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Evidence-Hearsay-Admissibility of Accident Reports Under the Federal Business Records Act

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EVIDENCE—HEARSAY—ADMISSIBILITY OF ACCIDENT REPORTS UNDER THE FEDERAL BUSINESS RECORDS ACT—The United States, as assignee of a civilian seaman's claim, brought an action against the defendant for injuries received when the seaman slipped on a walkway which the defendant had contracted to maintain in good repair.¹ At the trial plaintiff sought to introduce into evidence a report compiled by the seaman's superior, such report being required to accompany the seaman's claim for compensation from the Government.² Admission of the report under the Federal Business Records Act³ was denied, and the Government's case was thereby materially weakened. Judgment was entered on a jury verdict for the defendant. On appeal, *held*, reversed and remanded for a new trial. Two of the judges, employing different rationales, concluded that the report was admissible,⁴ while the third, though concurring in the decision to

¹ The seaman was compensated under the Federal Employees' Compensation Act § 1, 39 Stat. 742 (1916), as amended, 5 U.S.C. § 751 (1958). He then assigned his claim against the defendant to the United States as required by the statute. Section 26, 39 Stat. 747 (1916), as amended, 5 U.S.C. § 776 (1958).

² Federal Employees' Compensation Act § 24, 39 Stat. 747 (1916), as amended, 5 U.S.C. § 774 (1958).

³ Section 1, 28 U.S.C. § 1732 (1958).

⁴ Judge Waterman held that the report was admissible because the circumstances of its compilation indicated that it was sufficiently trustworthy. Principal case at 797. Judge Clark, on the other hand, rejected the trustworthiness test followed by Judge Waterman,

grant a new trial, disagreed with the determination as to the admissibility of the report.⁵ *United States v. New York Foreign Trade Zone Operators, Inc.*, 304 F.2d 792 (2d Cir. 1962).

At common law two principal exceptions to the hearsay rule were developed which made possible the admission of business records into evidence.⁶ The older of these exceptions was the "shopbook rule," which facilitated the introduction of the small tradesman's shop records into evidence, thus lessening the burden imposed on him by his incompetency as a witness resulting from his interest as a party. The second exception provided that records made in the regular course of business would be admissible when the entrant was unavailable to testify in person.⁷ As the common law developed, these exceptions became so circumscribed that it was almost impossible in many instances for litigants to use their business records as evidence.⁸ The need for legislative reform stimulated the drafting of a model act by the Commonwealth Fund Committee.⁹ The Model Act has been adopted with minor changes by seven states,¹⁰ as well as by the federal government.¹¹ In addition, it became the basis for the Uniform Business Records as Evidence Act,¹² which has been adopted in twenty-five states.¹³

In enacting the Federal Business Records Act, Congress intended to create a liberal and uniform rule throughout the federal judicial system which would facilitate the admission of voluminous account books and

and concluded that the statutory language required the admission of all records once their regularity was established, regardless of the inherent trustworthiness of the report. Principal case at 799.

⁵ Judge Moore agreed with Judge Waterman that trustworthiness was an essential factor to be considered in determining admissibility. However, he thought that the trial court should be given a chance to pass on the issue of trustworthiness before the court of appeals decided it. Principal case at 801.

⁶ See 5 WIGMORE, EVIDENCE § 1518 (3d ed. 1940).

⁷ See generally Polasky & Paulson, *Business Entries*, 4 UTAH L. REV. 327 (1954); 47 HARV. L. REV. 1044 (1934).

⁸ See Cardozo, *A Ministry of Justice*, 35 HARV. L. REV. 113, 122 (1921). See also 5 WIGMORE, *op. cit. supra* note 6, § 1520.

⁹ MORGAN *et al.*, THE LAW OF EVIDENCE; SOME PROPOSALS FOR ITS REFORM 63 (1927).

