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ADMISSIBILITY OF ACCIDENT REPORTS REQUIRED BY FEDERAL LAW

By Thomas C. Wood

Federal statutes and regulations require numerous accident reports to be made by private companies and governmental agencies. These reports contain data that could be quite useful to private litigants in civil actions. This comment examines the admissibility into evidence of accident reports prepared by public carriers and the respective federal agencies. The basic problem concerns a conflict between: (1) admissibility under the Federal Business Records Act (FBRA), and (2) the effect of statutory provisions excluding accident reports from use in civil suits.

ADMISSIBILITY UNDER THE FEDERAL BUSINESS RECORDS ACT

An accident report is hearsay when offered in evidence to prove the truth of a matter stated therein. Such an extra-judicial statement is inadmissible unless it comes within an exception to the hearsay rule. At common law one such exception existed for business records.

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1 Member, Second Year Class.
4 McCormick gives this definition: "Hearsay evidence is testimony in court or written evidence, of a statement made out of court, such statement being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter." McCormick, Evidence, § 225, at 460 (1954) [hereinafter cited as McCormick].
6 5 Wigmore, Evidence § 1426 (3d ed. 1940) [hereinafter cited as Wigmore]. The exceptions number from ten to twenty, depending on the minuteness of the classification. McCormick § 309.
By 1936, the business records exception had lost much of its utility. A "mass of detailed petty limitations" severely restricted its application. To obviate this situation, Congress enacted the Federal Business Records Act based upon a Model Act proposed by a committee of legal scholars. The FBRA provided that a business record was admissible if made in the regular course of business and if it was the regular course of that business to make such a record; other considerations were to affect, not the record’s admissibility, but only its probative weight.

In 1943, the United States Supreme Court gave its only interpretation of this Act in Palmer v. Hoffman. This case involved a railroad grade crossing accident in which the plaintiff’s decedent was killed. Two days afterwards, the engineer of the train in accordance with regular company procedure gave his account of the accident in a report to his superiors. The report tended to exculpate him of negligence and the railroad sought to admit it into evidence. The Supreme Court affirmed denial of the report's admissibility under the FBRA by holding that it was not made in the regular course of business within

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8 5 Wigmore § 1520.
9 See generally McCormick §§ 282-83. Concerning this state of the law, Mr. Justice Cardozo remarked "that many of the simplest things of life, transactions so common as the sale and delivery of merchandise, are often the most difficult to prove." Cardozo, A Ministry of Justice, 35 Harv. L. Rev. 113, 121-22 (1921).
10 49 Stat. 1561 (1936). This Act, now codified in 28 U.S.C. § 1732(a) (1964), provides: "In any court of the United States and in any court established by an 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 any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

"All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

"The term 'business,' as used in this section, includes business, profession, occupation, and calling of every kind.

Laughlin, supra note 7, compares the FBRA with the proposals regarding the business records exception contained in the American Law Institute’s Model Code of Evidence rule 514 (1942) and in the National Conference of Commissioners on Uniform State Laws’ Uniform Business Records as Evidence Act and its Uniform Rule of Evidence 63(13).

11 Morgan et al., The Law of Evidence, Some Proposals for Its Reform 51-63 (1927), contains the Model Act and comments by the committee that drafted it for the Commonwealth Fund of New York.
The accident report was not a record "made for the systematic conduct of the business as a business," but rather was "calculated for use essentially in the court;" its primary utility was "in litigating, not in railroading." The Court mentions examination of the record's character and earmarks of reliability as the test for admissibility under the FBRA, rather than regularity of preparation.

**Interpretation of Palmer by the Courts**

The Federal courts in applying the Palmer case's narrow interpretation of the FBRA have reached conflicting conclusions regarding the admissibility of accident reports.

The Second Circuit court is the leading advocate for a more liberal interpretation of the FBRA. In its own decision in Palmer it held the accident report inadmissible because it was "dripping with motivations to misrepresent," thus focusing upon the report's untrustworthiness.

In *Pekelis v. Transcontinental & W. Air, Inc.* it was held reversible error for the district court to have refused plaintiff's offer in evidence of several accident reports. Mr. Justice Douglas' Palmer decision was distinguished because here the reports were not made for the party offering them and were "clearly not part of a story cooked up in advance of litigation in the disguise of business records." These reports were made by boards established by the defendant to investigate all of its airplane crashes. They were thus found to be made in the regular

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14 Id. at 113.
15 Id. at 114.
16 Ibid.
17 Ibid.
19 Hoffman v. Palmer, 129 F.2d 976, 991 (2d Cir. 1942), aff'd, 318 U.S. 109 (1943). The court limited its holding to such reports where the maker "knows at the time of making it that he is very likely, in a probable law suit relating to that accident, to be charged with wrongdoing as a participant in the accident, so that he is almost certain, when making the memorandum or report, to be sharply affected by a desire to exculpate himself and to relieve himself or his employer of liability." Ibid.

