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Fairness vs. Trustworthiness: The Predecessor in Interest Controversy of Rule 804(b)(1)

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I. INTRODUCTION

Rule 804(b)(1) of the Federal Rules of Evidence[1] provides a specific hearsay exception for former testimony.[2] In order for testimony or a deposition taken in the same or a different proceeding to qualify as an exception to the prohibition against hearsay, it must be offered against a party who possessed an opportunity and similar motive in the other proceeding to develop the testimony by direct, cross-, or redirect examination. In a civil proceeding,[3] rule 804(b)(1) also permits former testimony to be used against a party whose predecessor in interest[4] possessed an opportunity and similar motive to develop the testimony in the prior proceeding. This comment examines the definitional problems associated with the term "predecessor in interest" and the policy implications of the conflicting interpretations.[5]

The Federal Rules of Evidence were adopted as a unified system of codified evidentiary law[6] that promotes fairness, eliminates unjustifiable expense and delay, and facilitates the development of the law of evidence in order to ascertain the truth

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1. The Federal Rules of Evidence became effective on July 1, 1975.

2. Rule 804(b)(1) reads as follows:

> (1) *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 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.

FED. R. EVID. 804(b)(1).

3. The predecessor in interest exception does not apply to criminal proceedings. *Id.*

4. BLACK'S LAW DICTIONARY 1060 (5th ed. 1979) defines the term "predecessor" as "the correlative of 'successor.'" It defines "successor in interest" as "[o]ne who follows another in ownership or control of property." *Id.* at 1283.

5. This Comment does not examine additional prerequisites or limitations inherent in rule 804(b)(1) or other hearsay exceptions found in the Federal Rules of Evidence. See FED. R. EVID. 804(a) for an example of such a prerequisite.

6. See S. SALTZBURG & K. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL 1-5 (3d ed. 1982), for a brief review of the historical background indicating the need for a uniform system of federal evidentiary law.

and determine judicial proceedings justly.[7] These purposes must be carefully balanced when attempting to determine the implications of the predecessor in interest requirement of rule 804(b)(1).

Efforts to balance these interests when defining the term "predecessor in interest" have resulted in three basic interpretations: (1) limitation of "predecessor in interest" to parties that meet the common-law notion of privity;[8] (2) rejection of common-law privity and expansion of "predecessor in interest" to include any party who had a similar interest and motive to develop testimony in the original action equivalent to that of the instant party;[9] and (3) partial rejection of common-law privity in favor of viewing certain governmental agencies as predecessors in interest to individuals bringing related private actions.[10]

The common-law privity interpretation of "predecessor in interest" best promotes the purposes of rule 804(b)(1) without neglecting the general policy objectives of the Federal Rules of Evidence. Before the adoption of the rules, courts disagreed about the need for privity between parties in former testimony situations. Careful scrutiny of the legislative history of the rule indicates that Congress intended the courts of the United States to apply a privity interpretation when construing "predecessor in interest." The congressionally approved interpretation of the term promotes fairness to the parties involved in the adversarial process.

II. ANALYSIS

A. Legal Developments Before the Adoption of Rule 804(b)(1)

At common law, most courts allowed former testimony to be admitted in a different proceeding only if substantially the same parties were involved in both actions.[11] Courts traditionally ex-

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7. FED. R. EVID. 102.

8. *E.g.*, Lloyd v. American Export Lines, Inc., 580 F.2d 1179, 1190 (3d Cir.) (Stern, J., concurring), *cert. denied*, 439 U.S. 969 (1978); *In re* IBM Peripheral EDP Devices Antitrust Litig., 444 F. Supp. 110 (N.D. Cal. 1978).

9. *E.g.*, Clay v. Johns-Manville Sales Corp., 722 F.2d 1289 (6th Cir. 1983); Lloyd v. American Export Lines, Inc., 580 F.2d 1179 (3d Cir.), *cert. denied*, 439 U.S. 969 (1978); Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 505 F. Supp. 1190 (E.D. Pa. 1980).

10. *E.g.*, *In re* Master Key Antitrust Litig., 72 F.R.D. 108 (D. Conn. 1976).

