**UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

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**No. 94-30212**
**Summary Calendar**

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**SWETT & CRAWFORD OF GEORGIA, INC. and SWETT & CRAWFORD,**

**Plaintiffs-Appellees,**

**versus**

**INSURANCE SERVICE GROUP, INC., d/b/a**
**Sports & Entertainment Insurance Services, ET AL.,**

**Defendants,**

**INSURANCE SERVICE GROUP, INC., d/b/a**
**Sports & Entertainment Insurance Services,**
**CHARLES C. MORTON, and**
**SPORTS & ENTERTAINMENT INSURANCE SERVICES, INC.,**

**Defendants-Appellants.**

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Appeal from the United States District Court
from the Eastern District of Louisiana
(CA 93-1427 "N" (5))

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(December 5, 1994)

Before JONES, BARKSDALE and BENAVIDES, Circuit Judges.

By EDITH H. JONES, Circuit Judge:[*]

Providing insurance for the sport of "bungee jumping" is apparently complicated business. This diversity action concerns the allocation of premium refunds between an insurance intermediary

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[*] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

and an insurance broker. The appeal is limited to the admissibility of one business record and the refusal of the district court to order a credit or set-off for some allegedly unearned premiums. Finding no abuse of discretion on either issue, we affirm the judgment of the district court.

**I.**

The Insurance Service Group (ISG), defendant, contests the admissibility and reliability of the invoice relied upon by the plaintiff to prove its prima facie case of an amount due on an open account. A plaintiff must prove by a preponderance of the evidence that the sum alleged due is in fact owed by the defendant in order to recover. Farlee Drug Center, Inc. v. Belle Meade Pharmacy, Inc., 464 So.2d 802, 806 (La. App. 5th Cir. 1985). Here the plaintiff relied on Exhibit 3 -- characterized at trial as an "account current or statement of accounts for [defendant] which was reflecting the amount owed to us by them."

On appeal, ISG challenges this exhibit as inadmissible hearsay. Specifically, it argues that the invoice could not satisfy the requirements of Fed.R. Evid. 803(6), the business records exception to the hearsay rule. Citing Rosenberg v. Collins, 624 F.2d 659, 665 (5th Cir. 1980), ISG asserts that computer records "must be kept pursuant to some routine procedure designed to assure their accuracy, [and] they must be created for motives that would tend to assure accuracy." ISG charges that neither of these prongs was satisfied.

In particular, the defendant challenges whether sufficient assurance of accuracy was possible given two discrepancies in the invoice discovered at trial. Furthermore, ISG contends that the necessary motive for accuracy was lacking since the plaintiff had no economic incentive to correctly distinguish between earned and unearned premiums. Finally, it questions whether the invoice was even created in the ordinary course of business or was artificially generated later.

Although interesting attacks, this circuit has settled that ISG failed to preserve these arguments. United States v. Fendley, 522 F.2d 181,184 (5th Cir. 1975). The entirety of ISG's objection at trial was:

> "Your Honor, we have no objection to any of the exhibits with the exception of the broker's statement which is Exhibit No. 3. As to that exhibit, we don't dispute that it is a true and correct copy of an invoice prepared by Swett & Crawford, but we have some problem with some of the individual items and we will pursue those on cross examination and then would like to review the admissibility of that exhibit at the close of cross examination." (emphasis supplied).

Later, but without additional elaboration, counsel observed that the exhibit was hearsay. These objections are even less precise than the one offered in Fendley.

> Then, Your Honor, we will renew our objection to Government's Exhibit 9-108-B (sic) on the basis that there is no accuracy shown that the instrument is accurate as to the figures it reflects;
>
> And that the preparer was someone other than the witness here; that we cannot determine the accuracy of it, and therefore, it shouldn't be admitted;

> Because it would be hearsay and, again, I cannot cross-examine the paper, obviously, without having the party assigned to compiling the figures on it before us.

Id. at 185. This court's response to that objection was unequivocal.

> It appears to us that this loosely formulated and imprecise objection at most comes to this: (1) that the document was hearsay; (2) that the witness laying the foundation for its introduction was someone other than the preparer; and (3) that the witness laying the foundation was unable to personally attest to the accuracy of the figures contained in the document. There was no objection on the only grounds which would have permitted the trial court to have required that a fuller foundation be laid for the admission of the exhibit - that the printout was made and kept in the regular course of business, for regular business purposes and relied upon by the business, and finally that it was not 'mere accumulations of hearsay or uninformed opinion.'
>
> The grounds asserted in the defendant's objections are clearly insubstantial. While obviously the document was hearsay, this in itself fails to state an objection as to whether the exhibit met the admissibility requirements of the Business Records Act. Similarly, nothing in the Business Records Act requires either that the foundation witness be able to personally attest to the accuracy of the information contained in the document, or that he have personally prepared the document. In fact, both these requirements have been frequently held to have been specifically eliminated by 28 U.S.C. § 1732.

Id. (citations omitted). Hence admission of this invoice was not an abuse of discretion.

**II.**

ISG also assails the trial court's failure to credit its liability to Swett & Crawford by an amount attributable to

premature cancellation of three policies. The district court entered express factual findings on the quantum of liability on two of the three policies. These interpretations are certainly reasonable--and arguably the most logical and preferable. ISG cites no authority for its argument that the facts it notes in its appeal can render the district court's conclusions clearly erroneous.

In any event, ISG fails to contest that Swett & Crawford is a broker not an insurer. Since return of unearned premium is due by insurers--not by intermediary brokers-- Swett & Crawford would not be liable to ISG for these amounts even if tantamount to unearned premiums. David Briggs Enterprises, Inc. v. Britamco Underwriters, Inc., 596 So.2d 1306, 1508 (La. 1992).

For the foregoing reasons, the judgment of the district court is **AFFIRMED**.