



The Brief Case: DRI Committee News

February 2024 | Volume 3 Issue 2



LawyerGuard[®]
An Insurance Program for Lawyers



The only Professional Liability Program sponsored by DRI.

Share this page:



Product Liability: An Update from the PLC

Evidence by eBay: Reanalyzing the Federal Rules of Evidence

By Edward R. Hugo & Bina Ghanaat

Do the antiquated Federal Rules of Evidence still apply to the reality of our times? Our last trial provided insight into that question. Specifically, the following was an attempt by plaintiff's counsel to admit an instruction book, purchased on eBay, into evidence under one of the exceptions to the rule against hearsay.

Q: Now, in formulating your opinions concerning these Foster Wheeler boilers, have you also looked at instruction books, actually manufactured by Foster Wheeler?

A: I have.

Q: I will hand you what has (been) marked as Dennis Exhibit No. 246. Is this the type of book you have looked at and relied upon in the past?

A: It is.

Q: This one is dated -- it says Bulletin M 441, 44-1. (Freudian slip; the book is not dated.) It's the seventh edition, correct?

A: Yes.

Q: Is this something that you have reviewed and relied upon?

A: I have.

MR. FROST: Your Honor, we would offer 246, the Foster Wheeler Marine Steam Generating Book.

THE COURT: Any objection?

MR. HUGO: I'm still trying to find it here. May I voir dire on that?

THE COURT: Pardon?

MR. HUGO: Voir dire.

THE COURT: On what?

MR. HUGO: How he knows this is, other than looking at it, it's a Foster Wheeler book.

THE COURT: You can cross him on it when the time comes, but you object to the exhibit itself?

MR. HUGO: Object to lack of foundation.

THE COURT: Lay a foundation for it.

BY MR. FROST:

Q: Captain Moore, in your study (of) asbestos and asbestos-related issues concerning boilers, have you been -- have you reviewed documents that purport to be from Foster Wheeler on their face?

A: Yes.

Q: Have you actually looked at the document like the one I provided to you, of not photocopies, but the actual document itself, and reviewed and relied upon that in formulating your opinions?

A: I have.

Q: In regards to that particular document, that is during the time frame that these boilers would have been designed in the 1950s, correct?

A: So far, I don't think we found a date on this particular one.

Q: Do you see the signatures?

A: There is a handwritten signature on the bottom with a name and the date 8/23/53 on it.

Q: Is this the type of material that you have reviewed and relied upon in formulating your opinions?

A: It is.

Q: And does that also discuss type -- this type of boiler that we're discussing in this case?

A: The basic same type of boiler, yes, not exactly the same boiler.

Q: These types of materials, have you reviewed them and seen them when you were working in the shipping industry?

MR. HUGO: That is vague and overbroad, whether he reviewed these before litigation or not.

THE COURT: I will allow you to actually voir dire him on this. You are saying he looked at this.

MR. FROST: Your Honor, it's self-authenticating.

THE COURT: In what sense is this self-authenticating. Did you ever asking the defendant whether or not they are contesting authenticity?

MR. FROST: Your Honor, it's on the exhibit list.

THE COURT: I don't care whether or not it's on the exhibit list or not. Did you ever ask the defendant to acknowledge that this is in fact a document that came from them?

MR. FROST: I know their corporate representatives has been asked, Your Honor. I'm not sure if Mr. Hugo will concede it's their document. I have the original, that's why I brought the original.

THE COURT: Let me ask the defense.

MR. HUGO: I want to voir dire the witness on this.

THE COURT: All right. I will allow to you voir dire the witness on it, but on the issue of his foundation for the document.

MR. HUGO: That's all.

VOIR DIRE EXAMINATION

BY MR. HUGO:

Q: Are you telling me, sir, you read, relied, and considered that original book that is in front of you when you were working either in the Navy or Ingalls afterwards?

A: No, this was during asbestos litigation later.

Q: When you were paid by Mr. Frost to work as an expert?

A: Among other attorneys, that is correct.

