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## Evidence--Government Advisory Materials Exception to Hearsay Rule

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## EVIDENCE—GOVERNMENT ADVISORY MATERIALS EXCEPTION TO HEARSAY RULE

In *Muncie Aviation Corp. v. Party Doll Fleet, Inc.*<sup>1</sup> the United States Court of Appeals for the Fifth Circuit held that advisory materials promulgated by a federal agency, but not having the force and effect of law, are admissible as an exception to the hearsay rule<sup>2</sup> when such materials are relevant, necessary as a matter of practical convenience, and otherwise trustworthy.<sup>3</sup>

*Muncie Aviation* was a suit in negligence, arising from a collision between the aircraft of the respective parties at an uncontrolled airport in Georgia. The trial court admitted, as evidence of the standard of care,<sup>4</sup> advisory circulars published by the Federal Aviation Administration containing recommended landing procedures for pilots approaching uncontrolled airports. The jury, instructed that the circulars were not conclusive as to the applicable standard of care, returned a verdict for plaintiff. Defendant appealed, alleging as error the admission of this evidence.

Traditionally, learned treatises,<sup>5</sup> newspapers,<sup>6</sup> safety codes,<sup>7</sup> and manuals<sup>8</sup> have been held inadmissible as hearsay, representing the mere opinion of a writer who is not present in court to have his statements tested by cross-examination.<sup>9</sup> The modern trend, though, has been to expand the scope of admissibility,<sup>10</sup> allowing the introduction of any evidence which meets the criteria suggested by Dean Wigmore for an exception to the hearsay rule—"a circumstantial probability of trustworthiness, and a necessity."<sup>11</sup> Thus, many courts now receive a broad spectrum of evidence

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1. 519 F.2d 1178 (5th Cir. 1975).

2. "Hearsay is not admissible except as provided by these rules . . ." FED. R. EVID. 802.

3. 519 F.2d at 1183.

4. Evidence of the conduct and custom of others engaged in the same kind of undertaking is normally admissible in determining whether the particular method used was negligent under the circumstances. W. PROSSER, LAW OF TORTS §33, at 166 (4th ed. 1971); 29 AM. JUR. 2d, *Evidence* §3-8 (1967).

5. E. CLEARY, *et al.*, MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE §321, at 743 (2nd ed. 1972). [hereinafter cited as MCCORMICK]; Annot., *Evidence—Medical Treatises*, 84 A.L.R.2d 1338 (1962).

6. *Poretto v. United States*, 196 F.2d 392 (5th Cir. 1952); Annot., *Newspaper Article as Hearsay*, 55 A.L.R.3d 663 (1974).

7. *Mississippi Power & Light Co. v. Whitescarver*, 68 F.2d 928 (5th Cir. 1934); Annot., *Evidence—Safety Codes*, 75 A.L.R.2d 778 (1961).

8. *Yellow Bayou Plantation, Inc. v. Shell Chem., Inc.*, 491 F.2d 1239 (5th Cir. 1974); *Theodor v. Lipsey*, 237 F.2d 190 (7th Cir. 1956).

9. MCCORMICK; Comment, *Admissibility of Safety Codes, Rules and Standards in Negligence Cases*, 37 TENN. L. REV. 581 (1970).

10. *Dallas County v. Commercial Union Assurance Co.*, 286 F.2d 388 (5th Cir. 1961); Annot., *Admissibility of Safety Codes or Standards*, 58 A.L.R.3d 148 (1974); See also FED. R. CIV. P. 43(a), which states in pertinent part: "In any case, the statute or rule which favors the reception of the evidence governs. . . ."

11. 5 J. WIGMORE, EVIDENCE §1420, at 251 (Chadbourn rev. 1974).

under this rationale, although on a rather haphazard basis.<sup>12</sup>

In the Fifth Circuit, the necessary-trustworthy analysis was firmly established in the case of *Dallas County v. Commercial Union Assurance Co.*<sup>13</sup> In a richly documented opinion, the court in *Dallas County* held that a fifty-eight year old newspaper was admissible under the Wigmore analysis,<sup>14</sup> specifically rejecting the "ancient document" rule<sup>15</sup> and other "readily identifiable and happily tagged species of hearsay exception."<sup>16</sup> This decision provided the foundation for the subsequent holding in *Muncie Aviation* that government advisory publications, as a rule, meet the basic criteria of necessity and trustworthiness, and thus are to be regarded as an exception to the hearsay rule.<sup>17</sup>

