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## FEDERAL RULE OF EVIDENCE 804: WILL THE REAL PREDECESSOR-IN-INTEREST PLEASE STAND UP

by

DENNIS J. TURNER\*

As any judge, lawyer or law student can attest, the rule against hearsay with its plethora of exceptions is probably the most vexing of all the rules of evidence. When the Supreme Court's Proposed Rules of Evidence were first published, it was fairly apparent, with respect to the specific rules governing hearsay, that the Court had intended to remove some of the sting from a few of the more annoying aspects of the rule against hearsay.<sup>1</sup> In fact, the changes proposed by the Court arguably constituted a first step toward eliminating the rule entirely.<sup>2</sup> The proposed hearsay rules (Federal Rules of Evidence 801-806) broadened and liberalized the number of exceptions whereby hearsay would be admissible. The rationalization for this expansion could be characterized as a bias toward the admission of hearsay whenever the out-of-court statement had been previously subjected to cross-examination, or when there was some substitute for cross-examination which provided the statement with certain indicia of reliability.<sup>3</sup>

### PROPOSED PRIOR TESTIMONY RULE

When Federal Rule of Evidence 804(b)(1) was proposed by the Supreme Court it originally reflected the Court's bias against excluding hearsay.<sup>4</sup> It pro-

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<sup>1</sup>For example:

- a. Prior inconsistent statements can now be used substantively. FED. R. EVID. 801(d)(1).
- b. Statements made to a physician who was consulted only for the purpose of testifying constitute an exception to the hearsay rule. FED. R. EVID. 803(4).
- c. Learned treatises can now be introduced for substantive purposes. FED. R. EVID. 803(18).

<sup>2</sup>The design of this rule (803) and of the rule (804) which follows is calculated to take full advantage of the accumulated wisdom and experience of the past. The common law exceptions are resorted to, however, not as a basis for formulating an extensive series of minute categories into some one of which a proffered hearsay statement must be fitted under penalty of exclusion, but rather as furnishing examples of appropriate application of one or the other of the two rules. Thus counsel may prepare for trial with ample predictability of result, while at the same time room is left for growth and development of the law of evidence in the hearsay area consistently with the broad purposes expressed in Rule 102. *Dallas County v. Commercial Union Ass. Co.*, 286 Fed. 2d 388 (5th Cir. 1961). FED. R. EVID. 803 advisory committee note.

<sup>3</sup>See Falknor, *The Hearsay Rule and Its Exceptions*, 2 UCLA L. REV. 43 (1954). See also FED. R. EVID. 803 advisory committee note, FED. R. EVID. 804(d) advisory committee note.

<sup>4</sup>The original language as promulgated by the Supreme Court For Rule 804(b)(1) was as follows:

Former Testimony — Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of another proceeding, at the instance of or against a party with an opportunity to develop the testimony by direct, cross, or redirect examination, with motive and interest similar to those of the party against whom now offered.

vided for an extension of the common law exception for the admission of prior testimony. Under common law, former testimony could be admitted if the proponent could show that both the parties and the issues in the prior proceeding were identical to the parties and issues in the subsequent proceeding in which the hearsay was offered. Although this very strict requirement was eventually eased to include prior testimony at a proceeding where there was a "predecessor-in-interest" and a "substantial identity of issues,"<sup>5</sup> it was still a rare case where prior testimony was admissible. The rule as was submitted by the Supreme Court permitted the admission of prior testimony if the person against whom it was offered, or a person with a similar motive and interest, had an opportunity to examine the witness during the course of the previous hearing.<sup>6</sup> This constituted a major change from the common law. Prior hearsay testimony of an unavailable witness could literally be replayed like a phonograph record as long as one of the examiners, upon either direct or cross, in the prior proceeding had a similar motive to examine the witness as the party subsequently opposing the admission of the testimony. For example, in lawsuits arising out of a mass tort such as a bus accident, the bus company could replay the testimony of an unavailable witness in each case brought by an injured passenger. Furthermore, the prior testimony need not have occurred during a formal hearing in which the rules of evidence applied.<sup>7</sup> This gap in the rule against hearsay created by the Supreme Court's proposal was apparently much too wide for those in the House of Representatives. They amended Rule 804(b)(1) to read as it presently does as follows:

(b) Hearsay exceptions — the following are not excluded by the hearsay rule if the defendant is available as a witness:

(1) Former Testimony — Testimony given as a witness at another hearing of the same or a different proceedings, or in a deposition taken in compliance with law in the course of *the same* or another proceeding, *if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.*<sup>8</sup>

The House did not elaborate any reasons for its changes, but the Judiciary Committee's report suggested that it was "unfair to impose upon a party against whom the hearsay evidence is being offered responsibility for the man-

FED. R. EVID. 804(b)(1) (Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates March, 1969).

<sup>5</sup>C. McCORMICK, McCORMICK ON EVIDENCE § 256 (3d ed. 1984).

<sup>6</sup>S. REP. NO. 1277, 93d Cong., 2d Sess. 28 (1974), *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7051, 7074.

<sup>7</sup>Rule 804(b)(1) only refers to testimony being received in another hearing. For example, the testimony could have been elicited during an N.L.R.B. hearing, or even a suppression hearing in a criminal case. The judicial officer in either type of hearing is not obligated to apply the rules of evidence.

<sup>8</sup>FED. R. EVID. 804(b)(1) (emphasis added). The changes which the House of Representatives made in the proposed rule are italicized.

ner in which the witness was previously handled by another party.”<sup>9</sup> To prevent this perceived “unfairness,” the House inserted the “predecessor-in-interest” requirement. This limits the use of prior testimony to situations in which the party who examined the now unavailable witness in the prior hearing was a “predecessor-in-interest” to the party now opposing its admission. There can be little doubt that the House perceived the “predecessor-in-interest” phrase as reducing the opportunity for the use of prior testimony,<sup>10</sup> but its failure to define the phrase has left unresolved the issue of how much the gap was actually narrowed. The Senate, when it had the opportunity of reviewing the amendment, did not believe that the new language changed the thrust of the Supreme Court’s proposed rule.<sup>11</sup> Thus, it was left to the courts to ultimately define the term.