¹⁰ ALA. CODE tit. 7, § 415 (1960); CONN. GEN. STAT. ANN. § 52-180 (1960); ME. REV. STAT. ch. 113, § 133 (1954); MD. CODE ANN. art. 35, § 59 (1958); MASS. ANN. LAWS ch. 233, § 78 (1956); N.M. STAT. ANN. § 20-2-12 (1954); R.I. GEN. LAWS ANN. § 9-19-13 (1957).

¹¹ 28 U.S.C. § 1732(a) (1958). "In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence or event, if made in the regular course of business, and if it was the regular course of business to make such memorandum or record at the time of such act, transaction, occurrence, or event within a reasonable time thereafter.

"All other circumstances of the making of such writing or record . . . may be shown to affect its weight, but such circumstances shall not affect its admissibility."

¹² 9A UNIFORM LAWS ANN. 299 (1957).

¹³ See *id.* at 297. See also Green, *The Model and Uniform Statutes Relating to Business Entries as Evidence*, 31 TUL. L. REV. 49 (1956); Norville, *The Uniform Business Records as Evidence Act*, 27 ORE. L. REV. 188 (1948).

other business records into evidence in the absence of direct testimony by the entrant.¹⁴ The language of the statute does not specify whether or not accident reports are also admissible, and Congress intimated no opinion on the subject in its committee reports.¹⁵ Admission of accident reports under the Federal Business Records Act was considered by the Supreme Court for the first and only time in *Palmer v. Hoffman*.¹⁶ In that case the Court affirmed a decision by the Second Circuit that an accident report made by defendant's employee, a railroad engineer, was inadmissible under the statute.¹⁷ Although this report was compiled pursuant to a routine company policy and in the presence of an official of the Massachusetts Public Utilities Commission, the court of appeals stated that its compilation was surrounded by circumstances which were "dripping with motivation to misrepresent."¹⁸ The court did, however, conclude that the report was made in the regular course of the railroad company's business. By deciding that the report was made in the regular course of business, while at the same time refusing to allow its admission into evidence, the Second Circuit placed itself in the position of deciding on admissibility in direct contravention to the express statutory language.¹⁹ In affirming, the Supreme Court avoided this dilemma by holding that the report was not made in the "regular course of business" because it was compiled primarily in anticipation of litigation, rather than for use in the operation of the railroad. The Court also noted that the original common-law business records exception had been created on the premise that such records were inherently trustworthy. There is some indication in the opinion that circumstances which suggest a lack of trustworthiness may have a bearing on the determination of whether a report is "regular" within the meaning of the statute. Thus, the *Palmer* decision effected an interpretation of the Federal Business Records Act which would appear to be consistent with the historical common-law business records exception. It is not so clear, however, that the decision was in accord with the intentions of the framers of the Model Act.²⁰

¹⁴ S. REP. NO. 1965, 74th Cong., 2d Sess. (1936).

¹⁵ At common law it was generally held that accident reports did not come within the business records exception to the hearsay rule. See *Davis v. Michigan Cent. R.R.*, 294 Ill. 355, 128 N.E. 539 (1920); *Bloom v. Union Ry.*, 165 App. Div. 257, 150 N.Y. Supp. 779 (1914); *Quigley v. Gulf C. & S.F.R.R.*, 142 S.W. 633 (Tex. Civ. App. 1911); *Conner v. Seattle, R. & S.R.R.*, 56 Wash. 310, 105 Pac. 644 (1909). But see *O'Driscoll v. Lynn & B.R.R.*, 180 Mass. 187, 62 N.E. 3 (1902); *Sullivan v. Minneapolis St. Ry.*, 161 Minn. 45, 200 N.W. 922 (1924); *Lebrun v. Boston & M.R.R.*, 83 N.H. 293, 142 Atl. 128 (1928).

¹⁶ 318 U.S. 109 (1943).

¹⁷ *Hoffman v. Palmer*, 129 F.2d 976 (2d Cir. 1942).

¹⁸ *Id.* at 991.

¹⁹ See note 11 *supra*. Once a report is established as being in the regular course of business, other factors may be deemed to affect only its weight but not its admissibility.