Q: Where did you get this original document?

A: I have received copies of this document as discovery on various cases through the years.

Q: I'm asking you about the document that is in front of you or the photocopy of it. Other than getting from Mr. Frost, can you tell me where this came from?

A: No.

MR. HUGO: Thank you.

BY MR. FROST:

Q: Sir, have you looked at the document?

A: I have.

Q: Does it appear to be a genuine and accurate copy of a Foster Wheeler manual that would have been produced in the 1950s?

A: It does.

Q: And you have seen photocopies produced in litigation by Foster Wheeler in the past of this document, correct?

A Yes.

Q: And even though we have the original right there, is any doubt in your mind?

THE COURT: Let me stop. Does the defense have an objection to the document?

MR. HUGO: Not being (the subject of an) admission, I object, lack of foundation.

MR. FROST: It's an ancient document, Your Honor. (FRE 803(16), discussed below.)

THE COURT: Let me just stop. This type of stuff needs to be resolved prior to trial. In other words, I have no doubt you have read it, I have no doubt you relied upon it. It's not been established that in fact this was a document that was created by Foster Wheeler at the time he purports -- he doesn't purport, your side purports that it was done. It would have been so easy to simply ask Foster Wheeler prior to this trial to admit that this was a document that was created by them in 1950. I don't understand why that wasn't done.

MR. FROST: Your Honor, it's an original document. It has been provided to them in discovery. I went and got an original copy.

THE COURT: That is something different. They provided this document to you in discovery in this case?

MR. FROST: No. They did not provide in this case, they have other cases, as Mr. Moore has testified to. The fact I went and got the original is actually to avoid this situation so you can look at it.

THE COURT: When you say you got the original, where did you go to get the original? You went to a library that had it? Did you write to Foster Wheeler for it? Did you look through the archives from some governmental agency? How did you get it?

MR. FROST: **I went to E-bay. It's an original copy.**

THE COURT: I will not allow it in if that's how you got it. I will not allow it in.

MR. FROST: Will you allow a photocopy of it?

THE COURT: I won't allow a photocopy. **That is not how these things are done. One doesn't go to E-bay to find evidence in a case of this sort. It's shocking in a way.**

MR. FROST: **Well, Your Honor, that is where you get original documents from.**

THE COURT: I have never had -- I have been a judge for a long time, I have been a judge since 1990s, I have never had an item that supposedly comes from -- bought on E-bay. Unless the lawsuit is concerned about whether or not it was a valid document or product that was bought on E-bay, I have never had something like that in any case. The answer is no, it doesn't come in.

Trial transcript of *Rosa Dennis v. Foster Wheeler, et al.*, Case No. CV 19-9343, U.S.D.C. – Central District of California (Trial Day 3 – November 9, 2023), at pp. 656:11- 662:14.

The Federal Rules of Evidence, Rule 803(16) provides as follows:

Rule 803 - Exceptions to the Rule Against Hearsay -- Regardless of Whether the Declarant Is Available as a Witness

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

...

(16) Statements in Ancient Documents. A statement in a document that was prepared before January 1, 1998, and whose authenticity is established.

However, FRE 803(16) must be interpreted in conjunction with FRE 901(b)(8) (and FRE 901(a)), which states:

Rule 901 -- Authenticating or Identifying Evidence

(a) **In General.** To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.

(b) **Examples.** The following are examples only -- not a complete list -- of evidence that satisfies the requirement:

...

(8) **Evidence About Ancient Documents or Data Compilations.** For a document or data compilation, evidence that it:

(A) is in a condition that creates no suspicion about its authenticity;

(B) was in a place where, if authentic, it would likely be; and

(C) is at least 20 years old when offered.

Clearly, eBay does not qualify as a “place where, if authentic, [the instruction book] would likely be.” In fact, one could argue that the opposite is true!

Undeterred by the ruling excluding the document, plaintiff’s counsel filed a subsequent trial brief seeking the instruction book’s admission under FRE 902(7) which provides:

Rule 902 -- Evidence That Is Self-Authenticating

The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:

...