11. *See, e.g.*, Anderson v. Hultberg, 247 F. 273 (8th Cir.), *cert. denied*, 248 U.S. 581 (1918); Irving Air Chute Co. v. Russell Parachute Co., 41 F.2d 387 (D. Del. 1930), *rev'd*

tended the mutuality of parties concept to include those who were in privity[12] with parties involved in the original proceeding.[13] Absent such a relationship, courts considered former testimony inadmissible because it was against "natural justice" to hold a party responsible for the testimony of a witness he never cross-examined.[14] Such an interpretation served to protect the rights of the party who was not directly involved in the initial proceeding at the possible expense of not admitting relevant testimony in the later action[15]

Professor Wigmore advocated a more liberal position, which emphasized the need to admit all trustworthy evidence even at the expense of natural justice concerns.[16] Wigmore concluded that the crucial issue was whether the interest of the initial party was strong enough to result in "equally as thorough a testing by cross-examination" as the present party would have made had he been involved in the initial proceeding.[17] This emphasis resulted in the "similar interest and motive" test: If a party in the previous action possessed an interest and motive to cross-examine similar to that of the present party, then testimony from the previous action is admissible against the present party.[18] Numerous courts and commentators adopted this test

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on other grounds, 47 F.2d 130 (3d Cir. 1931); Charles H. Demarest, Inc. v. United States, 174 F. Supp. 380 (Cust. Ct. 1959). *See generally* 1 B. ELLIOT & W. ELLIOT, THE LAW OF EVIDENCE § 508 (1904); 1 S. GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 163*a* (J. Wigmore 16th ed. 1899); 2 B. JONES, COMMENTARIES ON THE LAW OF EVIDENCE IN CIVIL CASES §§ 337-38 (1913).

12. A commonly accepted definition of "privity" as it pertains to evidentiary questions is as follows:

> The term "privity" denotes mutual or successive relationships to the same rights of property, and privies are distributed into several classes, according to the manner of this relationship. Thus, there are privies in estate, as donor and donee, lessor and lessee, and joint tenants; privies in blood, as heir and ancestor, and co-parceners; privies in representation, as executor and testator, administrator and intestate; privies in law, where the law, without privity of blood or estate, casts the land upon another, as by escheat.

Metropolitan St. Ry. Co. v. Gumby, 99 F. 192, 198 (2d Cir. 1900) (quoting from 19 AMERICAN & ENGLISH ENCYCLOPEDIA OF LAW 156 (1890)); *see also* 2 B. JONES, *supra* note 11, at 783-85.

13. *See supra* note 11.

14. *E.g.*, Lane v. Brainerd, 30 Conn. 565 (1862). *See generally* 2 J. WIGMORE, EVIDENCE § 1386 (1904).

15. *See infra* notes 76-89 and accompanying text.

16. *See* Note, *Affidavits, Depositions, and Prior Testimony* 46 IOWA L. REV. 356, 363-64 (1961).

17. 2 J. WIGMORE, *supra* note 14, at § 1388.

18. Wigmore has concluded that "[i]t ought, then, to be sufficient to inquire whether the former testimony was given upon such an issue that the party-opponent in that case

before Congress formulated and enacted the Federal Rules of Evidence.[19]

B. Legislative History of Rule 804(b)(1)

Rule 804(b)(1) has its roots in the Model Code of Evidence[20] and, to a greater degree, in the Uniform Rules of Evidence.[21] The Uniform Rules adopted the similar interest and motive position of Wigmore and served as the prototype for the subsequent hearsay rule recommended to Congress by the Supreme Court's Advisory Committee. The Proposed Draft of the Advisory Committee contained a former testimony exception to hearsay roughly equivalent to the similar interest and motive version found in the Uniform Rules of Evidence.[22]

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had the same interest and motive in his cross-examination that the present opponent has." *Id.* (emphasis omitted). This statement is frequently cited as authority for rejection of the common-law privity requirement. *See, e.g.*, Wolf v. United Airlines, Inc., 12 F.R.D. 1 (M.D. Pa. 1951).

