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Notes

Mercantile Credit Reports as Evidence

Most courts exclude mercantile credit reports from evidence with the generalization that they are hearsay and hence inadmissible. This Note examines the various problems involved in using such credit reports in evidence. The author points out that the hearsay objection can often be overcome when the problem is recognized as one of "double hearsay." He concludes that even where a strict application of the hearsay rule would bar the evidentiary use of these reports, they should be admitted into evidence in particular cases as "business records" when the trial court finds that a given report meets the standards of reliability imposed by the "business records" exception to the hearsay rule.

In the modern commercial world the need for reliable and accurate credit information has been met to a large extent by mercantile credit agencies which collect, compile, and furnish information to businessmen which will be helpful to them in determining the credit risk of a prospective debtor. This credit information, disseminated in the form of mercantile credit reports, may also be useful as evidence in proving disputed facts in litigation. However, such credit

1. On mercantile agencies generally, see 36 Am. Jur., Mercantile Agencies (1941); Beckman, Credits & Collections in Theory and Practice 155-214 (4th ed. 1939); Foulke, The Sinews of American Commerce 275-379 (1941); Irons & Bellemore, Commercial Credit and Collection Practice 79-123 (2d ed. 1957); American Financial Institutions 605-88 (Fychoody ed. 1951); Shultz & Reinhart, Credit and Collection Management 55-104 (2d ed. 1954) [hereinafter cited by authors' or editors' names]. The need for credit information is illustrated by the fact that nearly 90% of all manufacturers' and wholesalers' sales today are based on credit. Shultz & Reinhart 3. Mercantile credit agencies have enjoyed a continuous growth since their inception in 1841, Irons & Bellemore 80, and have developed into large institutions which provide a steady flow of credit information on virtually every kind of commercial operation. Foulke 303.

2. Credit reports would seem especially useful as evidence when the reputation for financial standing of a business or person is in issue, since this fact seems less capable of proof by means other than a credit report than are other kinds of information in the report. See notes 27-33 infra and accompanying text. In addition to an appraisal of credit strength, credit reports contain a variety of information which may be relevant in litigation such as the history of a firm and its personnel, methods of operation, physical facilities, and financial reports. This information may be obtained from many different sources, making the credit report a composite of a variety of information. Compare the discussion of the use in evidence of accountants' summaries at note 69 infra. When specific facts such as a person's net worth or ownership of property are in issue, a credit report may be the only available evidence. See Brown v. Caylor, 144 Ga. 302, 87 S.E. 295 (1915); Blake v. Meadows, 225 Mo. 1, 123 S.W. 888 (1909).
reports are usually excluded from evidence when offered to prove the truth of the facts contained in the reports, although they may be admissible for various non-hearsay purposes. The purpose of this Note is to (1) examine the methods credit agencies use in compiling and reporting credit information; (2) consider the extent to which the use of credit reports in evidence is limited by the hearsay rule; and (3) determine whether a strict application of this rule should be relaxed to permit a greater evidentiary use of these reports.

I. THE COLLECTION AND REPORTING OF CREDIT INFORMATION

The primary source of credit information is usually the business whose credit standing is being investigated. Outside sources of information — public records, banks, merchandise suppliers, and others who have dealt with the business in question — are utilized in supplementing and verifying the information obtained from the primary source. This "outside" information may be derived from business records, such as creditor's ledgers. However, the extent to which regularly-kept records or only the informant's word are relied on will vary from case to case.

Several types of reporters are employed by credit agencies. Dun & Bradstreet "city" and "resident" reporters are usually trained spe-


4. For example, in Crossier v. McNeal, 60 Ohio C.C. Dec. 748, 17 Ohio C.C.R. 644 (8th Cir. 1885), a credit report was admitted on the question whether a subscriber had notice of the facts contained in the report. Credit reports are admissible as evidence of falsely representing financial standing to a credit agency. Apparently, the rationale is that evidence of the representation is not hearsay for this purpose, but constitutes "operative facts." See, e.g., Ernest v. Cohen, 62 S.W. 186 (Tenn. App. 1900). A credit report might also be used to refresh a witness' memory. See Trippett v. Rugby Distilling Co., 66 Ark. 219, 49 S.W. 975 (1899). In Trainor v. Buchanan Coal Co., 154 Minn. 204, 191 N.W. 431 (1923), a credit report showing a buyer's poor financial condition was admitted to show seller's good faith in relying on the report when he revoked buyer's credit. Accord, Texas Employees Ins. Ass'n v. McDonald, 238 S.W.2d 817 (Tex. Civ. App. 1951).

5. FOULKE 387.

6. "An effort is made to investigate every statement . . . [obtained from the party being investigated] . . . and to check every item . . . through inquiries made of bankers, merchants, and other members of the community." BECKMAN 167. Also, see FOULKE 387.

7. For example, "outside" credit information obtained by Retail Credit Company, a special-line mercantile agency, is confirmed through records whenever possible. PROCHNOW 629.

8. Increased specialization and departmentalization by credit agencies have produced trained specialists who achieve a high degree of competence in collecting, compiling, analyzing, and reporting credit information. Dun & Bradstreet, Inc., has a number of departments, each of which provides special reporting services. The Credit Report Department investigates, analyzes, and publishes credit reports on virtually every kind of business concern. The Insurance Division of this department publishes special reports for fire insurance underwriters and agencies. The Reference Book Department prepares a credit rating book. The Advisory Service Department
cialists in the particular commercial fields which they investigate.\textsuperscript{9} Reporters for National Credit Office, Inc., a special-line mercantile agency, work exclusively on a particular group of firms within a specific industry.\textsuperscript{10} Dun & Bradstreet local correspondents are usually businessmen in non-metropolitan areas who devote a part of their time to credit investigating.\textsuperscript{11} These local correspondents do not have the opportunity to achieve the degree of expertness which a full-time specialist can attain; however, the fact that they often cover the same trade area over a long period of time provides the advantage of familiarity with local sources of information and trade conditions.\textsuperscript{12}

The various means employed by credit agencies in communicating credit information to subscribers range from credit ratings, which express a general evaluation of a business concern's credit strength,\textsuperscript{13} to extensive credit reports.\textsuperscript{14} Credit ratings, such as Dun & Bradstreet Reference Book Ratings, estimate credit strength in terms of "high," "good," "fair," or "limited."\textsuperscript{15} These ratings are determined by two principal criteria—estimated financial strength, which is

supplies specialized information to garment manufacturers. Other special departments provide information relating to specific subjects such as foreign businesses and political entities—states, counties, municipalities, and similar borrowing units for investors. There are also departments which collect past-due accounts, publish Dun's Review, a business monthly, and make statistical studies on various problems affecting industry, banking, accountancy, and review congressional legislation affecting business. FOULKE 302-03.

9. Dun & Bradstreet, Inc., employs approximately 2,000 reporters who receive special training in one of more than thirty types of business operations. IRONS & BELLEMORE 99.

Dun & Bradstreet reporters are classified as City Reporters, Resident Reporters, Local Correspondents, and Traveling Reporters. The City Reporter concentrates on large corporate concerns, and investigates in only one particular field such as large department stores or chemical manufacturers. He may further specialize by working in only one geographical area in a large city, thus becoming thoroughly familiar with the businessmen and firms in a particular area. The work of a Resident Reporter is much the same as a City Reporter, except that the Resident Reporter does not edit the report himself. He devotes his time to gathering credit information which is edited in the central office by specialists in the particular field of the business being investigated. Traveling Reporters make periodic investigations in a certain geographical area so that each business can be investigated at least once a year. PROCENOW 606-07.