### PRIOR TESTIMONY RULE AS CONSTRUED

It is not surprising that when the courts were forced to offer their interpretation of the “predecessor-in-interest” language some construed it so broadly that it was not a limitation, while some construed it so narrowly that the new Rule 804(b)(1) was left to be nothing more than a codification of the common law. Also not surprisingly, some courts groped for the middle ground between the two extremes. Thus, the portrait painted by the courts of a “predecessor-in-interest” is somewhat blurred and impressionistic.

Representing the “broad-brush” school is the United States Court of Appeals for the Third Circuit which drew a portrait of a “predecessor-in-interest” in *Lloyd v. American Export Lines, Inc.*<sup>12</sup> Frank Lloyd was a seaman on a vessel owned by American Export Lines, and he claimed that American was liable under general maritime law for the injuries he sustained during a fight with fellow crewman, Roland Alvarez. American joined Alvarez as a third-party defendant and Alvarez counter-claimed against American for the injuries he had sustained in the same fight. Alvarez alleged that American failed to use reasonable precautions to protect him from Lloyd, who American knew was a dangerous character. Conveniently for Alvarez, Lloyd habitually failed to appear for pre-trial hearings, and was subsequently dropped from the case leaving as the only issue left for trial Alvarez’s claim for negligence against American.

At trial, Alvarez related a neatly-packaged story about how, prior to the fight in question, Lloyd had developed a pattern of being involved in fights with shipmates as well as harassing and intimidating Alvarez everytime they

<sup>9</sup>H.R. REP. NO. 650, 93d Cong., 1st Sess. 15 (1973), *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7075, 7088.

<sup>10</sup>Comment, *Evidence — Former Testimony — Coast Guard Hearing Officer Is Predecessor In Interest To Civil Litigant Under Federal Rule of Evidence 804(b)(1)*, 10 RUT. CAM. 479, 485 (1979).

<sup>11</sup>S. REP. NO. 1277, 93d Cong., 2d Sess. 28 (1974), *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7051, 7074.

<sup>12</sup>*Lloyd v. American Export Lines, Inc.*, 580 F.2d 1179 (3d Cir.), *cert. denied*, 439 U.S. 969 (1978).

passed each other on the ship. He further testified that he had reported these incidents to the ship's officers. Finally, Alvarez gave a graphic description of their last confrontation where Lloyd hit him from behind and how Alvarez had managed to thwart Lloyd's attack by striking Lloyd with a turnbuckle.

Unfortunately, American's attorneys had no witness available to contradict the version provided by Alvarez. Lloyd, who had been the only other witness to the fight, had disappeared. However, American did have Lloyd's recorded version of the fight. More specifically, American had a transcript of Lloyd's testimony as was given at a Coast Guard hearing previously conducted to determine if Lloyd's merchant mariner's license should be suspended or revoked on the basis of his fight with Alvarez. American's attempt to introduce Lloyd's testimony under the prior testimony exception to the hearsay rule, Rule 804(b)(1), was rebuffed by the trial court on the grounds that the Coast Guard was not a "predecessor-in-interest" to Alvarez, and thus a necessary precondition for the admission of such testimony under the exception was not satisfied.<sup>13</sup>

The Third Circuit reversed after determining that the Coast Guard was indeed Alvarez's "predecessor-in-interest."<sup>14</sup> Although this conclusion was built on a foundation of shifting and shaky premises, there were, nevertheless, many circumstances in the case which supported the admission of Lloyd's testimony, assuming Judge Aldisert could clear the "predecessor-in-interest" hurdle. First, there was a great need for the testimony as it was the only version of the incident American could offer to counter that provided by the opposing party. Second, it was highly relevant to the central issue in the case — who threw the first punch. Third, the prior testimony was made under oath and had been subject to a vigorous cross-examination by a party who had a substantial interest in destroying its credibility. Fourth, the prior proceeding was a formal hearing before a professional hearing examiner. Finally, the plaintiff Alvarez had been present with counsel, and had even testified at the prior hearing, so there could be no credible claim that he would be surprised by Lloyd's testimony. All of the above reasons for admission whether alone or altogether, however, were not sufficient for admissibility under Rule 804(b)(1) unless Alvarez could also be labeled as a "predecessor-in-interest."<sup>15</sup>

<sup>13</sup>*Id.* at 1182.

<sup>14</sup>*Id.*

<sup>15</sup>Judge Stern, in his concurring opinion, suggested that there were sufficient reasons for admission of the prior testimony, but those reasons did not satisfy the requirements of Rule 804(b)(1). *Id.* at 1191 (Stern, J., concurring). In his view, "community-of-interest" could not be equated with "predecessor-in-interest" without thwarting congressional intent. *Id.*

Thus, even if I could agree that Congress intended to relax the common law requirement of actual privity between the parties before prior testimony could be admitted, I cannot endorse a rule which would automatically render admissible against a party evidence which was elicited in a different proceeding by an unrelated person merely because both shared an interest in establishing the same facts.

*Id.* He ultimately determined that, under Rule 804(b)(5), the circumstances of the prior testimony were such that there were equivalent guarantees of trustworthiness and that, therefore, the prior testimony should be admitted. *Id.* at 1192 (Stern, concurring).