²⁰ *Palmer* was widely criticized because it was thought that this decision had severely restricted the scope of the statutory exception. Also, the commentators foresaw a resurgence of the confusion which had plagued the courts regarding the admissibility of business records before the statutory reform. See, e.g., McCORMICK, EVIDENCE § 287, at 604 (1954); Note, 56 HARV. L. REV. 458 (1942); Morgan, *The Law of Evidence 1941-*

Post-*Palmer* decisions by the circuit courts of appeals indicate a lack of agreement as to the circumstances necessary for a given accident report to be admitted into evidence under the Federal Business Records Act. For example, the Second Circuit has envisaged no difficulty in admitting accident reports where they are introduced against the maker,²¹ while the Third Circuit has denied admission of such reports in like circumstances.²² The Third Circuit, however, has admitted accident reports compiled by the Government when it was not a party to the litigation.²³ Decisions by the District of Columbia Circuit indicate a view that the *Palmer* decision allows the admission of only those records which are compiled on a day-to-day basis.²⁴ Such an interpretation would seem, in effect, to require the exclusion of all accident reports. Although the Fourth and Sixth Circuits have stated that the "character of the records" as an "earmark of their reliability" is the determining factor, these courts have decided that the nature of accident reports is such that they are inadmissible under the Federal Business Records Act.²⁵ In contrast to these somewhat mechanical approaches, previous decisions of the Second Circuit have indicated that, in applying the *Palmer* decision, a number of factors are to be considered by the trial court in determining the question of admissibility of a given accident report.²⁶

In the principal case the opinions by Judges Waterman and Moore appear to follow the approach previously espoused in decisions by the Second Circuit. Unlike the situation in some earlier cases in that court, the accident report involved in the principal case was not compiled by the party against whom it was to be introduced, nor was it compiled by a disinterested third party. Judge Waterman was, however, especially influenced by two other factors: first, the report was not prepared for the purpose of litigation in a court of general jurisdiction, but rather to accompany the seaman's claim for statutorily fixed compensation; secondly, the maker of the report testified at the trial and was available for cross-

1945, 59 HARV. L. REV. 481 (1946); Comment, 48 COLUM. L. REV. 920 (1948); 17 SO. CAL. L. REV. 165 (1944). *But cf.* Polasky & Paulson, *supra* note 7, at 343-45; 43 COLUM. L. REV. 392 (1943).

²¹ *Korte v. New York, N.H. & H.R.R.*, 191 F.2d 86 (2d Cir.), *cert. denied*, 342 U.S. 868 (1951); *Pekelis v. Transcontinental & W. Airlines, Inc.*, 187 F.2d 122 (2d Cir.), *cert. denied*, 341 U.S. 951 (1951). Of course, these reports could have been introduced as an admission against interest without resorting to the Federal Business Records Act. See MCCORMICK, *op. cit. supra* note 20, §§ 253-57.

²² *Nuttal v. Reading Co.*, 235 F.2d 546 (3d Cir. 1956); *Masterson v. Pennsylvania R.R.*, 182 F.2d 793 (3d Cir. 1950).

²³ *Moran v. Pittsburgh-Des Moines Steel Co.*, 183 F.2d 467 (3d Cir. 1950).

²⁴ See *Clainos v. United States*, 163 F.2d 593 (D.C. Cir. 1947); *New York Life Ins. Co. v. Taylor*, 147 F.2d 297 (D.C. Cir. 1945).

²⁵ See *Hartzog v. United States*, 217 F.2d 706 (4th Cir. 1954); *NLRB v. Sharples Chems., Inc.*, 209 F.2d 645 (6th Cir. 1954).

²⁶ See *Puggioni v. Luckenbach S.S. Co.*, 286 F.2d 340 (2d Cir. 1961), where the court indicated that *Palmer* gave wide discretion to the trial courts in the matter of admitting accident reports under the Federal Business Records Act.

examination.²⁷ In addition, the report was "regular" in the sense that similar reports were made in all accident cases involving an application for compensation under the Federal Employees' Compensation Act.