The specialization of credit reporters may take unusual and varied forms. For example, a credit reporter may be an expert in the fish or lumber industry, or may specialize in businesses in China Town in San Francisco, or in resort towns. See FOULKE 341-47.

10. IRONS & BELLEMORE 104. Special-line agencies report on either a particular business, a limited territory, or give credit information of a special type, such as ledger information of creditors of the person or business being investigated. See id. at 103-22.

11. FOULKE 309.

12. BECKHAM 167.

13. See IRONS & BELLEMORE 85-89; Shultz & Reinhardt 60-64.

14. See IRONS & BELLEMORE 89-98; SHultz & REINHARDT 64-74.

15. IRONS & BELLEMORE 87.
usually measured by tangible net worth, and a composite credit appraisal, which is the agency’s subjective determination based on a number of factors.

Credit reports, unlike credit ratings, contain supporting factual data in addition to the agency’s analysis of these facts so that the subscriber can draw his own conclusions. For example, Dun & Bradstreet Analytical Reports typically include information about the personnel of the business, its history, method of operation, subsidiaries, financial condition, paying record, and bank relations. The financial sections of these reports contain the latest available financial statements of the business investigated.

Despite their reluctance to admit credit reports into evidence, courts are not unaware of the high reputation these reports have among businessmen and the extent to which they are relied on in important business transactions. Numerous credit agencies com-

16. Shultz & Reinhardt 60.
17. The composite credit appraisal expresses “the degree with which the following eight conditions are met in the appraised business: (1) soundness of its legal structure; (2) sufficient age . . . ; (3) capacity and experience of the management; (4) no record of criticized failures or fires; (5) willingness to submit financial statements; (6) sound financial position; (7) favorable financial and business trends; and (8) good payment record.” Id. at 63.
18. Id. at 64–65.
19. [Dun & Bradstreet] analytical reports are written by highly trained and specialized reporters on the larger and more complicated business enterprises. The information presented in such reports is presented under seven captions: . . . Under the “Personnel” caption is given a brief description of the background and business career of each officer or partner and the capacity in which he serves the business. The development of the business from the inception down to the present time is traced under the “History” caption. Included under “Method of Operation” are such subjects as the products sold or manufactured, the trade to which distribution is made, sales territory, number of accounts, selling terms, number of salesmen, seasonal aspects of the business, number of employees, facilities, and location.

The “Subsidiaries” presentation . . . gives the name and location of the subject company’s subsidiaries, the percentage of stock ownership by the parent company, and other important information referring to the intercompany relationships. The “Financial Information” section presents the companies financial statements in comparative form for the latest three years, including such operating details as net sales, net profits and dividends or withdrawals . . . The “Trade Investigation” presents the paying record of the business as reflected by a tabulation of supplier ledger experiences. The “Bank Relations” section outlines the nature and scope of the company’s position with its depositories.

Ibid.
Analytical reports also contain ratings similar to those found in Dun & Bradstreet Reference Books. Irons & Bellemore 91.

20. Ibid. Very often these financial statements are reproduced by photographic processes, thus avoiding possible errors in reproduction. Id. at 100.
21. See authorities cited note 3 supra.
22. As early as 1889, a court recognized that “[credit] agencies have become almost a necessity in the transaction of commercial business, and the rules by which they are governed, and the information they gather . . . are well known to business and commercial men generally, and such information is perhaps more frequently relied upon among such men than that obtained from all other sources, and courts cannot shut their eyes to these facts. . . .” Mooney v. Davis, 75 Mich. 188, 192, 42
pete with one another in the business of furnishing credit information, a fact which naturally tends to encourage the development of more accurate and reliable credit reporting. There is every reason to believe that credit agencies are completely disinterested and act at all times with honesty and objectivity in publishing credit information:

The agency has every possible motive to be accurate. For obvious reasons its only motive is to convey as nearly as possible the whole truth in every report. If a report should exaggerate the worthiness of a risk and thus induce subscribers to trust this risk more than is warranted, losses to the subscriber would result. Should the report be too unfavorable, then subscribers might deny credit to a good customer and thus lose business. In either case the subscriber would blame . . . [the agency].

However, the accuracy and reliability of credit reports will depend in each case on such factors as the skill of the particular reporter, the sources of information available, and the cooperation given by those persons from whom information is sought.

II. CREDIT REPORTS AND THE HEARSAY RULE

A. The Problem: Hearsay and Double Hearsay

A hearsay problem will invariably arise in connection with the evidentiary use of credit reports. Since the information gathered by the credit reporter is obtained from out-of-court informants, an attempt to prove the truth of this information by the reporter's testimony will involve the introduction of hearsay evidence. And, when the report is offered in place of the reporter's testimony, a "double hearsay" problem arises because the report itself is hearsay based on the reporter's statements. This problem exists even when the report is not offered to prove the truth of its contents, but for a non-hearsay purpose such as proving a misrepresentation of financial statements.

N.W. 802, 803 (1889). In Pump-It, Inc. v. Alexander, 230 Minn. 564, 570, 42 N.W. 2d 337, 340 (1950), the court said "there is no apparent reason why a disinterested representative of a reputable commercial agency should misrepresent or color the truth. The salability of his employer's service and his position depend upon the accuracy of the reports. These reports are compiled by a regular procedure and enjoy a good reputation in the business community."

23. There are about one hundred credit agencies in New York City besides Dun & Bradstreet and an unknown number of them throughout the rest of the United States. SHULTZ & REINHARDT 76.


25. On double hearsay generally, see MCCORMICK, EVIDENCE § 225 at 461 (1954) [hereinafter cited as MCCORMICK].

26. Evidence of a misrepresentation is admissible under the "operative facts" doctrine. "Operative facts," as labeled by McCormick, or "utterances forming a part of the issue," as characterized by Wigmore, are not excluded by the hearsay rule. The rule is stated by Wigmore: "Where the utterance of specific words is itself a part of the details of the issue under the substance law and the pleadings, their utterance may be proved without violation of the Hearsay rule, because they are not offered to evidence the truth of the matter that may be asserted therein." 6 WIGMORE, EVIDENCE § 1770 at 185 (3rd ed. 1940) [hereinafter cited as WIGMORE]. See MCCORMICK § 228 at 463–64.
cial condition to a credit agency. Though there is no "first step" hearsay problem here, the use of the report in evidence requires the introduction of hearsay at the "second step" level; the report is being offered to prove the truth of the reporter's out-of-court statement that a given representation was made to him.

The "first step" of the double hearsay problem must be resolved by showing that the credit reporter could properly testify as to matters contained in the report—either because an exception to the hearsay rule applies or because the report is not offered for a hearsay purpose. And, the "second" step of the double hearsay objection must be met with a separate hearsay exception, such as the business records exception, which will allow substitution of the report for the reporter's testimony.

B. Resolving the First Step of the Double Hearsay Problem

In meeting the first step of the double hearsay objection by showing that the credit reporter could properly testify as to the contents of the report, the reputation, admissions, and declaration against interest exceptions to the hearsay rule seem especially applicable.