The Supreme Court did not use this reasoning as the basis for its affirmance. See text accompanying note 13 supra.
course of business and admissible under the FBRA. The opinion interpreted the Palmer holding as dealing with a situation where evidence was built up to promote the self-interest of the report's maker. The court stressed that the reports were against the interest of the maker when made and were introduced into evidence by the opposing party.

In the next two important cases by the Second Circuit on this matter, Central R.R. v. Jules Sottnek Co. and Puggioni v. Luckenbach S.S. Co., the court established that its construction of the Palmer case gives the trial judge discretion to determine whether the circumstances surrounding an accident report justify its acceptance as evidence. He is to examine any indicia of unreliability, such as, the inclusion in the report of multiple hearsay, which would make the report unreliable and therefore inadmissible.

It also appeared, in Sottnek and Puggioni, that the Pekelis rule was going to apply only in cases where admission is sought of an accident report prepared by one other than the party seeking to admit it. However, this limitation did not last. The court went on in United States v. New York Foreign Trade Zone Operators, Inc. to hold it error for the district court to exclude from evidence an accident report.

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23 Ibid.
25 266 F.2d 340 (2d Cir. 1961).
26 As Judge L. Hand has stated: "In cases where the entrant records what he has heard, the document will be evidence of what they have told him only in case it appears that it was part of their regular course of business to report to him what the declarants themselves knew, as it was part of his business to record what they said. ... 'Multiple hearsay' is no more competent now than single hearsay was before." United States v. Grayson, 166 F.2d 863, 869 (2d Cir. 1948). See generally McCormick § 286.
27 Accord, McDaniel v. United States, 343 F.2d 785 (5th Cir.), cert. denied, 382 U.S. 826 (1965); Shenker v. United States, 322 F.2d 622 (2d Cir. 1963), cert. denied, 376 U.S. 907 (1964); Pennsylvania R.R. v. The Buchanan Boys, 155 F.2d 585 (2d Cir. 1946).

The Second Circuit recently elaborated on this discretion in LeRoy v. Sabena Belgian World Airlines, 344 F.2d 266, 274 (2d Cir.), cert. denied, 382 U.S. 878 (1965): "The district court's discretion with respect to § 1732 is a discretion in judging whether the document offered 'has an inherent probability of trustworthiness.' Central R.R. v. Jules S. Sottnek Co., 258 F.2d 85, 88 (2d Cir. 1958). It is therefore a necessary premise for its exercise that the document's trustworthiness be in doubt."

Judge Clark, the Second Circuit's most ardent proponent of a liberal interpretation of the FBRA, insists the Act does not give the trial judge such discretion and, if a record is made in the regular course of business, the FBRA requires its admission. The other circumstances are to go toward the record's weight as stated in the Act. For his view see: United States v. New York Foreign Trade Zone Operators, Inc., 304 F.2d 792, 799 (2d Cir. 1962) (concurring opinion); Hoffman v. Palmer, 129 F.2d 976, 1000 (2d Cir. 1942) (dissenting opinion), aff'd, 318 U.S. 109 (1943).

29 304 F.2d 792 (2d Cir. 1962).
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filled out by an employee of the party seeking to enter it.30 Palmer was distinguished because the report here was statutorily required and thus prepared in the regular course of business within the meaning of the FBRA.31 The court found no reason to doubt the report's reliability. Its primary utility was not in litigation (as was found in Palmer), but to assist the evaluation of an injured employee's claim for compensation. If any litigation was contemplated when the report was made, it would have been between the employee and his employer and not his employer and the present defendant.35

The Second Circuit recently reaffirmed its liberal position regarding the FBRA in Taylor v. Baltimore & O.R.R.34 The defendant was allowed to put into evidence an accident report it had submitted to the Secretary of Labor as required by statute.35 This decision went a step further than Foreign Trade Zone in that here, any anticipated litigation would have been between the two present litigants. The court, however, found that there was no abuse of the district court's discretion in admitting the report. Sufficient reliability existed because the individual who made the report was not personally involved and had no awareness of the manner in which the report might work to his employer's benefit. Moreover, no litigation was anticipated at the time.38

The Second Circuit has decided no case which directly holds that an accident report by a federal agency is admissible under the FBRA. However, if it were the agency's regular business to make such reports and the district court finds no indicia of unreliability, the report would undoubtedly be admissible. The court has cited37 favorably Moran v.