(7) Trade Inscriptions and the Like. An inscription, sign, tag, or label purporting to have affixed in the course of business and indicating origin, ownership, or control.

In response the trial court ruled as follows:

PROCEEDINGS: IN CHAMBERS - RULING ON PLAINTIFF'S OFFER OF PROOF ADMISSIBILITY OF EXHIBIT NO. 246

Plaintiff seeks to admit her Exhibit No. 246 which is a purported copy of a manual entitled "Foster Wheeler Corporation Instruction Book, Marine Steam Generators (7th Ed.)" which also includes a letter on Foster Wheeler letterhead to a supposed customer - where the Exhibit had been purchased on eBay by Plaintiff's counsel. Plaintiff asserts that the Exhibit is admissible as a self-authenticating document under Fed. R. Evid. 902(7). Defendants have objected and the Court sustains the objection.

Rule 902(7) provides that self-authenticating items include "Trade Inscriptions and the Like. An inscription, sign, tag, or label purporting to have been affixed in the course of business and indicating origin, ownership, or control." The "factors [that] justify dispensing with preliminary proof of genuineness of commercial and mercantile labels" is that the "risk of forgery is minimal" because "[t]rademark infringement involves serious penalties." See Advisory Committee Notes, 1972 Proposed Rules.

However, Exhibit No. 246 is not a simple inscription or the like. It appears to be an instruction manual. As observed in *Wright & Gold*, 31 *Federal Practice and Procedure: Federal Rules of Evidence* § 7141 (2023), “[i]t should be clear that Rule 902(7) does not normally apply to documents, the origins of which usually are established by signatures or seals.” In *Whitted v. General Motors Corp.*, 58 F.3d UWO, 1204 (7th Cir. 1995), it was held that “[t]he owner's manual is not a trade inscription and admitting the manual because it had a trade inscription on its cover does not comport with the rule.” While there are cases which disagree with the holding in *Whitted* - see, e.g., *ACCO Brands, Inc. v. Pc Guardian Anti-theft Prods.*, 592 F. Supp. 2d 1208, (N.D. Cal. 2008), this Court finds *Whitted* and the quoted portion of *Wright & Gold* to be more persuasive.

If trials are a search for the truth, in-person trials with real evidence still beat virtual trials with evidence from eBay. The antiquated Federal Rules of Evidence need to be interpreted in light of the realities of our times.



Edward R. Hugo is a trial attorney, appellate lawyer, litigator and litigation manager for cases involving products and premises liability, toxic torts, environmental claims, construction defect, personal injury, wrongful death, insurance, professional negligence, sexual molestation and criminal law. He has also been retained as an expert witness and testified in trial, arbitration and deposition regarding: the duties of defense counsel, the effectiveness of defense strategies, the reasonableness of settlement values and defense costs, and insurance coverage issues.



Bina Ghanaat is a Partner with experience in toxic torts, insurance coverage, bad faith, habitability, and personal injury cases. She manages her cases from inception to resolution, handling discovery, depositions, law and motion, and trial preparation in state and federal courts. Ms. Ghanaat has defended a wide range of clients, including manufacturers, suppliers, contractors, insurance carriers, building owners, and trucking companies. She has drafted numerous motions for summary judgment that have resulted in dismissals of her clients or significantly reduced demands. She has also drafted and argued successful motions for summary adjudication as to punitive damages and various causes of action in asbestos matters venued in San Francisco and Alameda. For those cases in which a dispositive motion has not been viable, Ms. Ghanaat has prepared them for trial in an efficient manner with an emphasis on achieving optimal results for her clients. In Fall 2020, Ms. Ghanaat was co-counsel in one of the first “virtual” trials in Alameda County.

Interested in joining the Product Liability Committee? [**Click here for more information.**](#)



222 South Riverside Plaza, Suite 1870, Chicago, IL 60606

P: 312.795.1101

F: 312.795.0749

Copyright ©2024 DRI, All Right Reserved.