I. Reputation evidence. When financial standing, solvency, or wealth are in issue, the most useful hearsay exception as applied to credit reports will be the reputation exception, which allows the financial standing and solvency of a person or business to be proved by evidence of general reputation in the business community. The witness must confine his testimony to his knowledge of general reputation, and may not give his personal opinion as to financial standing or solvency.

Reputation evidence is in reality no different from information contained in a credit report which is gathered by a reporter from persons in a business community who have knowledge of facts relating to the solvency or financial standing of a person or business.

27. E.g., Lucas v. Swan, 67 F.2d 106, 110 (4th Cir. 1933) (dictum); Hahn v. Penny, 60 Minn. 487, 62 N.W. 1129 (1895); McCORMICK § 298 at 625; 5 WIGMORE § 1623. Contra, Coleman v. Lewis, 183 Mass. 485, 67 N.E. 603 (1903). The practice of using reputation evidence "harks back to a time when jurors looked to neighborhood repute, rather than to testimony in court, as their source of knowledge, and long antedates the hearsay rule itself." McCORMICK § 299 at 624. When the hearsay rule evolved in the late seventeenth century, the use of reputation evidence was so firmly established that an exception to the hearsay rule was recognized for this kind of evidence to prove certain kinds of facts. Id. at § 228 at 469–70.

In some jurisdictions, other facts likely to be found in a credit report are provable by evidence of reputation in the community: ownership or title, 5 WIGMORE § 1628; incorporation, id. at § 1625. The reputation exception is not limited to proving reputation in the community in which one lives, but extends to a commercial community. Id. at § 1616.

28. E.g., Lucas v. Swan, supra note 27; Hayes v. Wells & Babbit, 34 Md. 512 (1871). See 5 WIGMORE § 1584 (the testimony must relate to reputation, it must not be an individual assertion); id. at 1591 (witness must have first-hand knowledge of reputation).
Because the credit reporter, by way of the credit report, relates the same kind of information as does the reputation witness, the financial information contained in credit reports should be admissible as reputation evidence to the extent that it is obtained from sources of information other than the business to which the records relate. The testimony of a member of the community regarding one's financial reputation is not likely to be as reliable a reflection of the opinion held by the business community as the findings of a credit reporter whose job it is to collect and report this kind of information. The methods used by credit agencies in collecting and compiling credit information are far more scientific than the means whereby an individual obtains knowledge of a person's general financial reputation. Of course, a credit report will not be admissible under the reputation exception to prove specific facts in a report, but only to the extent that it reflects general reputation in the community.  

Though no case has squarely held that credit reports are admissible as evidence of financial standing, in *Perper v. Edell*, the Florida Supreme Court appeared to apply the reputation rationale. There a real estate agent brought suit for commissions allegedly due for procuring a purchaser for defendant's hotel. On the issue whether plaintiff had procured a purchaser who was willing and financially able to buy the hotel, the court held that the testimony of a representative of a credit agency relating to the financial responsibility of the purchaser should have been received over the hearsay objection. The court did not state the precise ground for its holding, but the reputation exception clearly seems to apply to the admission of this credit information to prove financial responsibility, and thus to satisfy the "first step" hearsay objection. And, the court's language that "evidence based on the financial responsibility

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29. See 5 Wigmore § 1585.

As will be seen below, the business records exception is an adequate answer to the second step of the double hearsay objection — use of the credit report in evidence in place of the reporter's testimony. But beyond this, there is even less harm in relying on the report when it is offered as reputation evidence, since lack of opportunity to cross-examine is not a serious hardship in this situation. The testimony of the reputation witness is not based on his personal knowledge of the facts he relates, but only on his knowledge of the community belief as to these facts. He can therefore be effectively cross-examined only as to the basis for his knowledge of reputation in the community. When preliminary proof for admission in evidence of a credit report is presented, there will be an adequate opportunity for this kind of cross-examination. See notes 75–80 infra and accompanying text.

30. 160 Fla. 477, 35 So. 2d 387 (1948).

31. All the elements of the reputation exception were present: 1) The testimony was hearsay since it was offered to prove the financial condition of the purchaser. 2) The testimony related to "financial responsibility and business standing," and was therefore a fact properly provable by reputation evidence. 3) The credit information was doubtless based in part on sources other than the purchaser himself. See note 6 and accompanying text, supra. To this extent the information was based on the purchaser's reputation in the business community.
and business standing of a proposed purchaser is admissible."  

2. Admissions of a party-opponent and declarations against interest. The admissions of a party-opponent and declarations against interest exceptions are also applicable in solving the first step of the double hearsay problem that arises in connection with the evidentiary use of credit reports. Since out-of-court statements of a party to litigation are admissible in evidence as admissions of a party-opponent, credit reports come within this exception to the extent that they contain information obtained from a party. When the credit information is obtained from a person who is not a party to the litigation, the declarations against interest exception may be available. An out-of-court statement is admissible under this exception if it was against the declarant's pecuniary or proprietary interest when made, and if the declarant is unavailable at the time of trial. This exception appears to be more applicable when the declarant is the person whose credit rating is being investigated by the credit

32. 160 Fla. at 485, 35 So. 2d at 391. Mathews v. State, 19 Okla. Crim. 153, 198 Pac. 112 (1921), is another case where the reputation exception was applicable. The case was a criminal prosecution for obtaining money by false pretenses. On the question whether a trust company had any assets and whether its commercial paper had any value, the court admitted testimony of a bank examiner based on information gathered from the books and records of the company and supplemented by information obtained from banks and credit agencies. The court did not set forth the specific ground for admission, but said, "It has been frequently held that the question of the solvency of an individual, or of a corporation, in cases of this character involving fraud, may be established by hearsay evidence." Id. at 166, 198 Pac. at 117. Insofar as the bank examiner's testimony was based on "outside source" information contained in the credit report, it would seem to come within the scope of the reputation exception. And if oral testimony based on the report is admissible, surely the report itself would be admissible.

33. The reputation witness in the Perper case was a representative of the credit agency's Miami office who was relating information obtained from the agency's Philadelphia office. Thus a double hearsay problem was involved. The reputation exception satisfies only the "first step" objection; the court did not indicate that it was treating the problem as one of double hearsay and did not specify a hearsay exception with which to resolve the "second step" objection—substitution of the Miami representative's testimony for that of the Philadelphia reporter who obtained the information. It is likely that the information forwarded to the Miami office was in the form of a written report, and, if so, it would seem that the report would have been admissible under this holding since oral testimony based on such a report is an even further step of hearsay. In fact, admission of this oral testimony seems to violate the rule requiring the reputation witness to have first-hand knowledge of the community reputation. See note 28 supra. It will be seen at notes 37-51 infra, and accompanying text that the business records exception would have justified admission of the credit report in the Perper case.

34. See generally, McCormick §§ 239-52.

35. Id. at § 253. The requirement of unavailability may have a significant limiting effect on the use of this exception. It has been strictly applied by many courts, although it has been argued persuasively that it should be relaxed. Id. at § 257. Such reasons as death, insanity, absence from the jurisdiction, or physical incapacity are acceptable, but it is doubtful whether mere practical inconvenience would satisfy the requirement. Ibid.
agency, rather than an outside source of credit information. In the former situation the declarant is more likely to make statements against his interest since he is furnishing information relating to his own business and financial condition. On the other hand, in the latter case the declarant furnishes information relating primarily to the business and activities of another.