30 Id. at 797.
31 The accident report was made in accordance with the Federal Employees' Compensation Act § 24, 39 Stat. 747 (1916), as amended, 5 U.S.C. § 774 (1964), by an injured civilian seaman's superior. The employer of the seaman, the United States government, being subrogated to his rights against the defendant, instituted the present action. The defendant was the owner of a pier upon which the employee slipped and injured himself.
32 304 F.2d 792, 797 (2d Cir. 1962).
33 Ibid.
34 344 F.2d 281 (2d Cir.), cert. denied, 382 U.S. 831 (1965).
35 A report was required by the Longshoremen's and Harbor Workers' Compensation Act § 30, 44 Stat. 1439 (1927), as amended, 33 U.S.C. § 930 (1964), from the defendant-employer regarding any accident of its employees—in this case Taylor, the plaintiff.

Judge Friendly reiterated the Second Circuit's position regarding the admissibility under the FBRA of a statutorily required report, saying: "It would ill become a court to say that the regular making of reports required by law is not the regular course of business." Taylor v. Baltimore & O.R.R., supra note 34, at 285.

36 Id. at 286.
38
Pittsburgh-Des Moines Steel Co., the leading case holding that accident reports by governmental agencies are admissible. The closest factual situation to reach the court was in LeRoy v. Sabena Belgian World Airlines. There the court affirmed the admission of a transcript copied from an appendix in an aircraft accident report prepared by an agency of the Italian government.

The other federal circuits have not followed the Second Circuit's liberal interpretation of the FBRA. The Court of Appeals for the Fifth Circuit has called the Pekelis decision a "complete disregard of what was decided in Palmer," and has said that such cases incorrectly construe the FBRA.

The approach employed by these courts is to subject the report to a more objective test. The court must determine "whether the particular document was prepared in the course of systematic routine office procedures to record information relating to, and to be used in, the routine operations of the business or agency." If the report is not thus related to the internal, routine operations of the business, these courts go no further to consider circumstances which might provide reliability. The document is held not to be made in the regular course of business as that language of the FBRA is interpreted.

Some examples will illustrate the restricted application of the FBRA that this approach produces. In the Third Circuit, Nuttall v. Reading Co. dealt with a factual situation similar to Palmer. Citing Palmer as authority the court held that signed statements taken by the de-

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38 183 F.2d 467 (3d Cir. 1950).
39 344 F.2d 266 (2d Cir.), cert. denied, 382 U.S. 878 (1965).
40 Id. at 272. The transcript was of a recording of a conversation between the airplane pilot and a traffic controller at the airport.
42 Matthews v. United States, 217 F.2d 409, 415 (5th Cir. 1954).
43 Ibid.
44 LaPorte v. United States, 300 F.2d 878, 880 (9th Cir. 1962).
45 Standard Oil Co. v. Moore, 251 F.2d 188, 213 (9th Cir. 1957), cert. denied, 358 U.S. 975 (1958).
46 It is sometimes possible, however, for an accident report to be admissible under some other exception to the hearsay rule. It may be admissible into evidence as an admission of a party, Cox v. Esso Shipping Co., 247 F.2d 629 (5th Cir. 1957), cf., Caruthersville Towing Co. v. John I. Hay Co., 334 F.2d 376 (5th Cir. 1964), or as an official record, Stemberg Dredging Co. v. Moran Towing & Transp. Co., 196 F.2d 1002 (2d Cir. 1952) (L. Hand, J.), cf., United States v. Grayson, 166 F.2d 863 (2d Cir. 1948).
47 235 F.2d 546 (3d Cir. 1956).
48 Id. at 550.
fendant-railroad from its employees regarding an accident were inadmissible. Though the statements were taken during the railroad’s investigation for the trial, the facts might well have been distinguished from Palmer, and the opposite result reached, had the case been tried in the Second Circuit. In this case it was the plaintiff who sought to admit the reports against the interests of the railroad. Under the Pekelis reasoning it might have been found that the statements were taken in the regular course of business and the fact that they were against the interests of the entrant would have provided grounds for reliability.