If one accepts as correct the double test of regularity and trustworthiness applied by Judges Waterman and Moore, it becomes important to determine what factors should be influential in deciding whether or not to admit a given accident report. As to the aspect of "regularity," the fact that similar reports were compiled by the entrant after every accident would be an important consideration.²⁸ Moreover, it should be ascertained whether a standard procedure was followed in compiling the particular report which is being offered in evidence. In cases where the accident report of a private business is sought to be introduced, a court should inquire into whether such reports are normally made throughout the industry. With regard to "trustworthiness," certainly reports which are being entered against the maker should be allowed in most cases,²⁹ and, in addition, it would seem that most accident reports compiled by a third party should likewise be admitted. In *Palmer* the Supreme Court indicated that all reports should be carefully scrutinized in order to ascertain if their primary function was to aid in litigation. According a great deal of weight to such a factor would seem questionable, since accident reports, like any business record, will frequently give one of the parties an advantage in litigation, as one primary purpose for compiling most records is to assist in or to avoid the litigation of disputes. On the other hand, if the report was compiled at a time when a lawsuit was obviously anticipated, this would definitely be a relevant consideration. The experience and capability of the person who compiled the report may also be indicative of its trustworthiness. Illustratively, a report of an automobile accident might be more trustworthy if prepared by a police officer³⁰ rather than by a private citizen. A test which would require consideration of the above factors in ascertaining the trustworthiness of accident reports offered under the Federal Business Records Act would do much to effectuate the purpose

²⁷ This factor has influenced the Second Circuit in a previous decision. See *Central R.R. v. Jules S. Sottnek Co.*, 258 F.2d 85 (2d Cir. 1958), *cert. denied*, 359 U.S. 913 (1959). The fact that the maker is available for cross-examination may not be as significant as Judge Waterman indicates, because cross-examination in federal courts is limited to matters raised on direct. Thus, if the entrant merely testifies that he made the report, cross-examination might be of little aid to opposing counsel. See *McCORMICK, op. cit. supra* note 20, § 21.

²⁸ Moreover, it would appear that a high degree of trustworthiness should be accorded to records which contain information pertaining to an accident, but are not actual accident reports. For example, the Second Circuit admitted a ship's log into evidence which branded the defendant as the aggressor in an assault case. See *United States v. Strassman*, 241 F.2d 784 (2d Cir. 1957). *But cf.* principal case at 801 (Judge Moore's opinion).

²⁹ See note 22 *supra*.

³⁰ Police reports of auto accidents have generally been held admissible, so long as the report is made from a police officer's own knowledge and not from what others have told him. See *Gencarella v. Fyfe*, 171 F.2d 419 (1st Cir. 1948); *McWilliams v. Lewis*, 125 F.2d 200 (D.C. Cir. 1941). *Cf. McKee v. Jamestown Baking Co.*, 198 F.2d 551 (3d Cir. 1952).

of the act while at the same time protecting the courts from evidence of questionable veracity.³¹

Perhaps the real solution to the problem of the admissibility of accident reports in federal courts lies in corrective legislation. That confusion reigns in this area of the law is amply demonstrated by the splits among the courts of appeals as well as by the three opinions in the principal case, each of which apparently represents a defensible viewpoint. The variety of interpretations may be attributable to the Supreme Court's decision in *Palmer*, or to the inconclusive language of the act itself. Hopefully, Congress might be persuaded to consider legislation dealing specifically with the admission of accident reports into evidence, and thereby clearly indicate its intent with reference to this problem. Otherwise, it seems dubious that any degree of unanimity on this question can or will be attained.

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³¹ An alternative solution to the problem presented by the principal case would be to admit all accident reports into evidence and allow the trial court to comment freely on the factors which would affect the weight of such evidence. Such a policy would strictly comply with the admonition in the Federal Business Records Act that all circumstances pertaining to the making of the record other than its regularity will affect its weight, but not its admissibility. See principal case at 799; Note, 56 HARV. L. REV. 458, 469 (1942).