In resolving the first step of the double hearsay objection, it must be remembered that a given exception will rarely ever apply to the entire report. For example, the admissions exception will apply only to that part of the report containing information obtained from a party to litigation, while the reputation exception will have application to parts of the report which are based on other sources. Thus, two or more exceptions may be applied simultaneously to admit all or part of a given report.

C. Resolving the Second Step of the Double Hearsay Objection—The Business Records Exception

When the "first step" hearsay objection has been met, the "second step" objection—which arises from substitution of the credit report for the reporter's testimony—can be resolved by applying the business records exception. The admission of regular business entries into evidence is an established exception to the hearsay rule. The basis for this exception is twofold: 1) most modern businesses use systematic and regular procedures which produce accurate records generally considered to be reliable and trustworthy; 2) the necessity of relying on these out-of-court statements is justified by the undue inconvenience and expense involved in presenting in court all persons connected with the making of the record or who have first-hand knowledge of the facts recorded.

Most states have statutory provisions governing the admission in

36. See generally, McCormick §§ 281–90. The modern business records exception to the hearsay rule is derived from the old English "Shop Book" rule, which admitted the shop books of businessmen as evidence of accounts due for sales or services rendered. Id. at § 282. The rule now includes records of an "act . . . or event made in the regular course of business." Uniform Business Records as Evidence Act § 2.

37. McCormick § 281. There are several requirements that the business record must meet to be admissible under the common law rule: 1) The entry must be an "original" entry, although this requirement is often relaxed where it is usual business practice for transactions to be recorded on slips or memorandum books and later recorded in a permanent record book. 2) The entry must be recorded within a short time of the transaction. This requirement receives varied treatment from the courts and often is not strictly enforced. 3) The first-hand knowledge requirement is no longer strictly enforced because of the complexity of modern business. It is unnecessary that the recording clerk have first-hand knowledge of the facts recorded if they are based on the report of one who knows the facts. 4) The regularity requirement means that it must be in the regular course of business to record the facts, but it is not required that the recorded occurrence be one that happens often. 5) The necessity requirement has now been relaxed so that only the inconvenience of presenting the testimony of those who had a part in the recording process need be shown, rather than requiring the unavailability of the entrant. Id. at §§ 283–88.
evidence of business records. The Uniform Business Records as Evidence Act has been adopted in approximately half the states while a few others have patterned statutes after the Model Act. The Uniform Act provides:

A record of an act, condition or event, shall, insofar as relevant, be competent evidence if the custodian or other competent witness testifies as to the identity and the mode of its preparation and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the source of information, methods and time of preparation, were such as to justify its admission.

The Model Act, after which is patterned the Federal Business Records Act, admits business records made in the regular course of business, and specifies that "All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility." Davis v. Louisville Trust Co. is the only case which has squarely held that credit reports are admissible as business records. On the question whether defendant corporation had misrepresented its financial condition by furnishing false information to a credit agency to induce the purchase of defendant's stock, the court approved the admission of the resulting credit report as evidence of the misrepresentation. Here there was no "first step" hearsay problem since the report was introduced for the non-hearsay purpose of showing that the representation was made. However, the defendant objected

38. See 6 WIGMORE, EVIDENCE § 1520, n.6 (3d ed. 1940, Supp. 1959).
39. UNIFORM BUSINESS RECORDS AS EVIDENCE ACT § 2. For a compilation of states that have adopted the Uniform Act, see 9A UNIFORM LAWS ANN. 297.
40. The Model Act was drafted by a committee established under the Commonwealth Fund and is set out in MORGAN, CHAFFEE, GIFFORD, HINTON, HOUGH, JOHNSTON, SUNDERLAND, WIGMORE, THE LAW OF EVIDENCE, SOME PROPOSALS FOR ITS REFORM 63 (1927) [hereinafter cited as MORGAN]. For a compilation of states adopting the Model Act, see 5 WIGMORE, EVIDENCE § 1520, n.6 (3d ed. 1940, Supp. 1959).
41. UNIFORM BUSINESS RECORDS AS EVIDENCE ACT § 2.
43. MORGAN 63. Professor McCormick has said that although this provision "could be interpreted as abolishing the requirement of first hand knowledge by one whose job it is to know the facts . . . the more reasonable interpretation" is that only the entrant, and not the one whose job it is to report the information, is excused from the first-hand knowledge requirement. McCORMICK § 286 at 602. However, this statutory provision has been relied on by courts to admit business records which would otherwise violate the hearsay rule and the personal knowledge requirement. E.g., Kelly v. Wasserman, 5 N.Y.2d 425, 185 N.Y.S.2d 538 (Ct. App. 1959), discussed at note 68 infra and accompanying text; Moran v. Pittsburgh-Des Moines Steel Co., 188 F.2d 467 (3d Cir. 1951), discussed at note 64 infra and accompanying text.
44. 181 Fed. 10 (6th Cir. 1910).
45. Since plaintiff's claim was based on defendant's false representations, evidence of the representations was admissible as "operative facts," although this was not discussed by the court. See note 26 supra and accompanying text.
that the report itself was hearsay, being an out-of-court statement of the reporter. Over this objection the court held the report admissible as a business record, pointing out that the reporter was engaged in the regular course of business, had a duty to record the information contained in the report, and had no personal interest in the matter recorded. The requirement of necessity was satisfied, since the reporter died prior to trial.

The business records exception seems clearly applicable to credit reports in cases where, as in Davis, the reporter could properly testify as to the matters contained in the report either because the testimony is not offered for a hearsay purpose or because a particular hearsay exception applies. Since this "first step" hearsay problem has already been resolved, the business records exception is not relied on to justify admission of the reports for the purpose of proving the truth of the information that they contain; it applies only at the "second step" level to substitute the report for the reporter's otherwise competent testimony.

Just as the recording methods of most modern businesses make ordinary business records a reliable substitute for direct testimony of the facts contained in the record, the efficient reporting and recording methods of credit agencies make credit reports a reliable substitute for the reporter's testimony. And, when the element of necessity is present because of the undue inconvenience of requiring the author of the report to testify, the requirements of the business records exception are satisfied.

III. Liberalizing the Hearsay Restriction on the Evidentiary Use of Credit Reports

In determining the admissibility of credit reports, courts usually exclude the reports with the generalization that they are inadmissi-

46. The requirement that a business record, to be admissible, be based on the personal knowledge of the informant, would appear to be satisfied by virtue of the fact that the credit reporter—the credit report’s informant—is made competent to testify because of an applicable hearsay exception.

47. In Baugh v. Life & Casualty Ins. Co., 307 S.W.2d 660 (Mo. 1957), the court applied the double hearsay approach in admitting into evidence a hospital record which was based upon hearsay statements. After stating that the business records exception does not render admissible a statement which is "hearsay based upon hearsay," the court found that the statement contained in the record was itself admissible as an "admission against interest." Thus, the admissions exception cured the "first step" hearsay objection and the hospital record was admissible as a business record.