A similar holding to the last case was reached in Dilley v. Chesapeake & O. Ry. in the Sixth Circuit. That court held that it was improper to admit an accident report made by a crew foreman of the defendant-railroad to his superiors as required by routine company policy. In the Second Circuit it is probable an opposite holding would have resulted, because in this case it was the plaintiff who introduced the report into evidence and no indicia of unreliability were present.

This narrow approach does not recognize the routine making of statutorily required reports as being done in the regular course of business. Accordingly, copies of income tax returns, a copy of a strike report to Bureau of Labor Statistics, and “sugar reports” required from certain retailers by the Director of Internal Revenue to control “moonshining” have been held not admissible under the FBRA.

There are clear indications that under this approach federal agencies’ accident reports do not come within the FBRA. In Chapman v. United States the court noted it was not error for the trial court to refuse to admit an Army Air Force Board’s accident report under the FBRA. By dictum, it has been stated that an accident report by a Coast Guard Marine Board of Investigation and an accident report

48 Ibid.
51 Id. at 251.
52 See note 21 supra and accompanying text.
53 Standard Oil Co. v. Moore, 251 F.2d 188, 222 (9th Cir. 1957), cert. denied, 356 U.S. 975 (1958).
55 Luttrell v. United States, 320 F.2d 462, 466 (5th Cir. 1963); Matthews v. United States, 217 F.2d 409, 417 (5th Cir. 1954).
56 194 F.2d 974 (5th Cir.), cert. denied, 344 U.S. 821 (1952).
57 Id. at 978. The court rejected and criticized Moran v. Pittsburgh-Des Moines Steel Co., 183 F.2d 467 (3d Cir. 1950).
58 Steward v. Atlantic Ref. Co., 240 F.2d 715, 716-17 (3d Cir. 1957) (dictum). This dictum was based on a 72 year old United States Supreme Court decision decided
Evaluation of the Two Interpretations

In comparing the two conflicting interpretations given to the FBRA by the federal courts of appeals, it appears that the approach followed by the majority is unduly narrow and limited. The drafters of the Model Act upon which the FBRA is based intended a broad remedial statute which would eliminate the difficulties present in the common law for admitting business records into evidence. It was the considered judgment of those legal scholars that only one requirement was necessary for admission. That requirement was regularity of the record's making by the company in question. All other circumstances of the making were to affect the record's probative weight, but not keep it from being admitted.

The judicial gloss that is given the FBRA by these courts which require the document to have a close relation and utility to the internal functions of the business is unwarranted. That the statute was not intended to be so narrowly construed is indicated by comments of the Model Act's chief drafters. Professor Morgan denounces the Palmer decision as typical of those cases which hamper attempts to reform the rules of evidence. He has stated that a restrictive interpretation "has been enforced by Courts of Appeals . . . to exclude many records that fall squarely within the language of the statute." Professor Wigmore, lamenting the fact that courts have not always been ready to give full effect to the spirit of this legislation, criticized the refusal of a court to admit a police officer's accident report, stating: "the most explicit words of a statute do not always avail to change the cerebral operations of the Judiciary . . . ."

before the FBRA and in the absence of any exclusionary provision (see text accompanying note 108 infra), The Charles Morgan, 115 U.S. 69 (1885).


60 MORGAN, ET AL., THE LAW OF EVIDENCE, SOME PROPOSALS FOR ITS REFORM 51-63 (1927).


62 Morgan, op. cit. supra note 60, at 63. For the purposes of the present analysis the requirement of the FBRA that it be the regular course of the business to record the event at the time of its occurrence or within a reasonable time thereafter is not discussed as a separate test. Such requirement is reasonable and not disputed.


65 MORGAN, BASIC PROBLEMS OF EVIDENCE 312 (1961).

66 5 WIGMORE § 1530a, n.1, at 392.
The mere fact that the legislative discussion preceding the enactment of the FBRA did not specifically mention accident reports should not preclude their inclusion as business records. It was only natural for the discussion to focus upon the most common and numerous accounting-type documents. The above comments by drafters of the proposed remedial statute show accident reports are within its intended scope.

The liberal interpretation of the FBRA by the Second Circuit is in harmony with contemporary attitudes regarding reform of the law of evidence. This approach provides the trial judge with discretionary power in these matters. Even though an accident report is prepared in the regular course of business, the judge still has discretion to refuse its admission if there is reason to doubt its reliability. The National Conference of Commissioners on Uniform State Laws in cooperation with the American Law Institute include in their recommended rule on business records a similar discretion for the trial judge. These rules have received the approval of the American Bar Association.