The court of appeal's conclusion in *Muncie Aviation* was based upon application of the Wigmore standard to government publications in general. After noting the relevance of these particular circulars,<sup>18</sup> the court found the elements held to justify admission of the hearsay in *Dallas County*, were "similarly present in the instant case."<sup>19</sup> The element of practical necessity was found to be present, based upon the "virtual impossibility" of calling the individual compilers as witnesses.<sup>20</sup> The second element, trustworthiness, was established on the basis that the responsible government agencies could have no conceivable interest other than the safety of the readers.<sup>21</sup> In upholding the admission of the evidence, the

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12. *Challoner v. Day & Zimmerman, Inc.*, 512 F.2d 77 (5th Cir. 1975) (government weapons test report); *Reyes v. Wyeth Laboratories*, 498 F.2d 1264 (5th Cir. 1974) (medical survey); *Butler v. Southern Pac. Co.*, 431 F.2d 77 (5th Cir. 1970) (report on loading tests); *Sabatino v. Curtiss Nat'l Bank of Miami Springs*, 415 F.2d 632 (5th Cir. 1969) (decendent's personal check record admitted as a business record, but under same analysis); *Dallas County v. Commercial Union Assurance Co.*, 286 F.2d 388 (5th Cir. 1961) (newspaper); *Quinn v. United States*, 312 F. Supp. 999 (E.D. Ark. 1970) (safety regulations of Corps of Engineers); *Nordstrom v. White Metal Rolling & Stamping Corp.*, 75 Wash. 2d 629, 453 P.2d 619 (1969) (safety code). See also *Hassan v. Stafford*, 472 F.2d 88, 94 (3rd Cir. 1973) (regulations without force of law), where the Court of Appeals for the Third Circuit stated:

[I]t is established that federal courts have the power to create new precedents under Rule 43 in order to permit the judicial development of a progressive federal law of evidence.

13. 286 F.2d 388 (5th Cir. 1961).

14. *Id.* at 396.

15. Documents thirty years old or more need not be authenticated by subscribing witnesses, but are self-proving. 3 S. GARD, JONES ON EVIDENCE §17:23 (6th ed. 1972). The present statement of the rule in federal courts is FED. R. EVID. 901(b)(8).

16. 286 F.2d at 398.

17. 519 F.2d at 1183.

18. *Id.* at 1180.

19. *Id.* at 1182.

20. *Id.* at 1182. "Necessity" in this context more accurately denotes convenience. 5 J. WIGMORE, EVIDENCE §1421, at 253 (Chadbourn rev. 1974).

21. 519 F.2d at 1182. Although not stated, the court appears to be specifically applying one of Wigmore's tests for a circumstantial probability of trustworthiness: "[W]here the circumstances are such that a sincere and accurate statement would naturally be uttered,

court stated its decision was in accord with the modern trend of cases which admit safety codes in negligence actions.<sup>22</sup>

*Muncie Aviation* did not supplant the rule established in this circuit by the *Dallas County* decision. Rather, it used and applied that doctrine in the specific area of governmental publications to create a new rule. More accurately, *Dallas County* established an *approach* to admissibility of evidence based not on rigid rules but rather upon a flexible standard resting on practical considerations.<sup>23</sup> While this approach to the problem has been followed by some courts<sup>24</sup> and approved by commentators,<sup>25</sup> it has not been without its problems. One objection that has been raised is that, under the liberal standard, lawyers are not able to determine in advance what evidence will be deemed admissible.<sup>26</sup> Additionally, it has been asserted that judges will tend to apply the old formalized rules rather than make an independent determination of trustworthiness, especially where such a finding would be time-consuming.<sup>27</sup>

The *Muncie Aviation* decision may be an initial attempt by the court of appeals to eliminate these problems<sup>28</sup> (at least in the area of government publications) by providing a general rule that "the *inherent* trustworthiness of such codes and recommendations, coupled with the need for their introduction in order to impart relevant information not contained elsewhere, is sufficient to justify their admission . . . ."<sup>29</sup>

and no plan of falsification be formed . . . ." 5 J. WIGMORE, EVIDENCE §1422, at 254 (Chadbourn rev. 1974).