48. See text accompanying note 38 supra.

49. Ibid.

50. The use in evidence of credit reports which contain facts obtained from other documents will usually not run afoul of the "best evidence rule." This evidentiary rule requires the "best evidence" to be presented in court when the terms of a particular document are sought to be proved. However, credit reports will most
ble hearsay without treating the problem as one of double hearsay.\footnote{51} It has been pointed out above that if this question is recognized as a two-step hearsay problem, credit reports will often be admissible. Nevertheless, a strict application of this technical hearsay doctrine to credit reports may result in the exclusion of much reliable and trustworthy evidence. The third part of this Note examines whether there is justification for admitting into evidence credit reports shown to be reliable even though the first step of the double hearsay objection has not been met.

A. Are Credit Reports Different From Normal Business Records?

In the typical modern business, the information contained in a business record is obtained from one person and recorded by another.\footnote{52} The evidentiary use of normal business records, like credit reports, therefore involves a “two-step” hearsay problem; the record is based on the out-of-court statement of the entrant which in turn is based on the out-of-court statement of the informant. Thus the business record exception resolves both steps of the double hearsay objection. Although the hearsay problems relating to both normal business records and credit reports are conceptually similar, the former are admissible while the latter are generally excluded. The question remains whether factual differences between these two types of records justify this disparity of treatment.

The principal factor distinguishing credit reports from the internal records of any other business is that in the latter case the source of the information and the recorder are both within the same business and are parts of one integrated system whereby facts relating to the business are ascertained and recorded. Thus, a fact which is recorded can be traced back through the organization of the business, can be verified and found to be based on the personal knowledge of someone connected with the business whose job it was to know and report the information.

However, in the case of credit reports, the informant is not associated with the recording business; in fact, he may not even be associated with the business to which his information relates. Thus, the recording business—the credit agency—does not have within its business organization a person having first hand knowledge of the report’s contents.

But on the other hand, credit information is often obtained from informants who do have first-hand knowledge of the affairs of the

\footnote{51} See authorities cited note 3 supra.
\footnote{52} See MORGAN 57-61.
business to which the reports relate. In such a situation, the only fact that distinguishes a credit report from any other business record is that more than one business is involved. It does not follow that for this reason a credit report fails to meet the standards of reliability and trustworthiness that the business records exception was designed to insure. When it is shown that the report was based on the personal knowledge of someone connected with one business, and was properly recorded in the regular course of the credit agency's business, the principal safeguards underlying the business records exception have been complied with: the informant had first-hand knowledge of the matters recorded, and the information was recorded in the regular course of business. But even though these safeguards may be met, it must be determined whether the business records exception properly encompasses records based on sources of information outside the recording business, or should be restricted in its application to only "single business" records.

B. Can the Admission of Credit Reports be Justified Solely by the Business Records Exception?

1. The Uniform Act and the Model Act. The business record exception, as codified by the Uniform Act and the Model Act, requires preliminary proof that the record be made in the "regular course of business." However, these acts do not require that the person making the record have personal knowledge of the facts recorded. Furthermore, they do not require that the "act or occurrence" recorded be an act or occurrence of the recording business. These acts express a liberal approach apparently designed to facilitate extensive use of business records in evidence. Thus, the Model Act provides that the circumstances of the making of a regularly-entered record, including personal knowledge, go only to weight and not admissibility. And, the Uniform Act expressly leaves to the trial judge's discretion the question whether the source of information and the manner of preparation justify admission of the record.

This broad grant of discretion could be interpreted as permitting the admission of business records, such as credit reports, which are based on sources of information outside the recording business. Under this interpretation, the fact that the informant and the recorder are connected with different businesses is just one element for the trial judge to consider, since the real question is whether the "source of information, method and time of preparation, were such as to

53. See notes 6 & 7 supra and authorities cited therein.
54. See McConkey § 286.
55. See notes 40-45 supra and accompanying text.
56. See text accompanying note 44 supra.
57. See text accompanying note 42 supra.
justify admission." 58 Thus, the trial court would decide, on the basis of the preliminary proof, whether a credit report is in fact unreliable because it is not a "single business" record. 59

2. Two illustrative cases. A significant number of cases have expressed a minority view that the business records exception is not restricted to records in which the informant and entrant were both associated with the same business. 60 For example, the Minnesota

58. Ibid.

59. The Model Act and the Uniform Act are discussed in McCormick § 289 at 607–09:

The Uniform Act ... makes clear that non-commercial records are covered and specifies that the record may be used to prove a "condition" which opens the way for reports of diagnoses in hospital records. As to the burden of production of participants and preliminary proof of unavailability of absent participants, the Model Act undoubtedly is intended to dispense with these requirements by omitting them and merely requiring that the trial judge shall find that the record was made in regular course, etc. The Uniform Act is more satisfactorily specific in its handling of this problem in providing that all the necessary preliminary proof may be made "by the custodian or other qualified witness." Both acts fail to give a clear answer to the question whether business records of information furnished by one who has no business duty to give it are admissible in proof of the facts so volunteered.

The Uniform Act in its last clause introduces the element of discretion of the trial judge to admit or exclude the record according to his "opinion" as to whether the sources of information, etc. were "such as to justify its admission." This affords a flexibility which may be valuable in particular cases but it may be questioned whether predictability of admission when certain fairly objective standards for the offered record are met is not a more useful aim.

Id. at 608.

60. McKee v. Jamestown Baking Co., 198 F.2d 551 (3d Cir. 1952); Pekelis v. Transcontinental & Western Air, Inc., 187 F.2d 122 (2d Cir.), cert. denied, 341 U.S. 951 (1951); Woodward v. United States, 185 F.2d 134 (5th Cir. 1950); Moran v. Pittsburgh-Des Moines Steel Co., 183 F.2d 467 (3d Cir. 1950); Hunter v. Derby Foods, Inc., 110 F.2d 425, 185 N.Y.S.2d 538 (Ct. App. 1959). Cf. Central R.R. v. Jules S. Settnek Co., 258 F.2d 85 (2d Cir. 1955). In State Farm Mut. Automotive Ins. Co. v. West, 149 F. Supp. 289, 299, n.9 (D. Md. 1957), the report of an insurance adjuster, containing the adjuster's conclusions and based in part on the defendant's police record, was held admissible under the business records exception. The court admitted the report on the basis of the adjuster's testimony that he made written reports to his supervisors in the regular course of business and that the reports were prepared near the time of the act recorded.

Contrariwise, in Standard Oil Co. v. Moore, 251 F.2d 188, 213 (9th Cir.), cert. denied, 356 U.S. 675 (1958): "The probability of trustworthiness of memoranda and records made and maintained as provided in § 1732 [the federal business records act] lies in the fact that they are the routine reflections of the day-to-day operations of the business in whose files the memoranda and reports are found." In Johnson v. Lutz, 253 N.Y. 124, 128, 170 N.E. 517, 518 (1930), the court, in excluding a police accident report which was not based on the personal knowledge of the reporting officer, said, "It [the business records exception] was not intended to permit the receipt in evidence of entries based upon voluntary hearsay statements made by third parties not engaged in the business or under any duty in relation thereto." Also, see Palmer v. Hoffman, 318 U.S. 109, 114 (1943), where the Court said, "Those [accident] reports are not for the systematic conduct of the enterprise as a railroad business. Unlike payrolls, accounts receivable, accounts payable, bills of lading and the like, these reports are calculated for use essentially in court, not in the business. Their primary utility is in litigating, not in railroading."