EFFECT OF EXCLUSIONARY PROVISIONS ON ACCIDENT REPORT ADMISSIBILITY

An exclusionary provision in a statute requiring an accident report will prohibit the report's use in civil litigation. Such provisions cover reports by railway and motor carriers and the regulating governmental agencies. The typical language provides that the required report shall not be admitted as evidence, or used for any purpose, in an action for damages growing out of any matter mentioned in the report.

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67 See Hoffman v. Palmer, 129 F.2d 976, 1000 n.6 (2d Cir. 1942) (dissenting opinion by Clark, J.), aff'd, 318 U.S. 109 (1943). For an account of this legislative discussion see Judge Frank's opinion in Hoffman v. Palmer, supra at 987.
69 See Shenker v. United States, 322 F.2d 622 (2d Cir. 1963), cert. denied, 376 U.S. 907 (1964). This is a compromise position short of a literal interpretation of the FBRA advocated by Judge Clark, supra note 27.
70 Uniform Rule of Evidence 63(13) excludes from the category of inadmissible hearsay: "Writings offered as memoranda or records of acts, conditions or events to prove the facts stated therein, if the judge finds that they were made in the regular course of a business at or about the time of the act, condition or event recorded, and that the sources of information from which made and the method and circumstances of their preparation were such as to indicate their trustworthiness." (Emphasis added.)
Conflict With the FBRA

The exclusionary statutes, when juxtaposed with the FBRA, present an apparent conflict in the law. The former make accident reports privileged and thus inadmissible as evidence, whereas the latter provides that reports made in the regular course of business are admissible. The Supreme Court’s Palmer decision contains dictum addressed to this problem. The Court stated:

We can hardly suppose that Congress modified or qualified by implication these long standing statutes [exclusionary provisions] when it permitted records made “in the regular course” of business to be introduced.

No federal court has directly confronted this conflict, though some dicta have indicated adherence to the above statement. Recently, however, in Taylor v. Baltimore & O.R.R., the court questioned the Palmer dictum in cases where the maker of the report seeks to admit his own copy. The court reasoned that in enacting provisions excluding company reports from evidence, “Congress was not thinking of the case, which could hardly have been envisioned under the then state of the law, where the carrier would attempt to use statements in the report in its favor.” This question was not ruled on, however, because the plaintiff did not make a timely objection based on the exclusionary provision. The railroad was allowed to enter into evidence its accident report under the FBRA exception to the hearsay rule.

Unanimity is lacking among the courts in the application of exclusionary statutes. This variance is apparent where the document sought to be admitted is not the final accident report itself, but is part of the investigation. The courts disagree on whether or not the

75 In those courts which do not recognize reports required by statute as being covered by the FBRA, no conflict appears. See text accompanying notes 53-55 supra.
76 Palmer v. Hoffman, 318 U.S. 109, 115 (1943) (dictum). As a basis for this dictum, the Supreme Court infers that the purpose of exclusionary provisions was to exclude untrustworthy reports. Professor Morgan objects that their purpose is not to exclude untrustworthy reports, but is to prevent their use as admissions of a party. Morgan, The Law of Evidence, 1941-1945, 59 Harv. L. Rev. 481, 507 (1946). The Congressional debates on the exclusionary provision for railroad company reports do not support the Court’s inference. 45 Cong. Rec. 155-59, 3459-60 (1909).
78 344 F.2d 281 (2d Cir. 1965) (dictum).
81 Id. at 285.
privilege covering the reports extends to documents upon which the reports are based.\textsuperscript{82}

Regarding company accident reports, the exclusionary provisions are normally interpreted as intended to induce complete and candid reports by the carriers.\textsuperscript{83} Nonetheless, some courts put a narrow construction on the exclusionary statutes in order to make privileged only the accident report itself.\textsuperscript{84} The contention that the statutory privilege should also cover the accident investigation records because they are compiled for the purpose of making the privileged reports is rejected.\textsuperscript{85} On the other hand, this contention is accepted by other courts.\textsuperscript{86} In these cases the reasoning is that it would violate the spirit of the statute if it were interpreted not to include data gathered during the investigation.\textsuperscript{87}

Regarding agency reports, the handling of investigatory documents of the Civil Aeronautics Board affords an example of the usual approach. The applicable exclusionary statute\textsuperscript{88} is interpreted as revealing a Congressional "intention to preserve the functions of the court and jury uninfluenced by the findings [i.e. opinions and conclusions] of the Board or investigators."\textsuperscript{89} By thus constricting the breadth of the provision's effect, courts have held admissible: a CAB investigator's report containing only facts,\textsuperscript{90} a letter from an airline official.