Judge Aldisert attached the “predecessor-in-interest” label by use of an intriguing logical syllogism. His first premise was that “interests in the law” are the equivalent of the claims, demands or desires of human beings or associations.<sup>16</sup> He bolstered this somewhat amorphous statement by suggesting that it was a Roscoe Pound pronouncement.<sup>17</sup> His next premise was that the “claims or desires” of Alvarez were the same as the Coast Guard’s “claims and desires” in the prior hearing.<sup>18</sup> Although Alvarez and the Coast Guard sought different remedies,<sup>19</sup> they both desired a determination of Lloyd’s culpability and exacting of a penalty from him. Therefore, both Alvarez as an individual and the Coast Guard as an association had a “community of interest.”<sup>20</sup> The Coast Guard was labeled a “predecessor” because the Coast Guard asserted its claim against Lloyd *prior* to Alvarez’s claim against him. The two labels were then combined to create the magic phrase “predecessor-in-interest.”

The court must have been somewhat embarrassed by its questionable reasoning process, however, for it eventually defined a “predecessor-in-interest” in much less convoluted terms. It held that the previous party (the Coast Guard), having had like motive to develop the testimony about the same material facts, is in the final analysis a “predecessor-in-interest” to the present party (Alvarez).<sup>21</sup> Although simple in its formulation, such a definition is difficult to reconcile with the language of Rule 804(b)(1). The phrase “predecessor-in-interest” must be more than a description of a person with similar motive or the House of Representatives would not have amended the proposed rule. When the House added the “predecessor-in-interest” language the term was not defined, but the brief rationale provided by the Judiciary Committee stated that it would be “unfair” to leave the rule as it had been proposed.<sup>22</sup> Consequently, the House must have intended the term to serve as a limitation on the original proposed language and not merely as a restatement. Thus, it could be claimed that the Third Circuit by its holding in *Lloyd* had turned the “predecessor-in-interest” phrase into a meaningless redundancy.<sup>23</sup>

The cases decided after the *Lloyd* decision are curious in that very few of them either clearly endorse or reject the Third Circuit’s interpretation. The opinion writers often appear to be of two minds. They are philosophically inclined to support the *Lloyd* approach to the problem, but they are reluctant to

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<sup>16</sup>*Id.* at 1184.

<sup>17</sup>*Id.*

<sup>18</sup>*Id.* at 1185.

<sup>19</sup>The coast guard wanted Lloyd’s license pulled, while Alvarez wanted Lloyd to monetarily compensate him for his injuries.

<sup>20</sup>*Id.*

<sup>21</sup>*Id.* at 1186.

<sup>22</sup>H.R. REP. NO. 650, 93d Cong., 1st Sess. 15 (1973), *reprinted in* 1974 U.S. CODE CONG. & AD. NEW 7075, 7088.

<sup>23</sup>See Comment, *supra* note 10, at 483.

give it their unqualified approval. A case in point is *In Re: Johns-Manville Asbestos Cases*<sup>24</sup> in which there was a question of whether prior testimony in cases against subsidiaries of Johns-Manville Corporation could be used against Johns-Manville in a later action arising from the same controversy. Judge Shadur cited *Lloyd* in his opinion, but then declared that it was unnecessary to endorse such a broad application of Rule 804(b)(1) in order to permit the introduction of the prior testimony.<sup>25</sup> Surely, he reasoned, Congress did not intend to use the term "predecessor-in-interest" in the strict sense of corporate privity.<sup>26</sup> Just what sense Congress *did* intend was not proffered by Judge Shadur.

Other cases such as *In re: Paducah Towing Co.*<sup>27</sup> assumed the existence of the "predecessor-in-interest" linkage but moderate the impact from such an assumption by strictly examining whether the "predecessor-in-interest" had a similar motive and ability to develop the testimony. The facts in *Paducah* are very similar to those in *Lloyd*. The prior hearing was commenced by the Coast Guard to revoke a captain's license for an accident involving his barge. The Coast Guard license revocation hearing was followed by a civil suit in which a claim for damages was asserted against the captain's employer (Paducah). The recorded testimony of a now-unavailable witness (Cole) taken during the license revocation hearing was offered by Paducah against Exxon, one of the claimants. The trial court admitted the prior testimony of Cole. On appeal, the Sixth Circuit assumed that the Coast Guard was a "predecessor-in-interest" to Exxon,<sup>28</sup> but reversed on the grounds that the examination of the witness (Cole) by the Coast Guard representative in the license revocation hearing had as a matter of fact been inadequate, and therefore did not comply with the requirement of Rule 804(b)(1) that the "predecessor-in-interest" have a proper opportunity to develop the testimony.<sup>29</sup>

Not all decisions following the *Lloyd* lead are so tepid in their support.<sup>30</sup> A few like *Carpenter v. Dizio*<sup>31</sup> could even be interpreted as an extension of *Lloyd*. In *Carpenter*, the plaintiff, Theodore Carpenter, was accosted one night on the streets of Philadelphia by someone he presumed was a "bum" and when

<sup>24</sup>93 F.R.D. 853 (N.D. Ill. 1982).

<sup>25</sup>*Id.* at 856.

<sup>26</sup>*Id.*

<sup>27</sup>692 F.2d 412 (6th Cir. 1982).

<sup>28</sup>*Id.* at 418.

<sup>29</sup>*Id.* at 419. Specifically, the court based its decision on the following factors: 1) The Coast Guard was not represented by an attorney at the prior hearing; 2) The person who did represent the Coast Guard was unskilled; and, 3) The scope of redirect examination was improperly limited. *Id.* It is ironic that the court admitted the findings of the hearing into evidence even though these findings were based in part on such faulty examination.

