed *Calloway*, including *Sas v. Federal Nat. Mortg. Ass'n*, --- So. 3d ----, 2015 WL 3609508 (Fla. 2d DCA 2015); *Channell v. Deutsche Bank Nat. Trust Co.*, --- So. 3d ----, 2015 WL 3875949 (Fla. 2d DCA 2015); and *Nationstar Mortg., LLC v. Berdecia*, --- So. 3d ----, 2015 WL 3903568 (Fla. 5th DCA 2015). Of particular note is the Fifth District's opinion in *Berdicia*, including its analysis. Although it did not break new ground, *Berdicia* re-iterated that the person testifying about the business records need not be the person who created the business records, but that person must be familiar with the record-keeping practices of the original record-keeper or must have independently verified the accuracy of the records.

One commentator has expressed significant concern about the *Calloway* decision:

> This [*Calloway*] approach erodes the requirement of reliability upon which section 90.803(6) and the other hearsay exceptions are premised. The presence of a contractual or business relationship does not insure that the records kept by the prior business are kept in accordance with the requirements of the business record exception and are reliable. So too, conclusory testimony that the acquired records were reviewed for accuracy and then relied on does not demonstrate the circumstances under which the acquired records are prepared that provides necessary foundation for a record to be admitted under section 90.803(6).

Charles W. Ehrhardt, Ehrhardt's Florida Evidence § 803.6 (2015 ed.).

Taking all the cases and comments together, several "take-aways" become apparent. First, the *Glarum v. LaSalle Bank Nat. Ass'n*, 83 So. 3d 780, 782–83 (Fla. 4th DCA 2011), decision is clarified to clear up the misconception that slavish addiction to the requirements of the 90.803(6) is not required. As the *Calloway* court stated: "The law does not require an affiant who relies on computerized bank records to be the records custodian who entered or created the data, nor must the affiant identify who entered the data into the computer. The law is also clear there is no *per se* rule precluding the admission of computerized business records acquired from a prior loan servicer." *Calloway,* 157 So. 3d at 1070. (emphasis supplied)

Second, the focus now seems to be properly on the trustworthiness of the evidence sought to be introduced. For example, Florida Statute section 90.401 states that "Relevant evidence is evidence tending to prove or disprove a material fact." Moreover, Florida Statute section 90.402 states: "All relevant evidence is admissible, except as provided by law." Of course, evidence that a borrower has or has not paid tends to prove the ultimate issue of whether there has been a default and whether there are any monies outstanding meets the relevance standard, so the only question is whether the information is trustworthy. *WAMCO* and *Calloway* approach the admission of business records evidence from this perspective: so long as the evidence meets the base requirement of

trustworthiness, it should be admitted and the opposing party can then challenge the credibility of the evidence or introduce their own evidence.

Commentators and courts may differ in their views whether the *WAMCO*/*Calloway* approach is correct, but the approach now appears to be accepted. Counsel should accordingly plan for the admission of business records evidence in most situations notwithstanding the unavailability of a witness from the creator of the records, and where appropriate, prepare for the introduction of evidence to counter the business records evidence.

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