22. 519 F.2d at 1183. There would seem to be some question as to whether governmental publications are as indicative of the general industry standard as are the safety codes to which the court refers. Some courts feel that the trustworthiness of the codes in this context is insured as they represent a consensus of opinions. *McComish v. DeSoi*, 42 N.J. 274, 200 A.2d 116 (1964); *Nordstrom v. White Metal Rolling and Stamping Corp.* 75 Wash. 2d 629, 453 P.2d 619 (1969). As an example, the publication admitted in *Nordstrom* was the product of extensive investigation by a committee representing 23 organizations including manufacturers, insurers, consumers, professional societies, and government agencies. It is not noted in *Muncie Aviation* whether the circulars in question represented a consensus of views, or the opinion of a single author.

23. 286 F.2d at 397. See Note, *Evidence—Hearsay—Old Newspaper Article Admitted as Evidence of Facts Contained on Grounds of Necessity and Trustworthiness*, 15 VAND. L. REV. 288 (1961).

24. *United States v. 60.14 Acres of Land, Etc.*, 362 F.2d 660 (3rd Cir. 1966); *Timber Access Indus. Co. v. United States Plywood-Champion Papers, Inc.*, 263 Ore. 509, 503 P.2d 482 (1972).

25. Note, *Evidence, Admissibility of Newspapers Under the Hearsay Rule*, 1961 DUKE L.J. 460; Note, *Evidence: Hearsay: Admissibility of Ancient Newspaper to Prove Matter of Local Interest*, 46 CORNELL L.Q. 645 (1961).

26. Note, *Admissibility of Hearsay Based on Trustworthiness and Necessity*, 15 STAN. L. REV. 945 (1961).

27. Note, *Evidence—Hearsay—Scope of Federal Rule 43(a)*, 60 MICH. L. REV. 105 (1961).

28. The courts, until now, appear to have been deciding questions on admissibility on a case-by-case basis. See *McDonald v. United States*, 284 F. Supp. 978 (N.D. Tex. 1967), note 12 *supra* and cases there cited.

29. 519 F.2d at 1183 (emphasis added).

Should the *Muncie Aviation* decision be interpreted strictly in accordance with the above statement, it would represent a substantial change in the law. However, the court seems to make such an interpretation questionable by stating that a trial court may, in its discretion, exclude material which fails "to meet the *threshold* tests for trustworthiness and relevancy."<sup>30</sup> From this language it is unclear whether there must be an affirmative showing of trustworthiness to effect admission, or whether the material is actually to be considered "inherently trustworthy" and *presumed* admissible. The latter seems the correct interpretation for three reasons. First, should the material not be presumed admissible, the court, despite its careful reasoning in creating a general rule, would still be left with the pre-existing approach requiring a case-by-case determination. It seems doubtful that such a result was intended. Second, the court, in speaking of this threshold requirement, seems primarily concerned with retaining the trial judge's right to exclude evidence shown to be entirely untrustworthy.<sup>31</sup> This right of exclusion does not affect the *presumption* of admissibility; it merely establishes the presumption as rebuttable. Finally, as a practical matter, it seems unlikely that a successful attack on trustworthiness could be mounted considering the definition of that term in this context.<sup>32</sup> An initial hearing would then, in the majority of cases, be a mere formality.

*Muncie Aviation*, if interpreted so as to make government agency publications presumptively admissible, would serve to eliminate some of the problems created by the case-by-case approach. Such action constitutes an application of the rationale underlying the *Dallas County* decision to establish a general presumption of admissibility for advisory publications of governmental agencies.<sup>33</sup> It remains to be seen whether this holding signals the beginning of a trend toward categorization to be continued in other areas.<sup>34</sup>

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30. *Id.* (emphasis added).

31. *Id.*, n.14. This exclusion of evidence affirmatively shown to be unreliable would not constitute an abuse of discretion.

32. *Id.* at 1182. For a discussion of this point see material cited in note 21, *supra*, and accompanying text.

33. The thrust of the *Dallas County* decision was that a departure from historical categories, in favor of admitting all relevant, trustworthy, and necessary material, would more effectively implement the function of the law of evidence.

34. The scope of this decision remains to be determined. It is not stated whether "government agency" includes only the major federal agencies (such as the Federal Aviation Administration involved here), or whether the smaller federal agencies and the state agencies were meant to be included as well. The court's analysis would be equally applicable to a publication of any of these bodies.