<sup>30</sup>*See, e.g., Standard Oil Co. v. Montedison, S.P.A., 494 F. Supp. 370 (D. Del. 1980); Carpenter v. Dizio, 506 F. Supp. 1117 (E.D. Pa. 1981).*

the “bum” became more aggressive in his demands for money Carpenter struck him. He quickly learned, however, that the “bum” was actually an undercover policeman when four other policemen arrived on the scene and proceeded to severely beat him. Not surprisingly, Carpenter was charged with a laundry list of crimes including aggravated assault and terroristic threats. He was tried and acquitted. Carpenter subsequently initiated a civil rights action against the police officers and the City of Philadelphia. During the civil trial, the court permitted Carpenter to introduce the prior testimony of a presently unavailable witness who had previously testified in the criminal proceeding. The issue regarding the admission of the prior testimony was raised once more in a subsequent new trial with the motion against admissibility again being denied. In support of this denial Judge Bechtle relied exclusively on the *Lloyd* decision. His analysis did not mention the phrase “predecessor-in-interest,” but concluded that the state in the criminal action had a similar motive as the defendants in the civil rights action to develop the witness’s testimony.<sup>32</sup> He found that a “community of interest” existed between the State of Pennsylvania and the police officers which, under Rule 804(b)(1), was a sufficient connection to allow the introduction of the prior testimony.<sup>33</sup> Judge Bechtle’s opinion went further than any other court has gone toward excising the “predecessor-in-interest” language from Rule 804(b)(1). It essentially amended the Rule adopted by Congress to reflect the original rule proposed by the Supreme Court.

In contrast to the court’s view in *Carpenter*, other courts when considering the meaning of the phrase “predecessor-in-interest” have either explicitly or implicitly rejected the *Lloyd* definition.<sup>34</sup> The court in *In re IBM Peripheral EDP Devices Antitrust Litigation*<sup>35</sup> did not provide a specific definition of the term, but determined that Congress had used it “in its old narrow substantive law sense, and not in an evidentiary sense, where probative force would be its rationale.”<sup>36</sup> If probative force was the measure, it would then be equivalent to “those having a similar motive and opportunity to develop the testimony” — a concept rejected by Congress.<sup>37</sup> Although the court offered no definition, the ruling in *In re IBM* provided very little scope to the “predecessor-in-interest” terminology. This restricted view is most apparent when the opinion is considered in light of the case’s particular facts. The proposed “predecessor” was the United States government which had instituted an action against IBM for

<sup>32</sup>*Id.* at 1124.

<sup>33</sup>*Id.* Citing *Lloyd v. American Export Lines, Inc.* as precedent, the court stated that “the City Solicitor in this case would have had the same motive and addressed the identical issues through its cross examination of Kofroth. With the same issues, motivation for examination and parties, the testimony of Kofroth was properly admitted into evidence.” *Id.*

<sup>34</sup>*See, e.g., In re Screws Antitrust Litigation*, 526 F. Supp. 1316 (D. Mass. 1981); *Bolden v. Carter*, 269 Ark. 391, 602 S.W.2d 640 (1980).

<sup>35</sup>444 F. Supp. 110 (N.D. Cal. 1978).

<sup>36</sup>*Id.* at 113.



violation of United States antitrust law. The proposed "successor" was the plaintiff Memorex which had initiated its own antitrust action against IBM for identical violations — a "predecessor-successor" relationship so close that it could almost be classified as being based on "privity."<sup>38</sup> If the "predecessor-in-interest" door was to be opened at all, *In re IBM* would have provided an excellent opportunity to do so. It could not have been claimed that the court opened the floodgates to the admission of prior testimony and, at the same time, the rule could have been made into something more than a restatement of the common law.<sup>39</sup> Nevertheless, the California District Court kept the door firmly closed by taking the view that the House of Representatives had intended by its amendment to limit the use of prior testimony to cases in which the common law requirements could be satisfied.<sup>40</sup>

Finally, there are cases which try to stake out the middle ground by discovering a relationship between the "predecessor" and the "successor" in interest that does not satisfy the traditional notion of privity, but is of sufficient intimacy that the relationship can be described as "privity-like." A typical example of this view is found in *In re Master Key Antitrust Litigation*<sup>41</sup> which was decided two years prior to *Lloyd*. The prior testimony at issue in *Master Key* was given during the trial of an antitrust action brought by the United States against three lock manufacturers — Eaton, Yale and Towne. *Master Key* was an antitrust class action initiated by Eaton's competitors which was spawned by the federal litigation. Eaton proposed to introduce the testimony of an unavailable witness who had testified during the previous federal suit. Plaintiffs objected to its admission on the grounds that the United States government was not their "predecessor-in-interest."<sup>42</sup> Judge Blumenfeld, like many who have examined this issue, was of two minds. On the one hand, he held that the legislative history of Rule 804(b)(1) "makes it clear that Congress intended this exception to the hearsay rule to be narrowly construed,"<sup>43</sup> and yet in the next paragraph he suggested that "Congress seems to have intended to relax the common law requirement of actual privity between the parties before prior testimony could be admitted."<sup>44</sup> He eventually concluded that,

<sup>38</sup>"The unique relationship between the government's antitrust enforcement suits and the private actions which follow has congressional recognition and ratification, which has in turn provided special benefits to the private plaintiffs." *In re Master Key Antitrust Litigation*, 72 F.R.D. 108, 109 (D. Conn.), *aff'd*, 551 F.2d 300 (2d Cir. 1976).

<sup>39</sup>"Privity" is an identity of interests between persons, so that the interest of the one is measured by the same legal rights as that of the other. It exists where there is a successive relationship to the same rights of property, as between a decedent and heir, intestate and administrator, testate and executor, and grantor and grantee. See *BALLENTINE'S LAW DICTIONARY* 996 (3d ed. 1969).

<sup>40</sup>Under the common law, the prior testimony could only be admitted if both the issues and the parties were the same as they were when the prior testimony was given. See *WIGMORE, EVIDENCE*, § 1386 (3d ed. 1942).