In United States v. Martin, 167 F. Supp. 301 (N.D. Ill. 1957), credit reports were
Supreme Court has said that records prepared by parties who are strangers to the business to which the records relate come within the business records exception, if it was in the regular course of business to have the third party make the business entry. The most liberal application of this minority view has been in the area of official government reports.

offered in evidence as business records of the subscriber companies to which the reports were sent by the credit agency. The court did not answer the question whether the reports would be admissible if offered as business records of the credit agency. The reports were excluded because no one within the subscriber companies could vouch for the trustworthiness of the reports. The court pointed out that “The statute . . . [the federal business records act] . . . does not cover records kept which are outside the regular course of business,” and held that “letters and reports made by third persons, other than defendants [to whom the reports related] who are neither employees or officers of . . . [the subscriber] . . . companies, are not business records contemplated by the act.” Id. at 302-03. Thus the records were inadmissible because they were not prepared within the companies offering them in evidence; the court did not decide the question whether the fact that the information contained in the reports was based on an informant outside the recording business rendered them inadmissible.

For a collection of cases in which “non-bookkeeping” entries have been admitted under the business records exception, see Polasky & Paulson, Business Entries, 4 Utah L. Rev. 327, 343-44, nn.90, 91 (1955).

61. Wilson v. Moline, 229 Minn. 154, 175-76, 38 N.W.2d 201, 208 (1949) (dictum). This case involved accounting statements prepared by a third party and based on the records of a partnership which were kept in an account book which one of the partners used in connection with a different business. The court refused to admit the records because they were not made in the regular course of business and were not identified by the party under whose supervision they were compiled. In stating that these third-party records would be admissible if made in the regular course of business, the court was speaking in the context of the Minnesota account book statute, Minn. Stat. § 600.05, and was not interpreting Minn. Stat. § 600.02, the Minnesota business records statute which is patterned after the Uniform Act. However, the court derived support for this proposition from Tiedt v. Larson, 174 Minn. 558, 219 N.W. 905 (1928), and 7 Dunnell’s Minnesota Digest § 3346 (2d ed. 1927), and both of these authorities were interpreting the business records exception codified by the Uniform Act which is applicable to business records generally.

In Pump-It, Inc. v. Alexander, 230 Minn. 564, 42 N.W.2d 337 (1950), the same Minnesota court did not answer the question whether the Wilson reasoning applied to credit reports. After stating that credit reports have usually been excluded when offered to prove the facts contained therein, the court admitted a credit report because its contents were proved by direct testimony. The court expressly declined to answer the question whether the report would be admissible absent this supporting testimony. Since the portions of the report sought to be introduced were based on information obtained from the defendant, the double hearsay approach could have been used. Thus, the admissions exception could have been applied to satisfy the “first step” of the double hearsay objection, and the report could have been substituted for the reporter’s testimony under the business records exception.

62. A majority of courts exclude written reports of government officials when they contain hearsay or are not based on the author’s first-hand knowledge. E.g., Kansas City Stock Yards Co. v. A. Reich & Sons, Inc., 250 S.W.2d 692 (Mo. 1952) (fire chief’s report stating the cause of a fire and based on hearsay held inadmissible); Johnson v. Lutz, 253 N.Y. 124, 170 N.E. 517 (1930) (report of a police officer relating to the cause of an accident held inadmissible unless the officer witnessed the accident). See McCormick § 294 at 617, n.8 (1954); McCormick, Can the Courts Make Wider Use of Reports of Official Investigations?, 42 Iowa L. Rev. 363 (1957). But see cases cited note 61 supra.
In Moran v. Pittsburgh-Des Moines Steel Co., the court, in admitting a Bureau of Mines report based on an investigation of the causes of an accident, said:

the making of such reports is, by command of Congress, part of the
"business" of the Bureau of Mines. The report was a record of an "occur-
rence" or "event" and it was required by act of Congress. . . .

The report is no less admissible because its contains conclusions of
experts based upon hearsay evidence as well as observation. These cir-
cumstances go to weight rather than admissibility.64

The court cited cases in which it had admitted medical reports and
said that "medical diagnosis is no less a matter of opinion based
upon observation and perhaps hearsay than this report of the
Bureau's investigation."65 Admissibility was based on the Federal
Business Records Act (patterned after the Model Act), although the
fact that the records were official government documents may have
provided an additional stamp of reliability.66

In Kelly v. Wasserman, the court admitted New York Depart-
ment of Welfare records containing memoranda of a telephone con-
versation and a face-to-face interview between a department em-
ployee and the defendant. The court noted that the records were
"required by law" to be kept and were made in the regular course
of business. Accordingly, admission was based on section 374-a of
the New York Civil Practice Act, (patterned after the Model Act).
The court also stated that the problem of identifying the voice over
the telephone did not affect admissibility, citing the portion of the
statute stating that "All other circumstances of the making of the
. . . record, including lack of personal knowledge by the entrant or
maker,"67 go only to weight and not admissibility.

The Moran and Kelly cases, although in the minority, illustrate a
growing judicial recognition of the evidentiary value of business

63. 183 F.2d 467 (3d Cir. 1950).
64. Id. at 473.
65. Ibid.
66. Official reports are admissible by statute in a number of states. There is
considerable variance in the form and substance of these statutes. See Commissioner's
Prefatory Note at 9A UNIFORM LAWS ANN. 331 (1957). The UNIFORM OFFICIAL
REPORTS AS EVIDENCE ACT § 1, currently adopted in six states (Idaho, Montana,
North Dakota, Ohio, Texas, and Wyoming), provides that "Written reports of findings
of fact made by officers of this state, on a matter within the scope of their duty as
defined by statute, shall, insofar as relevant, be admitted as evidence of the matters
stated therein." Also, see UNIFORM RULE OF EVIDENCE 63(15), discussed at McCo-
MICK § 294 at 817-18. The federal act provides that "Books or records of accounts
or minutes of proceedings of any department or agency of the United States shall be
admissible to prove the act, transaction or occurrence as a memorandum of which the
same were made or kept." 28 U.S.C. § 1733 (1958). On official reports generally, see
McCORMICK § 291.
68. Id. at 430, 185 N.Y.S.2d at 542. The court cited Johnson v. Lutz, 253 N.Y.
124, 170 N.E. 517 (1930), for the proposition that it is unnecessary for the entrant
of a record to appear as a witness when he had a duty to record the information in
the memorandum. But it ignored the holding in Johnson that the New York business
records even when the sources of information are outside the recording business. The courts did not treat the "first step" hearsay records statute "was not intended to permit the receipt in evidence of entries based upon voluntary hearsay statements made by third parties not engaged in the business or under any duty in relation thereto." Id. at 128, 170 N.E. at 518.

In the Kelly case, since defendant's statements constituted an admission of a party-opponent, the court might have dealt with the problem as one of double hearsay, and applied the admissions exception in conjunction with the business records exception.