19. *See, e.g.*, Insul-Wool Insulation Corp. v. Home Insulation, Inc., 176 F.2d 502 (10th Cir. 1949); Bartlett v. Kansas City Pub. Serv. Co., 349 Mo. 13, 160 S.W.2d 740 (1942); Travelers Fire Ins. Co. v. Wright, 322 P.2d 417 (Okla. 1958); 2 B. JONES, JONES ON EVIDENCE § 9:27 (S. Gard 6th ed. 1972); C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 232 (1954); J. WIGMORE, *supra* note 14, at § 1388. *But see* Falknor, *The Hearsay Rule and Its Exceptions*, 2 UCLA L. REV. 43, 55-58 (1954). *See generally* Note, *supra* note 16, at 363-64.

20. The American Law Institute adopted the Model Code of Evidence in 1942 in an effort to clarify the law of evidence. The code never received widespread support because of its "departures from traditional and prevailing views." Spangenberg, *The Federal Rules of Evidence—An Attempt at Uniformity in Federal Courts*, 15 WAYNE L. REV. 1061, 1064 (1969). The Model Code of Evidence advocated a former testimony exception to hearsay that gave tremendous discretion to the trial judge.

> Evidence of a hearsay statement . . . is admissible for any purpose for which the testimony was admissible in the action in which the testimony was given or for use in which the deposition was taken, unless the judge finds that the declarant is available as a witness and in his discretion rejects the evidence.

MODEL CODE OF EVIDENCE Rule 511 (1942).

21. The National Conference of Commissioners on Uniform State Laws adopted the Uniform Rules of Evidence in 1953 as a more conservative codification of evidentiary law than the Model Code of Evidence. Spangenberg, *supra* note 20, at 1064. The Uniform Rules permit former testimony to be used if the declarant is unavailable and "the issue is such that the adverse party on the former occasion had the right and opportunity for cross examination with an interest and motive similar to that which the adverse party has in the action in which the testimony is offered." UNIFORM RULES OF EVIDENCE Rule 63(8) (1953).

22. The Proposed Draft of the Advisory Committee contained the following former testimony exception to hearsay:

> *(1) 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

The House Committee on the Judiciary rejected the similar interest and motive test contained in the Advisory Committee Draft and narrowed the hearsay exception of former testimony to

> [t]estimony 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 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.[23]

The House Committee on the Judiciary's note accompanying the change in the rule indicates that the committee was not singularly concerned about testing the trustworthiness of hearsay evidence by cross-examination but rather felt that fairness considerations should be given significant weight.

> The subcommittee believed it is generally *unfair* to impose upon the party against whom the hearsay is being offered responsibility for the manner in which the witness was previously handled. The *sole exception* to this, in the subcommittee's view, is when *a party's predecessor in interest* had the opportunity and similar motive to examine the witness. The subdivision was amended to reflect these policy determinations.[24]

The policy determination of the House Committee—to treat fairly the party against whom the former testimony is being offered—is reminiscent of the common-law position emphasizing natural justice.[25] The need for fairness is given greater emphasis in the House Committee's version of the rule than in the Advisory Committee's, which emphasized the need for trustworthy evidence.[26]

The change recommended by the House Committee resulted in significant comment and criticism.[27] Taken collectively,

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examination, *with motive and interest similar to those of the party against whom now offered.*

COMMUNICATION FROM THE CHIEF JUSTICE OF THE UNITED STATES, H.R. DOC. No. 46, 93d Cong., 1st Sess. 33 (1973) (emphasis added).

23. FED. R. EVID. 804(b)(1) (emphasis added).

24. *Rules of Evidence (Supplemental): Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary,* 93d Cong., 1st Sess. 388 (1973) (emphasis added) [hereinafter cited as *Hearings of the House*].

25. *See supra* note 14.

26. *See infra* notes 76-89 and accompanying text.

27. *See, e.g., Rules of Evidence: Hearings on H.R. 6463 Before the Senate Comm.*

the statements clearly indicated a consensus of opinion that the term "predecessor in interest," as used in rule 804(b)(1), was equivalent to the common-law requirement of privity.[28]

The Senate specifically adopted the House predecessor in interest amendment to rule 804(b)(1) but also made an interesting observation respecting the difference between the House and Advisory Committee formulations of the rule.