\textsuperscript{83} Louisville & No. R.R. v. Grant, 234 Ky. 276, 27 S.W.2d 980 (Ct. App. 1930); see 45 Cong. Rec. 155 (1909) (remarks by Representative Mann).
\textsuperscript{85} Mower v. McCarthy, 122 Utah 1, 17, 245 P.2d 224, 233 (1952).
\textsuperscript{87} Craddock v. Queen City Coach Co., supra note 86, at 382, 141 S.E.2d at 800.
\textsuperscript{88} 72 Stat. 781 (1958), 49 U.S.C. § 1441(e) (1964) provides: "No part of any report or reports of the Board relating to any accident or the investigation thereof, shall be admitted as evidence or used in any suit or action for damages growing out of any matter mentioned in such report or reports."

It should be noted that this statute does not make accident reports by the airlines privileged. A good analysis of the cases involving this Act up to 1950 is found in Simpson, \textit{Use of Aircraft Accident Investigation Information in Actions for Damages}, 17 J. Am. L. & Com. 283 (1950).
\textsuperscript{90} Lobel v. American Airlines, Inc., 192 F.2d 217 (2d Cir. 1951), cert. denied, 342
to the CAB relating to an accident investigation,91 and statements by
a pilot of a crashed airplane to a CAB investigator.92 One court has
also adopted this restrictive approach in construing a similar exclu-
sionary statute concerning accident reports by the ICC.93

Consideration of the Underlying Policies

The resolution of the conflict caused by the cross-purposes of the
exclusionary provisions and the FBRA requires a consideration of
these statutes' underlying policies. The FBRA, as an exception to the
hearsay rule, is directed at increasing the body of evidence placed
before the trier of fact for consideration in its quest for truth. Exclu-
sionary provisions are based upon two rationales: (1) for carrier
reports it is the desire to obtain from private companies factual reports
of accidents which may reveal the need for regulatory legislation for
the public welfare,94 and (2) for federal agency reports it is the
desire to protect the trier of fact from being influenced by agency
findings.95

It is submitted that the rationale of inducing factual reporting is
unsound. Its objective is obtainable without making company reports
privileged. Exclusionary provisions making these accident reports
privileged are based upon the assumption that if the reports are avail-
able as evidence they will necessarily be incomplete or erroneous.96
A company would not report incriminatory evidence for fear of its use
in a possible law suit. The premise of this argument is the belief that:
(1) a party would either not thoroughly investigate its accidents due
to fear of uncovering incriminating facts, or (2) whatever incrimin-
ating information is discovered would be omitted from or erroneously
entered in the required report.

In regard to the first half of this premise, there is a compelling

92 Ratner v. Arrington, 111 So. 2d 82 (Fla. Dist. Ct. App. 1959); Aviation Enter-
93 Yanick v. Pennsylvania R.R., 192 F. Supp. 373 (E.D.N.Y. 1961); but see Cour-
94 See Louisville & No. R.R. v. Grant, 234 Ky. 276, 27 S.W.2d 980 (Ct. App. 1930);
45 Cong. Rec. 155 (1909) (remarks by Representative Mann).
95 See Berguido v. Eastern Air Lines, Inc., 317 F.2d 628 (3d Cir.), cert. denied,
375 U.S. 895 (1963); 45 Cong. Rec. 156 (1909) (remarks by Representative Olmsted).
96 See statements by Representative Mann made in the House during the debate
on the first exclusionary provision for railroad accident reports. 45 Cong. Rec. 155
(1909).
economic reason why a company must maintain competent accident investigating machinery.\textsuperscript{97} Accidents cost the company money. They cause loss of lives, equipment, time, contracts, and customers, plus expensive law suits. To minimize costs all the facts must be uncovered so faulty equipment can be replaced, unsafe designs and systems corrected, and unqualified personnel trained or discharged.\textsuperscript{98} The company must investigate in order to decide intelligently whether to settle or fight a law suit, to guard against surprises if it litigates, and to uncover exculpatory facts.\textsuperscript{99}

In regard to the second half of the premise—that inculpatory information will be omitted or erroneously entered—there are three reasons to doubt the necessity for exclusionary statutes to prevent this occurrence.