<sup>41</sup>*In re IBM*, 444 F. Supp. at 113.

<sup>42</sup>72 F.R.D. 108 (D. Conn.) *aff'd*, 551 F.2d 300 (2d Cir. 1976).

<sup>43</sup>*Id.* at 109.

<sup>44</sup>*Id.*

although the government did not satisfy the "privity" requirement, the special and "unique relationship" between the government in an antitrust enforcement suit and subsequent private actions is such that the government can be considered a "predecessor-in-interest."<sup>45</sup> The opinion does not actually articulate a definition of the term, but does suggest that it is sufficiently expansive to include parties which have a particularly close connection. The key ingredients of such a connection appear to be: the "predecessor" in the prior proceeding was a government agency; the agency was fulfilling its obligation to enforce the law by initiating the prior action; and the "successor" is a person whom legislature intended to benefit from the government enforcement action.<sup>46</sup> The court's opinion in *Master Key*, which required these rather rare circumstances, did not constitute a radical change from the previous requirements of "privity," but it did support the proposition that Rule 804(b)(1) was designed to be more than a redundant recitation of the common law.<sup>47</sup>

#### ANALYSIS

Rather than commence analysis through the legal looking glass and attempt to decipher Congress' intent when it added the "predecessor-in-interest" language to Rule 804(b)(1), this article proposes to first weigh the risk and benefits of the various positions taken by the courts. If one view emerges as clearly superior, then an attempt will be made to reconcile that view with the legislative intent. Should reconciliation prove impossible, then a proposed change in the rule will be offered.

Since Rule 804(b)(1) is designed to prevent the introduction of hearsay, the beginning of any analysis must start with the consideration of why hearsay should be excluded. In essence, hearsay is an out-of-court statement that has not been tested by cross-examination.<sup>48</sup> More particularly, it has not been tested by the party opposing its admission. The fear is that 'without vigorous cross-examination by an interested party' one cannot determine if the declarant was lying, joking, or just confused when he made the statement. If he was lying, joking or confused, it would not be fair to jeopardize a future litigant's legal rights by such testimony. Thus, the rule against hearsay starts out by excluding all hearsay testimony.<sup>49</sup> It then goes on, however, to open the floodgates to all types of hearsay statements by allowing a tidal wave of excep-

<sup>45</sup>*Id.*

<sup>46</sup>Some of the benefits may be that the statute of limitations is extended, or that the judgment in the earlier decision will be admissible as evidence and serve to establish a prima facie case. *Id.*

<sup>47</sup>A more recent case taking this view is *Zenith Radio Corp. v. Matsushita Electric Co., Ltd.*, 505 F. Supp. 1190 (E.D. Pa. 1980).

<sup>48</sup>The primary justification for the exclusion of hearsay is the lack of any opportunity for the adversary to cross examine the absent declarant whose out of court statement is introduced into evidence. *Anderson v. United States*, 417 U.S. 211, 220 (1974); see also MCCORMICK, MCCORMICK ON EVIDENCE, § 245 (3d ed. 1984).

<sup>49</sup>FED. R. EVID. 802

tions to inundate the rule.<sup>50</sup> As mentioned previously, a common characteristic of hearsay exceptions is that the hearsay possesses some extra indicia of reliability which serves as a substitute for cross-examination. The exception for the use of prior testimony obviously fits into this pattern. The substitute for today's cross-examination of a witness is the cross-examination of the same witness which occurred in a similar trial yesterday. It follows, however, that the prior examination can only be equated with today's examination if the previous examination was as vigorous and challenging as the examination that could be conducted today.

In order to judge the adequacy of the prior examination, Rule 804(b)(1) could have required courts to focus on the substance of the prior examination and determine if the party presently opposing the introduction of the prior testimony would be likely to vary the previous examination. If any variation would be likely, the hearsay would be inadmissible. The rule as written, however, presumes that the examination would normally not vary if the present party is a successor-in-interest to the party who conducted the previous examination. But, since the "predecessor-successor" relationship does not *guarantee* similarity, the remaining language of Rule 804(b)(1) also requires the predecessor to have had a similar motive as the successor in developing the testimony.

The foregoing illustrates the mechanism of Rule 804(b)(1) but does not solve the mystery of who or what is a "predecessor-in-interest." If a "predecessor-in-interest" is merely a person with a "similar motive to examine" then the phrase is meaningless and redundant. A narrower construction of the phrase,<sup>51</sup> however, breathes meaning into the term.<sup>52</sup> By requiring "privity"<sup>53</sup> between predecessor and successor, the additional qualification of "similar motive" filters out prior testimony when there may be privity, but the predecessor and successor have dissimilar interests in examining a particular witness. Thus, one can appreciate why a "privity" requirement alone would not be an adequate protection against suspect hearsay, but is the opposite proposition true? Does the narrow "privity" interpretation of the "predecessor-in-interest" phrase provide any additional protection against the vices of hearsay? Does it, for example, exclude "bad hearsay" that would otherwise be admissible if the standard was only that the predecessor had a similar opportunity and motive to develop the testimony?

<sup>50</sup>See FED. R. EVID. 803, FED. R. EVID. 804.

<sup>51</sup>As was taken by the courts in *In re IBM*, 444 F. Supp. 110 (N.D. Cal. 1978); and in *In re Screws Antitrust Litigation*, 526 F. Supp. 1316 (D. Mass. 1981).

<sup>52</sup>Under the narrow view, one must first determine if the "predecessor" has a special and close relationship to his "successor," and only after that question has been satisfactorily answered does one consider the question of whether the "predecessor" had a "similar motive to examine."

<sup>53</sup>See *supra* note 33 for the meaning attached to the term "privity."