> The House amended the rule to apply only to a party's predecessor in interest. Although the committee recognizes considerable merit to the rule submitted by the Supreme Court, a position which has been advocated by many scholars and judges, *we have concluded that the difference between the two versions is not great, and we accept the House amendment.*[29]

Some courts and commentators have utilized the Senate's vague and placative observation to justify a more expansive interpretation of "predecessor in interest."[30] Certain courts have even suggested that the term "predecessor in interest" is identical in meaning to the term "similar interest and motive," thus completely eliminating the need for privity.[31]

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on the Judiciary, 93d Cong., 2d Sess. 69, 174-75, 231-32, 388 (1974) [hereinafter cited as *Hearings of the Senate*]; *Hearings of the House*, *supra* note 24, at 273, 297, 308-09.

28. *Id.* Most commentators also felt that Congress intended to apply a common-law privity definition to the term "predecessor in interest." *See, e.g.*, M. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 804.1 (1981); S. SALTZBURG & K. REDDEN, *supra* note 6, at 651-52; 4 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE § 804(b)(1)[04], at 804-67 (1976), *quoted in In re* IBM Peripheral EDP Devices Antitrust Litig., 444 F. Supp. 110, 113 (N.D. Cal. 1978); 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE, § 2150 (Supp. 1982). *But see* 4 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 487, at 1103-11 (1980), which advocates a more "creative interpretation" of the term "predecessor in interest." One treatise, edited by Professor Cleary, has been wishy-washy in defining the term "predecessor in interest." In C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 256 (E. Cleary 2d ed. Supp. 1978), the conclusion was drawn that Congress's use of the term "predecessor in interest" reinstated "the earlier traditional requirement of identity or privity with the party against whom offered." *Id.* at 77. This appeared persuasive since Professor Cleary was both the general editor of this second edition and Reporter for the Supreme Court Advisory Committee. However, Professor Cleary recanted in C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 256 (E. Cleary 3d ed. 1984) and endorsed the similar interest and motive analysis found in Lloyd v. American Export Lines, Inc., 580 F.2d at 1190. This comes as no surprise since Professor Cleary favored the similar interest and motive test promulgated by the Supreme Court Advisory Committee and would welcome any opportunity to endorse it, even though that test was formally rejected by the House.

29. SENATE COMM. ON THE JUDICIARY, FEDERAL RULES OF EVIDENCE, S. REP. NO. 1277, 93d Cong., 2d Sess. 28 (1974) (emphasis added).

30. *See, e.g.*, *In re* Master Key Antitrust Litig., 72 F.R.D. 108 (D. Conn. 1976).

31. *See, e.g.*, Clay v. Johns-Manville Sales Corp., 722 F.2d 1289 (6th Cir. 1983); Lloyd v. American Export Lines, Inc., 580 F.2d 1179 (3d Cir.), *cert. denied*, 439 U.S. 969

C. Case Law Developments Since the Adoption of Rule 804(b)(1)

The unintended effect of the Senate's vague language was manifest shortly after the rules were enacted. In *In re Master Key Antitrust Litigation,*[32] the defendant sought to introduce testimony from a previous federal antitrust action. Plaintiffs objected, claiming such testimony was inadmissible hearsay because the United States Government could not be deemed their predecessor in interest within the meaning of rule 804(b)(1).[33]

The district court reviewed the legislative history of the rule and concluded, on the basis of the Senate's language, that "Congress seems to have intended to relax the common-law requirement of actual privity between the parties before prior testimony could be admitted."[34] The court did not fully adopt the similar interest and motive test but did rationalize that the "unique relationship" between the government antitrust suits and private actions that follow justified counting the United States Government as the plaintiffs' predecessor in interest within a relaxed definition of the term.[35]

The United States District Court for the Northern District of California adopted an opposing interpretation of rule 804(b)(1) in *In re IBM Peripheral EDP Devices Antitrust Litigation.*[36] In this case, IBM sought to overturn a decision for

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(1978); Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 505 F. Supp. 1190 (E.D. Pa. 1980).

32. 72 F.R.D. 108 (D. Conn. 1976).

33. *Id.* at 109.

34. *Id.*

35. *Id.*

36. 444 F. Supp. 110 (N.D. Cal. 1978). Two cases that preceded *In re IBM Peripheral EDP Devices Antitrust Litig.* deserve mention.