First, there are statutory sanctions provided to ensure reliable reports. Railroad reports must be made under oath which subjects the maker to prosecution for false swearing if the report is falsified;\textsuperscript{100} motor carrier reports, if falsified, make the company subject to heavy fines.\textsuperscript{101} The federal government provides standard forms which must be filled out for each accident.\textsuperscript{102} Regardless of the existence of any exclusionary provisions, the carrier can be expected to enter the required minimum of information truthfully, though in the light most favorable to it.\textsuperscript{103}

Second, the protection provided by the exclusionary provisions affords little or no inducement to report inculpatory facts which otherwise might go unreported. Prohibiting use of the report as evi-
dence does not preclude use by an adversary of facts revealed within the report. Such information can be introduced into evidence by calling the individual who investigated the accident to testify as to what he personally observed.\textsuperscript{104} In addition, facts uncovered by the carrier's investigation are already available to a litigant in many jurisdictions through discovery\textsuperscript{105} and subpoena duces tecum procedures.\textsuperscript{106} Hence, the exclusionary statutes have no appreciable effect upon the completeness of carrier reports.

The third reason casting doubt on the necessity for exclusionary provisions to ensure reliability is the absence of such provisions for similar accident reports from airline\textsuperscript{107} and shipping\textsuperscript{108} companies. Accident reports by these enterprises are not privileged and have been used as evidence against them in actions for damages.\textsuperscript{109} There is no apparent reason why it is necessary for railway and motor carrier reports to be privileged to ensure reliability, whereas no privilege is deemed necessary for just as important reports from airline and shipping companies.

It is submitted that the rationale of keeping agency findings from the trier of fact is also unsound. The premise of this rationale is that by presenting to the trier of fact a report by a presumably unbiased and competent authority, the case will be prejudiced. It is feared the


\textsuperscript{107} Airline companies are required to make accident reports by 14 C.F.R. § 320.15 (a) (1966).

\textsuperscript{108} Shipping companies are required to make accident reports by 18 Stat. 128 (1874), as amended, 33 U.S.C. § 361 (1964). These reports are submitted to the United States Coast Guard, which has supervision over marine accident investigations. See 49 Stat. 1381 (1936), as amended, 46 U.S.C. § 239 (1964); 46 C.F.R. § 136 (1966). The regulations require an accident report by the owner, agent, master, or person in charge of the vessel. Normally the ship's master makes the report as agent of the shipping company. See, e.g., Cox v. Esso Shipping Co., 247 F.2d 629 (5th Cir. 1957).

trier will not give due consideration to the rest of the evidence in reaching its verdict.

This objection that opinion or conclusion introduced into evidence invades the province or usurps the function of the jury is not compelling. An agency's accident report—even one containing opinion as to the ultimate issue—is not conclusive proof binding upon the trier of fact. Nor is the case prejudiced. Though an agency opinion is expressed as to the accident's cause, the adverse party is free to introduce evidence to refute that conclusion or show why liability does not necessarily follow. Facts and testimony in addition to those considered by the agency can be introduced for the jury to weigh. In the end result the jury is free to make its own evaluation of all the facts, giving to each piece of evidence the weight it is thought to deserve. As Professor McCormick has cogently argued:

The question is, how far do we wish to facilitate the use, in the judicial process, of the results of the investigative and fact-finding operations of administrative officials? As to most such reports, on account of the nearness of the investigation to the time of the event, and of the element of official responsibility, I believe the courts' fact-finding will gain by their use.113

110 Regarding this objection, one court has stated: "As Wigmore puts it: such reason is 'a mere bit of empty rhetoric' and that '... no legal power, not even the judge's order, can compel them [the jury] to accept the witness's opinion against their own.'" United States v. Standard Oil Co., 316 F.2d 884, 889 (7th Cir. 1963).