Another example of a liberal approach to the problem of the admissibility of official reports, but one which did not rest on the business records exception, is Banford Trust Co. v. Prudential Ins. Co., 102 Conn. 481, 129 Atl. 379 (1925). There the court admitted the report of a city medical examiner which contained the comment "suicide" on the statement of the cause of death. The court recognized that this conclusion of the examiner was not founded "upon knowledge or information peculiar to the medical profession, but upon external facts and circumstances, and such as he would not be permitted to give in evidence were he called as a witness." Id. at 487, 129 Atl. at 381. Nevertheless, the court admitted the report on the ground that it was required by law to be recorded. The court expressed a realistic attitude in stating that "We agree with Professor Wigmore's conclusion: 'It is sensible to admit all such entries for what they may be worth; in controverted cases, other evidence is usually available.'" Id. at 487, 129 Atl. at 382. Professor McCormick points out that Uniform Rule of Evidence 63(15) codifies the position taken by the Banford court by allowing the judge to admit, "as exceptions to the hearsay rule, reports and findings of officers, if the judge finds them to be within the scope of duty and that it was the duty of the officer 'to investigate the facts . . . and to make findings and draw conclusions based on such investigations.'" McCormick, Can the Courts Make Wider Use of Reports of Official Investigations?, 42 Iowa L. Rev. 363, 368 (1957).

69. Other examples of reports somewhat analogous to credit reports which have been admitted as business records are accountant's summaries and market reports. In United States v. Mortimer, 118 F.2d 266 (2d Cir.), cert. denied, 314 U.S. 616 (1941), the court admitted charts containing material extracted from official tax record books and company files. The court emphasized the fact that the information was drawn from records in the custody of public officers and open for inspection to all, saying that "there are numerous cases holding admissible on the testimony of a supervising agent statements compiled from voluminous records according to a method at once practicable and offering a reasonable guarantee of accuracy, even though the supervisor had not examined such records himself." Id. at 269. The court said that the supervising accountant's aides who compiled the information were acting in the regular course of business. The work of the accountant's aides in this case is similar to that of the credit reporter, since both deal with information relating to another business and both make a value judgment as to what information will be included in the summary or report. It is questionable whether records kept in official custody are inherently more reliable than other business records, or whether official custody insures more accurate reporting by the accountants in the Mortimer case than is done by credit reporters acting in the regular course of their business.

Market reports from newspapers and trade journals are admissible to prove market price under a separate exception to the hearsay rule. See Annot., 43 A.L.R. 1192 (1926). These reports are admitted if it is shown that they are accepted by the trade as reliable and trustworthy, "without requiring evidence of how the information published . . . [was] obtained." Mount Vernon Brewing Co. v. Teschner, 108 Md. 158, 168, 69 Atl. 702, 706 (1908). The reporting of market prices obtained from large marketing centers may lend itself to a higher degree of accuracy and precision than is possible in the reporting of credit information. Market price involves only one objective fact, while credit reporting involves a variety of data and a certain amount of subjective judgment. However, the basis for admitting market reports in evidence—their reliability and acceptance by businessmen—would justify the admission of credit reports in particular cases where the reports are shown to be reliable.
problem in either of these cases; in both, the fact that the record was based on hearsay affected only weight and not admissibility.

Although the cases exhibiting the most liberal approach to the business records problem have usually involved reports prepared by government officials, this fact does not necessarily make these reports more reliable than credit reports. The reason for which official reports are deemed reliable—that they have been made by an official who has a duty to investigate and make a report on which official action will be based—seems no more likely to insure reliability than those factors which make credit reports trustworthy: a duty on the reporter to collect and report information on which the credit agency stakes its reputation and on which businessmen rely as a basis for commercial transactions involving large sums of money.

The tendency in Moran and Kelly to break away from a strict application of the hearsay rule is commendable. However, it would be unfortunate if these cases were construed as interpreting the business records exception to provide a cure-all for any kind of objectionable information contained in a business record. A better approach is to leave to the trial court's discretion the question whether, in each particular case, the "outside information" in the record is unreliable evidence. The wholesale admission of evidence that may be unreliable and misleading seems as unjustified as a wholesale exclusion of evidence that may be reliable and useful in litigation.

3. The trial court's discretion. An approach that leaves the question of admissibility of credit reports to the trial court's discretion allows for the admission in evidence of reports shown to have been prepared under conditions which insure the degree of reliability and trustworthiness that the business records exception requires. At the same time, it provides the necessary flexibility for excluding unreliable reports. This is the means of determining admissibility suggested by the Uniform Act.

70. See authorities cited note 61 supra.
71. See McCormick § 294.
72. In Davis v. Louisville Trust Co., 181 Fed. 10 (6th Cir. 1910), where a credit report was admitted under the business records exception, the court, in pointing out that the reporter had a duty to prepare the report, stated:

    "It is well settled . . . that the duty thus discharged need not be imposed by law. It is enough that the duty is recognized. The fact that the record is designed for the use of all persons rightly interested in the subject, and that the success of the business of supplying the information so obtained is dependent upon its accuracy, cannot, we think, but enhance the obligation and sense of duty involved."

Id. at 18.
73. See note 55 supra and accompanying text.
74. The Uniform Act provides for the admission of regular entries if properly identified, if it was the regular course of business to make the entry at or near the time of the act, "and if, in the opinion of the court, the source of information,
The judge should consider all the circumstances surrounding the preparation of the report that relate to its reliability. Such factors are the nature and number of sources from which the credit information was obtained, whether the informant had first-hand knowledge, whether the report is composed largely of objective fact or subjective judgment, the qualifications of the reporter, and the inconvenience that would result if all the persons having first hand knowledge of the making of the report or its contents were required to testify.

The problem of producing sufficient preliminary proof of the reliability of the report may be a difficult one. Of course, the major obstacle arises in attempting to establish that the source of information is an informant who had first-hand knowledge of the facts contained in the report. Since the reports are offered as records of the credit agency, this foundation testimony will be presented by a representative of the agency, an individual not connected with the person or business from which the information was obtained. However, in the case of ordinary business records, the preliminary proof is presented by one who is connected with the business to which the records relate and who is presumably in a position to establish the fact of the first-hand knowledge of the informant. But as a basis for insuring the reliability of the business record, this distinction is not always a realistic one, since

In respect to a particular record, it may not be possible to prove specifically that [the witness presenting the preliminary proof knew that] the particular informant observed the facts, or indeed who the informant was. As evidence that he did, it will be prima facie sufficient to show that it was someone's job, or his business duty in the firm's routine or system, to observe them.76

If the foundation witness does not in fact know who the informant was or whether he had first-hand knowledge, then the mere fact that

methods and time of preparation, were such as to justify admission.” UNIFORM BUSINESS RECORDS AS EVIDENCE ACT § 2.

In Henderson v. Zubik, 390 Pa. 521, 524, 136 A.2d 124, 126 (1957), the court said that “it is clear that the legislature intended to grant to the trial court discretionary power as to the admissibility of business records, provided, that they meet the standards set forth in the [Uniform] act. . . .” In Morgan, The Law of Evidence, 1941-1945, 59 HARV. L. REV. 481, 567 (1946), in the context of hospital records, it is said that “obviously the provision requiring the court to be persuaded that the sources of information, method, and time of preparation were such as to justify admission puts a large measure of discretion in the court and warrants the imposition of reasonable limitations.”

75. See note 60 supra. Also, see Davis v. Louisville Trust Co., 181 Fed. 10 (6th Cir. 1910), discussed at text accompanying note 45 supra, where preliminary proof was established by the manager of the credit agency office from which the report was issued.