In Hewitt v. Hutter, 432 F. Supp. 795 (W.D. Va. 1977), a case in which a purchaser sought recission of a contract on the basis of misrepresentation, the court refused to admit a deposition from a previous trial because the witness was not questioned by the instant party or his predecessor in interest. *Id.* at 799. The court did suggest that rule 32 of the Federal Rules of Civil Procedure could apply a similar interest and motive analysis to admit the deposition from the prior proceeding, but such a conclusion is not without argument to the contrary. *See* 8 C. WRIGHT & A. MILLER, *supra* note 28, at 166, which argues that any differences between rule 804(b)(1) of the Federal Rules of Evidence and rule 32 of the Federal Rules of Civil Procedure should be resolved in favor of the former.

A second case, *In re* Sterling Navigation Co., 444 F. Supp. 1043 (S.D.N.Y. 1977), acknowledged the predecessor in interest language of rule 804(b)(1), but failed to define the term. Instead, the court concluded that even if the requirement were met, there was still a lack of similar interest and motive. *Id.* at 1046.

Memorex that prohibited IBM from introducing testimony taken in three prior suits not involving Memorex.[37] The court refused to adopt the broad interpretation of "predecessor in interest" proffered by IBM, noting that the similar interest and motive test was specifically rejected when rule 804(b)(1) was adopted by Congress.[38] The court favored the narrow privity interpretation of the term and sustained the objection to the admission of the former testimony.[39]

The most widely cited case utilizing the Senate's language to adopt an expansive reading of "predecessor in interest" is *Lloyd v. American Export Lines, Inc.*,[40] which involved an action brought by a crewman against a shipowner for injuries suffered in an altercation with another crewman. The shipowner sought to introduce testimony from a Coast Guard proceeding that investigated the fight between the two crewmen. The injured crewman objected, claiming the testimony was hearsay since the Coast Guard could not be considered his predecessor in interest under rule 804(b)(1).[41]

The Third Circuit majority opinion observed that Congress did not specifically define "predecessor in interest" and assumed that task had been left to the courts.[42] After citing the language of the House and giving special emphasis to the observation of the Senate, the court concluded that the synthesis of both congressional comments resulted in no "compelling difference" between the predecessor in interest and similar interest and motive versions of the rule. As a result, the court applied a "community of interest" test that mimicked the similar interest and motive test advocated by the Advisory Committee and specifically rejected by Congress.[43]

The *Lloyd* court's community of interest position emphasized the need to present all trustworthy testimony to the jury but failed to recognize the competing interest of fairness, which was singled out and given new emphasis by the House.

> "[I]f it appears that in the former suit a party having a like motive to cross-examine about the same matters as the present

37. *In re* IBM Peripheral EDP Devices Antitrust Litig., 444 F. Supp. at 111.
38. *Id.* at 113.
39. *Id.*
40. 580 F.2d 1179 (3d Cir.), *cert. denied*, 439 U.S. 969 (1978).
41. *Id.* at 1181-83.
42. *Id.* at 1185.
43. *Id.* at 1185-86.

> party would have, was accorded an adequate opportunity for such examination, the testimony may be received against the present party." Under these circumstances, the previous party having like motive to develop the testimony about the same material facts is, in the final analysis, a predecessor in interest to the present party.[44]

Shortly after the decision in *Lloyd,* Judge Wisdom, writing for the Fifth Circuit, interpreted the term "predecessor in interest" as requiring privity between the parties. In a statement concerning the applicability of rule 804(b)(1) to a criminal case, Judge Wisdom observed:

> Even for civil cases, the draftsmen of the Federal Rules rejected the theory that subjecting testimony to the questioning of a person who is not a party at the trial, although he has a like motive and interest, will furnish a guarantee of trustworthiness equal to that of cross-examination by the one against whom the evidence is introduced.[45]

However, district courts within the Third Circuit have generally accepted the community of interest test of *Lloyd* in its entirety,[46] although *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*[47] suggests that a more cautious acceptance of *Lloyd* is warranted. In *Zenith* the court reviewed the legislative history of the rule, acknowledged that the House intended the term "predecessor in interest" to be narrowly construed but felt that the Senate "differed in their views of the meaning of that language."[48] The court failed to note that the Senate specifically accepted the House version and not vice versa but did recognize that authority for a narrow construction of the term exists. Nevertheless, the court was unable to accept such authority because it felt "bound . . . by the opinion of the panel majority in *Lloyd.*"[49]

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44. *Id.* at 1187.