There is a divergence of views regarding the effect of opinion in reports sought to be admitted under the FBRA. Some courts hold that if the report qualifies under the FBRA, then the inclusion of expert opinion only affects the report's probative weight. Pekelis v. Transcontinental & W. Air, Inc., 187 F.2d 122 (2d Cir.), cert. denied, 341 U.S. 951 (1951); Moran v. Pittsburgh-Des Moines Steel Co., 183 F.2d 467 (3d Cir. 1950). This position is premised upon the normal requirement that the opinion must concern a matter calling for special skill, experience, or knowledge, and that the declarant must be so qualified. Barnes v. Norfolk So. Ry., 333 F.2d 192, 197 (4th Cir. 1964); Standard Oil Co. v. Moore, 251 F.2d 188, 213-14 (9th Cir. 1957), cert. denied, 356 U.S. 975 (1958). A few courts have held that if the opinion is mere conjecture and subject to disagreement, the report is inadmissible. Lyles v. United States, 254 F.2d 725 (D.C. Cir. 1957), cert. denied, 356 U.S. 961 (1958), 362 U.S. 943 (1960), 368 U.S. 992 (1962) (5-to-4 decision); New York Life Ins. Co. v. Taylor, 147 F.2d 237 (D.C. Cir. 1944) (vigorous dissenting opinion by Edgerton, J.). Contra, Thomas v. Hogan, 308 F.2d 355 (4th Cir. 1962); Medina v. Erickson, 226 F.2d 475 (9th Cir. 1955).

111 See Meredith v. United States, 238 F.2d 535, 543 (4th Cir. 1956). See generally 7 WIGMORE §§ 1920-21; MCCORMICK § 12. The recently adopted Evidence Code in California has codified the following provision: "Testimony in the form of an opinion that is otherwise admissible is not objectionable because it embraces the ultimate issue to be decided by the trier of fact." CAL. EVIDENCE CODE § 805.


113 McCormick, Hearsay, 10 Rutgers L. Rev. 620, 627 (1956) (discussing admi-
CONCLUSION

The conflict between admission of company and agency reports under the FBRA and their exclusion under the exclusionary statutes should be resolved in favor of admissibility. The proper attitude should be to treat such statutes "as stumbling blocks in the jury's search for truth." The above analysis has shown that the exclusionary provisions for carrier reports are not necessary to have thorough accident investigation and reliable reporting. Further, it was contended that the reluctance to admit agency accident reports should give way in deference to the trier of fact's search for truth. Therefore, to resolve this conflict, it is recommended that the exclusionary statutes for railroad, motor carrier, ICC, and CAB accident reports be repealed.

The repeal of these exclusionary statutes would provide litigants with an inexpensive source of relevant information. By allowing an accident report to be used as evidence of the facts and expert opinion contained therein, money and time (both that of the litigants and the court) would be saved by not having to call witnesses to testify on these matters. This advantage would realize one of the major purposes for a Business Records Act discussed by the Model Act's drafters, 114

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114 See McCormick, *Hearsay*, 10 Rutgerns L. Rev. 620, 629-27 (1953). The burden then would be on the adversary to call witnesses to refute any facts in contention, and possibly to call for cross-examination a person who expressed expert opinion included in the report.
namely, reduction of the exorbitant cost a litigant faces in proving certain facts.\textsuperscript{117}

It is the injured and possibly indigent patron and employee who stand to gain most from the repeal of these statutes. In more cases they would be able to afford to initiate legal proceedings to acquire compensation. Making available an inexpensive, ready source of evidence to an injured customer of a public carrier would complement the common law policy of holding public carriers to a higher degree of responsibility.\textsuperscript{118} In addition, the repeal is consistent with the modern trend toward expanding enterprise liability which, applied to the present problem, would seem to dictate assisting the patron and employee.\textsuperscript{119}

The proposals recommended to liberalize admissibility under the FBRA (monitored by judicial discretion) and to repeal the exclusionary statutes are supported by the venerable counsel of Professor Thayer:

A true analysis would probably restate the law so as to make what we call the hearsay rule the exception, and make our main rule this, namely, that whatsoever is relevant is admissible.\textsuperscript{120}

\textsuperscript{117} See United States v. New York Foreign Trade Zone Operators, Inc., 304 F.2d 792 (2d Cir. 1962); Morgan, et al., The Law of Evidence, Some Proposals for Its Reform 57 (1927). In Foreign Trade Zone the court stated: “[T]he purpose behind the Federal Business Records Act is to permit the introduction into evidence of reports in substitution for the actual testimony in court of the persons making the reports.” United States v. New York Foreign Trade Zone Operators, Inc., supra at 797.

\textsuperscript{118} See Pennsylvania Co. v. Roy, 102 U.S. 451 (1880).

\textsuperscript{119} See Steffen, Enterprise Liability: Some Exploratory Comments, 17 Hastings L.J. 165 (1965). As Professor Steffen suggests: “it is possible that there is growing acceptance of the idea that enterprise should accept final responsibility.” Id. at 176.

\textsuperscript{120} Thayer, A Preliminary Treatise on Evidence at the Common Law 522 (1898).