## NARROW PRIVACY VIEW EXAMINED

The essence of a “privity” relationship between two persons is that they possess a mutual or successive interest in the same property. They might be a lessor and lessee, ancestor and heir, or assignor and assignee. Presumably it is this overlapping interest that justifies the substitution of the predecessor’s examination for the successor’s. This view, however, is not necessarily accurate. In the first place, the rule does not require that the lawsuit in which the prior testimony is proffered be concerned with the particular property that forms the subject matter of the “privity” relationship. For example, the claim could arise from a personal injury accident in which two brothers, who also happened to jointly own the family farm, were injured. If testimony is introduced in “brother-predecessor’s” case, the answer to the question of whether the same testimony should be introduced in “brother-successor’s” case does not depend upon the nature of their common interest in the family farm. Their co-tenancy tells us nothing about whether the testimony was developed so thoroughly by “brother-predecessor” that it can be safely introduced in “brother-successor’s” case without giving rise to substantial hearsay concerns. Yet, under Rule 804(b)(1), the prior testimony may be accepted if the brothers happen to be related as co-tenants and rejected if they are only twins. Thus, the narrow construction of the “predecessor-in-interest” language provides no additional protection against “bad hearsay” in cases where the issues are unrelated to the common interest that gives rise to the “privity” relationship.

Furthermore, in litigation which *does* involve the commonly held interest, the “privity” requirement provides no additional protection against “bad hearsay.” The requirement is based on the assumption that two persons who have a common interest in the same piece of property will have an equal motivation in protecting that interest. Thus, an examination conducted by one is the equivalent to an examination conducted by the other. That assumption is based, however, on the premise that the two persons place the same value on the property. Such a premise may or may not be true. The donor may attach very little value to a Klee drawing whereas the donee may actually over-value it. Nevertheless, the “privity” approach assumes they value it equally and would therefore have the same motivation to protect their interest in it. Equal loss suffered by two people does not mean that they are equally mournful over that loss.

On the other hand, even if one accepts the premise that equal risk of loss gives rise to equal motivation to protect oneself against such a loss, the same risk can be shared by two people who do not have common interest in an identical piece of property. Two downstream property owners may have an equal interest in preventing the Acid Chemical Company from polluting a river, but they are obviously not in “privity.” Farmer Brown may want to protect his cows while Farmer Jones wants to save his pigs. It is the risk of losing

something they value from the same cause and not the risk of losing a jointly owned piece of property that makes Farmer Brown almost interchangeable with Farmer Jones when testimony concerning the pollution is developed. Farmer Brown's examination of a witness will be vigorous because he wants to protect his cattle, and Farmer Jones' examination will be no less complete or vigorous because he wants to preserve his pigs. Thus, to require "privity" between them before allowing "prior testimony" developed by one to be used against the other is missing the critical point of their similarity. It is not common ownership but common interest. Thus, the "privity" interpretation of the "predecessor-in-interest" language suggested by some courts provides no greater security against the admission of "bad hearsay," and often prevents the introduction of very reliable testimony. Furthermore, unlike the exclusion of some hearsay testimony, the exclusion cannot be remedied by subpoenaing the out-of-court declarant and introducing live testimony since by definition the prior testimony exception requires that the declarant be unavailable.

#### LLOYD VIEW EXAMINED

As previously mentioned,<sup>54</sup> Judge Aldisert attempted to provide some definition for the "predecessor-in-interest" phrase by suggesting that it meant the existence of a "community of interest" between the predecessor and the successor.<sup>55</sup> This nebulous definition can only be viewed as a thinly veiled attempt to remove the "predecessor" roadblock by defining it out of existence. Once that stumbling block was eliminated, Judge Aldisert was free to use the analysis originally proposed by the Supreme Court, that is, that prior testimony should be admitted if the predecessor had a similar motive as the successor to develop the testimony. Does this interpretation open Pandora's "bad hearsay" box? Certainly not. As demonstrated above, the "predecessor-in-interest" language does nothing to enhance the reliability of the prior testimony, therefore, its removal by judicial interpretation raises no risk that the trial will be contaminated by suspect hearsay. In fact, it is puzzling and very ironic that Congress was so concerned with the possibility of polluting the trial by the introduction of prior testimony, which is usually very reliable, and simultaneously was so blasé about the introduction of other hearsay statements which are inherently suspect. Such hearsay exceptions as "present-sense impression,"<sup>56</sup> "excited utterance"<sup>57</sup> and a "statement-against-interest"<sup>58</sup> are surely more questionable than the exception for prior testimony which was given under oath and had been tested by a party who had a personal stake in

<sup>54</sup>See *supra* text accompanying notes 16-20.

<sup>55</sup>See *Lloyd*, 580 F.2d at 1185.

<sup>56</sup>FED. R. EVID. 803(1).

<sup>57</sup>FED. R. EVID. 803(2).

<sup>58</sup>FED. R. EVID. 804(b)(3).

assuring its reliability.<sup>59</sup>

One can only speculate why Congress doubted the reliability of prior testimony more than the reliability of an excited utterance, but it may have been that Congress confused the rationale for the rule against hearsay with the rationale for limiting the use of collateral estoppel.<sup>60</sup> In fact, the House Committee language suggests that the primary concern for the use of prior testimony was that it imposed on the party opposing its admission the responsibility for the manner in which the witness was previously handled by the predecessor party.<sup>61</sup> This explanation focuses on the possible binding effect (on the successor party) of the prior testimony and not on whether the testimony was tested in such a fashion that it was sufficiently reliable for admission. Compare the reason for the "excited utterance" exception with the rationale for the "prior testimony" exception. The "excited utterance" is admissible because the circumstances surrounding the statement enhance the reliability of the statement.<sup>62</sup> Its possible impact on the party opposing its admission is not critical or even important. Contrastingly, when considering the admission of prior testimony, Congress is not concerned with surrounding circumstances enhancing reliability, but with the effect of admission on the succeeding party. If the successor party would be bound in the collateral estoppel sense to the prior testimony, the Committee's concern would be justified. However, that is not the case. The successor party is free to refute, clarify or impeach the prior testimony just as if the statement were admissible under any other exception to the hearsay rule. Neither is the factfinder more likely to be unduly swayed by the admission of prior testimony hearsay than by the admission of a prior statement against interest.<sup>63</sup>