76. MCCORMICK § 286 at 602. See Ferguson v. Atlanta Newspaper, Inc., 93 Ga. App. 622, 92 S.E.2d 321 (1956), where a business record was admitted into evidence although the preliminary witness could only testify that it was a regularly kept record, and could not testify from his own knowledge that the record was accurate.
this witness is associated with the business to which the record relates only lends some credence to the proposition that the informant probably had first-hand knowledge. Since circumstantial evidence of first-hand knowledge is deemed sufficient for the admission of ordinary business records, lack of direct proof of personal knowledge in the case of credit reports should not automatically exclude these reports from evidence.

The basic purpose which the first-hand knowledge requirement is designed to serve—insuring reliable evidence—can be achieved by other means. One factor tending to establish reliability is that the information in a given report was obtained from a number of sources who supplied identical information. These various sources serve as a check upon one another, and although this will not assure that each informant had first-hand knowledge of the facts, it provides a reasonably effective means of culling out inaccuracies and insuring reliable information. It might also be shown in a given case that the reporter in question was thoroughly acquainted with the sources of information and was, thus, in a position to obtain information from reliable sources who had first-hand knowledge. In addition, a showing might be made that a given report is the product of two independent investigations by two reporters. A comparison of results of concurrent investigations serves to disclose possible errors of the reporters or inconsistencies in information received from particular informants.

IV. CONCLUSION

A greater evidentiary use can be made of credit reports when it is recognized that the question of their admissibility involves a “two-step” hearsay problem. In many cases, the “first step” of the problem can be resolved by a showing that the credit reporter could properly testify as to matters contained in the report under some exception to the hearsay rule. The business records exception is then available as a means of resolving the “second step” hearsay problem.

77. See McCormick § 10 at 19, § 286 at 602.
78. See Beckman 167.
79. See notes 9 & 10 supra, and text accompanying note 12 supra. When such a showing is made, reliance on the credit reporter to obtain information from informed and trustworthy sources would seem as satisfactory as reliance on a preliminary witness connected with the business in the operation of which this information was recorded when the witness can only testify that it was someone’s duty to know and record the information contained in the report.

Another factor encouraging accurate and honest disclosure to the reporter is that misrepresentations as to financial condition are actionable by one who grants credit in reliance on the representation. See Annot., 32 A.L.R.2d 184 (1953).
80. Dun & Bradstreet traveling reporters sometimes check the accuracy of the reports of local correspondents at periodic intervals or on special occasions. Also, two local correspondents employed in the same territory sometimes are assigned the same investigations without knowing of the duplication. Beckman 167.
—substituting the report for the reporter's testimony as a business record of the credit agency.

However, even though an exception cannot be found to meet the "first step" objection, a credit report should not be summarily excluded merely because it fails to fit within the scope of a mechanical rule that does not take account of particular cases. Under modern codifications of the business records exception, these reports should be admitted when the trial court is satisfied by the preliminary proof that they are in fact reliable.

It has long been urged that the "kind of evidence on which responsible persons are accustomed to rely in serious affairs" should not be excluded from consideration in the determination of disputed facts in litigation. Since businessmen, courts, and commentators have all recognized the reliability of credit reports, a general categorization of these reports as inadmissible hearsay may result in the exclusion of much reliable evidence.

82. The Uniform Act specifically provides that the trial court is to determine whether "the source of information, methods and time of preparation, [of the record] were such as to justify its admission." See text accompanying note 42 supra.
84. See 2 Davis, op. cit supra note 82, at § 14.01; McCORMICK § 300-02; Morgan 51: "The adjudicated cases alone, without any independent investigation into current systems of accounting, reveal the need for inducing the courts to give evidential credit to the books upon which the mercantile and industrial world relies in the conduct of business."
85. Consideration must be given to several factors that generally tend to cast doubt on the reliability of credit reports. The credit agency does not usually guarantee to the subscriber the accuracy of the information contained in the reports, although it is held to a duty of reasonable care absent an exculpatory clause in the contract between agency and subscriber. 36 Am. Jur. Mercantile Agencies §§ 6, 7 (1941). However, the contract usually contains provisions protecting the agency from liability arising from losses caused the subscriber through reliance on erroneous credit reports. 1916 Ann. Cas. 747, 750. This exculpatory clause protects the agency from acts of negligence, but not from gross negligence or false reports knowingly made. Munro v. Bradstreet, 170 App. Div. 294, 155 N.Y. Supp. 833 (1915). Such contract provisions are usually construed strictly against the agency, Crew v. Bradstreet Co., 134 Pa. 161, 19 Atl. 500 (1890), see Annot., 102 A.L.R. 1070 (1936), but they have prevented recovery by an injured subscriber in several cases. See, e.g., Globe Home Improvement Co. v. Perth Amboy Chamber of Comm. Rating Bureau, Inc., 116 N.J.L. 168, 182 Atl. 641 (1938); Bauman v. Bradstreet Co., 238 App. Div. 617, 265 N.Y. Supp. 169 (1933). Although the enforcement of such provisions may appear to be an undue hardship on subscribers, it must be remembered that credit agencies do not undertake to sell credit insurance, but only credit information.

Credit agencies are liable for defamatory material that they publish, but a majority of courts hold that a privilege exists as to information contained in credit reports. E.g., Watwood v. Stone's Mercantile Agency, Inc., 194 F.2d 160 (D.C. Cir.), cert. denied, 94 U.S. 821 (1952), Contra, Pacific Packing Co. v. Bradstreet Co., 23 Idaho 666, 139 Pac. 1007 (1914). The privilege does not apply to information communicated to subscribers generally, Bohlenger v. Germania Life Ins. Co., 100 Ark. 477, 140 S.W. 257 (1911), but only to information given in response to a request of a subscriber, Hooper-Holmes Bureau v. Bunn, 161 F.2d 102 (5th Cir.
and information so given is usually conditional on the subscribers' agreement to keep it in strict confidence. See Irons & Bellmore 96.

The fact that credit agencies insulate themselves from liability by use of the exculpatory clause and privilege may indicate a lack of confidence in the accuracy of their reports which casts doubt on their reliability. However, questions of reliability should not hinge on any one such general criticism of the evidence offered; this insulation from liability should be only one factor to be considered by the court. Such general criticisms do not answer particular questions about the reliability of credit reports in particular cases.

Dun & Bradstreet, Inc., has indicated that it does not favor the use of its credit reports as evidence except in cases where a subscriber has relied on a Dun & Bradstreet report to his detriment. Since credit information is obtained and disseminated on the understanding that it will be kept in strict confidence, it is believed that the use of the reports in litigation would weaken the trust and confidence upon which credit reporting is based. Letter from Howard Kraetz, City Department, Dun & Bradstreet, Inc., to Minnesota Law Review. No reported case can be found where this point has been discussed, but it is unlikely that courts would consider that the confidential relationship upon which credit reports are based is worthy of protection by a legally recognized evidentiary privilege. Most commentators believe that the policy arguments in favor of getting all the facts before the court far outweigh the reasons supporting the suppression of evidence under the privilege theory. See, e.g., McCormick § 108. Of course, this factor cannot be summarily dismissed, but it should be only one of the factors that the trial court considers in determining the admissibility of a credit report. He must weigh the possible harm involved in disclosing this information in court against the harm involved in suppressing relevant evidence.