One negative side-effect to the *Lloyd* interpretation is that more judicial time will be expended in determining whether prior testimony should be admitted. With the "predecessor-in-interest" phrase rendered meaningless, the trial

<sup>59</sup>The irony is more apparent when one considers that shaky hearsay like an "excited utterance" and "present sense impression" are admissible without showing the absence of declarant.

<sup>60</sup>The Restatement of Judgments describes collateral estoppel as follows: "where a question of fact essential to the judgment is actually litigated and determined by a valid and final judgment, the determination is conclusive between the parties in a subsequent action on a different cause of action, . . ." RESTATEMENT OF JUDGMENTS § 68 (1942); see also Scott, *Collateral Estoppel by Judgment*, 56 HARV. L. REV. 1 (1942).

<sup>61</sup>H.R. REP. NO. 650, 93d Cong., 1st Sess. 15 (1973), reprinted in 1974 U.S. CODE CONG. & AD. NEWS 7075, 7088.

<sup>62</sup>In theory, a person who makes a declaration while under the influence of an exciting event will not be able to reflect on his/her words and therefore will be less likely to fabricate. See C. McCORMICK, McCORMICK ON EVIDENCE § 297 (3d ed. 1984).

<sup>63</sup>The true impact of reading a dead transcript to the jury can be determined by comparing counsel's preferred tactical choices. Proffering counsel would prefer to have the live testimony in place of the transcript, but is limited to the transcript because the witness is unavailable. Contrarily, opposing counsel would actually prefer in most cases the introduction of the dry transcript to the testimony of a live witness, but claims the need for the live witness in the hope of having the testimony excluded entirely. Thus, the concern that the factfinder will somehow give more weight to evidence introduced by the admission of prior testimony is not really legitimate.

judge will have to closely examine the prior testimony and the motivation of the predecessor in every case where admission is proposed. There is no "easy out" by finding that the parties are not in privity, and thus avoiding more exacting analysis. This additional expenditure of time, however, should not deter the adoption of the *Lloyd* approach. On the whole it permits the introduction of relevant testimony that otherwise would be lost forever, and still provides the party opposing admission adequate protection against suspect and unreliable hearsay.

### MIDDLE GROUND EXAMINED

Having discussed the two opposing interpretations of the "predecessor-in-interest" language, some mention is necessary of the middle ground that has been suggested.<sup>64</sup> This compromise view attempts to provide the term with some meaning, but a meaning that is not linked too closely with the concept of "privity." The cases which espouse this view speak in terms of a "unique relationship" between the predecessor and the successor. The usual case is one that involves the predecessor being a government agency carrying out its statutory obligations, and the successor being a member of a class the statute was designed to benefit.<sup>65</sup>

An argument could be made that this compromise approach is essentially no different than the approach proposed in *Lloyd*. If a court can re-define "predecessor-in-interest" to mean persons who have a "unique relationship," then a re-definition which suggests that it means a "community of interest" is no more offensive to legislative intent. Assuming that Congress intended to break from the common law "privity" requirement, the break made in *Lloyd* is equally justifiable, and in addition aids the introduction of more evidence that is reliable and relevant.<sup>66</sup> Upon closer examination, however, this compromise solution does not appear to be as complete of a refutation of the "privity" requirement as that proposed in the *Lloyd* opinion. Its primary focus is still on the relationship that exists between the parties before the occurrence of the events giving rise to the litigation. It examines the relationship first and determines if apart from their similar motive to win a lawsuit the predecessor and successor have been closely associated. The government antitrust division and competitors of antitrust violators usually do have such a close association, while two pedestrians injured in the same traffic accident do not. The disappointing aspect of this limited break with "privity" is that its application is confined to a very few cases. Many litigants are left in the unenviable position of needing testimony from a critical witness who is unavailable, but are not able to introduce a transcript of such testimony taken in a prior action litigating the

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<sup>64</sup>See *In re Master Key Antitrust Litigation*, 72 F.R.D. 108 (D. Conn.), *aff'd*, 551 F.2d 412 (6th Cir. 1982). See also *Zenith Radio Corp. v. Matsushita*, 505 F. Supp. 1190 (E.D. Pa. 1980).

<sup>65</sup>See, e.g., *In re IBM*, 444 F. Supp. 110 (N.D. Cal. 1978).

<sup>66</sup>See *supra* text developing the Farmer Brown — Farmer Jones hypothetical.

same issues.

### RECONCILIATION OF THE THREE VIEWS WITH CONGRESS' INTENT

If the reason Congress included the language of Rule 804(b)(1) as part of the Rules of Evidence was to blaze a new trail for the admission of prior testimony, then almost any judicially-provided definition for the "predecessor-in-interest" phrase could probably be reconciled with congressional intent. There are two signposts, however, which indicate that Congress was not in a trail-blazing mood. One is that the terms predecessor-in-interest and successor-in-interest were not cut from whole cloth. They have been well worn phrases for many decades, in a variety of contexts,<sup>67</sup> and consequently have acquired some meaning which could not be totally disregarded. Secondly, the manner in which the phrase was inserted by the House of Representatives strongly suggests that the House believed that it would serve as a deterrent to any excessive use of prior testimony.<sup>68</sup> It is unfortunate, but such a conclusion is probably inescapable, and necessarily leads one to the conclusion that the definition asserted by the *Lloyd* court cannot be reconciled with legislative intent. The use of the term in this manner is unfortunate because, as has been previously demonstrated,<sup>69</sup> the interpretation in *Lloyd* imposes no risk that "unreliable hearsay" will be admitted, and provides great benefit in that important relevant evidence will not be forever lost.

The middle ground definition proposed by some courts is also irreconcilable with congressional intent. Surely Congress could not have had such a finely drawn concept in mind when it inserted the "predecessor-in-interest" language.<sup>70</sup> Instead, Congress assumed that it employed a phrase that everyone would understand because it had been much used in the past. The fact that many courts seemed to be perplexed about its meaning is more a reflection of

<sup>67</sup>The term "successor-in-interest" is much more common than the phrase "predecessor-in-interest" because the successor is usually the person who falls heir to legal problems and is therefore the person most referred to in court opinions. Of course, it is obvious that where there is a "successor" there must have been a "predecessor," thus the definition of "successor-in-interest" is in large part applicable to "predecessor-in-interest." A "successor-in-interest" is generally defined to be one who follows another in ownership or control of property. See BLACKS LAW DICTIONARY 1283 (5th ed. 1979).

Some examples of typical predecessor-successor relationships are:

1. Administrator (successor) appointed in place of deceased's executor (predecessor). *Moss v. Ramsey*, 49 Okla. 499, 153 P. 843 (1915).

2. Assignee (predecessor) — Assignee (successor). *Clotworthy v. Clyde*, 1 Utah 2d 251, 265 P.2d 420 (1954).

3. In a wrongful death case the representative is a successor-in-interest to the deceased (predecessor). *McNulta v. Huntington*, 62 A.D. 257, 70 N.Y.S. 897 (App. Div. 1901).

4. Judgment creditor (successor) who purchased debtor's (predecessor) property at execution sale. *State v. Tuttle*, 51 S.D. 596, 216 N.W. 194 (1927).

<sup>68</sup>See Comment, *supra* note 10, at 485.

<sup>69</sup>See *supra* note 66.

<sup>70</sup>The "unique relationship" between government antitrust enforcement suits and the private actions which follow arises in such a specialized circumstance that even a Congressional Committee would not make it the standard which governs the admissibility of hearsay evidence.



their desire to avoid its limiting effect than actual confusion about what Congress had intended. Judges knew Congress wished to severely curb the use of prior testimony, and simply did not like it. Objectively speaking there is little to like, but if Congress is supposed to have the final word on what legislation means, then the conclusion is unavoidable that a "predecessor-in-interest" is one who is in "privity" with the "successor-in-interest." Two parties must have a common interest in the same property before the examination of the witness by one can be considered the equivalent of an examination by the other.

A very recent case decided by the Fifth Circuit provides additional support for the proposition that the attempts by the courts to skirt the "predecessor-in-interest" requirement conflict with Congressional intent. In *Dartez v. Fibreboard Corp.*,<sup>71</sup> Judge Clark declined to wrestle with the "predecessor-in-interest" language of Rule 804(b)(1) and instead approved the admission of prior testimony under the catch-all exception of Rule 804(b)(5).<sup>72</sup> Judge Clark concluded that the prior testimony of a physician was admissible because the hearsay had circumstantial guarantees of trustworthiness. What were the guarantees that were so persuasive to Judge Clark? Simply that the predecessor had an opportunity and similar motive to develop the testimony of the physician or cross-examination.<sup>73</sup> The Fifth Circuit was obviously reluctant to adopt the *Lloyd* interpretation which is clearly at odds with Congressional intent, but at the same time the Court did not want to exclude trustworthy prior testimony. Consequently, the court took one indicia of trustworthiness from Rule 804(b)(1) while ignoring other Rule 804(b)(1) requirements and transplanted it in Rule 804(b)(5) in order to reach the same result achieved by the *Lloyd* Court.

### CONCLUSION

This author's conclusion stemming from the above analysis will hardly be surprising. It is that the language of the Federal Rule of Evidence 804(b)(1) as proposed by the Supreme Court should be reinstated by way of amendment.<sup>74</sup>

<sup>71</sup>765 F.2d 456 (1985).

<sup>72</sup>*Id.* at 462.

Other exceptions — A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interest of justice will be best served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

FED. R. EVID. 804(b)(5).

For cases holding that Rule 804(b)(5) does not permit the introduction of prior testimony, see *Creamer v. General Teamsters Local Union*, 560 F. Supp. 495 (D. Del. 1983); *Zenith Radio Corp. v. Matsushita*, 505 F. Supp. 1190 (E.D. Pa. 1980).

<sup>73</sup>*Dartez*, 765 F.2d at 462 (5th Cir. 1985).

<sup>74</sup>See *supra* note 4 for the original language which the Court proposed.

The *Lloyd* court tried to “effect” the amendment by judicial construction and, although completely correct in its judgment that its view made the most sense, its attempt to remold legislative intent beyond recognition is unacceptable. The approach taken by the Fifth Circuit in *Dartez* was ingenious, but is not a wholly satisfactory solution. The use of Rule 804(b)(5) to justify the admission of prior testimony makes the admission process for this very reliable evidence much more complicated than it need be.<sup>75</sup> Admittedly the amendment process is tedious, time consuming, and unlikely to be completed in this decade or perhaps this century, but it is probably the only legitimate way to change Rule 804(b)(1) for the better.

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<sup>75</sup>Rule 804(b)(5) requires that advance notice be given to one's opponent of the intent to introduce the prior testimony, and furthermore, the proponent must show that the prior testimony is more probative on the point than any other available evidence. FED. R. EVID. 804(b)(5).