45. Government of Canal Zone v. Pinto, 590 F.2d 1344, 1354 (5th Cir. 1979) (dictum). It is obvious that Judge Wisdom feels Congress intended a strict privity interpretetion of the term "predecessor in interest." However, he fails to recognize that the real concern was for fairness and not trustworthiness.

46. *See* Creamer v. General Teamsters Local Union 326, 560 F. Supp. 495, 499 (D. Del. 1983); Carpenter v. Dizio, 506 F. Supp. 1117, 1123-24 (E.D. Pa.), *aff'd,* 673 F.2d 1298 (3d Cir. 1981); Standard Oil Co. v. Montedison, 494 F. Supp. 370, 421 n.462 (D. Del. 1980), *aff'd,* 664 F.2d 356 (3d Cir. 1981), *cert. denied,* 456 U.S. 915 (1982).

47. 505 F. Supp. 1190 (E.D. Pa. 1980).

48. *Id.* at 1253.

49. *Id.* at 1254 n.80.

Zenith appears to favor a somewhat narrowed interpretation of *Lloyd* since the court twice emphasized that *Lloyd* involved a predecessor in interest who was a government investigator, presumably impartial, with no role in the subsequent legal action.[50] On the basis of this observation, the court easily distinguished *Zenith,* which involved codefendants, from *Lloyd* and denied admission of the former testimony.

Certain courts outside the Third Circuit have sought to limit the precedential impact of *Lloyd* and give greater recognition to the House's clear expression of intent, rather than wholesale adherence to the Senate's general observation. For example, in the recent case of *In re Screws Antitrust Litigation,*[51] the plaintiffs attempted to use testimony from a criminal antitrust trial of the director of a subsidiary in a civil suit against the parent corporation. The court rejected the attempt under rule 804(b)(1) and refused to accept the argument that defendants in a criminal action are predecessors in interest to different defendants in "subsequent civil action[s] arising out of the same facts."[52] The court reached this conclusion after rejecting the similar interest and motive test espoused by the Advisory Committee and by confining *Lloyd* to government prosecutorial situations.[53]

A similar mistrust of *Lloyd* is found in *In the Matter of Johns-Manville/Asbestosis Cases,*[54] a case in which the employees of an asbestos corporation sought to use a deposition taken of a physician in an earlier personal injury suit in their action against the parent corporation.[55]

In deciding whether the deposition should be admitted, the court reviewed the conclusions of *Lloyd* and referred to the comments of both the House and Senate but did not choose to accept the community of interest test even though the facts of the case would have allowed it to do so. Rather, the court found it "unnecessary to endorse that broad application of rule 804(b)(1)"[56] since the strict concept of corporate privity was nar-

50. *Id.* at 1254, 1292.
51. 526 F. Supp. 1316 (D. Mass. 1981).
52. *Id.* at 1319.
53. *Id.* at 1318-19.
54. 93 F.R.D. 853 (N.D. Ill. 1982).
55. *Id.* at 854.
56. *Id.* at 856.

rower in scope than the predecessor in interest limitation intended by Congress.[57]

The Ninth Circuit has not specifically interpreted rule 804(b)(1), but there is some indication that given the opportunity to do so it would elect the narrower position of the House. In *Hub v. Sun Valley Co.*,[58] the court construed the "successor in interest" language of rule 32 of the Federal Rules of Civil Procedure, which is analagous to the "predecessor in interest" term found in rule 804(b)(1), to determine if depositions taken in a prior proceeding were admissible in a later action.[59]

In defining "successor in interest," the court cited a number of cases adhering to Wigmore's similar interest and motive test but "reserve[d] for another day deciding whether the presence of an adversary with the same motive to cross-examine is sufficient."[60] The court articulated its concern about the unfairness of the similar interest and motive standard in a footnote stating:

> [T]he test . . . fails to take into account the possibility that the prior opponent mishandled the cross-examination. When that has happened, we question whether the deposition should be admitted against a party who did not participate in the cross-examination. Our purpose here is not to resolve this issue. Instead, we want to make clear only that our citing cases that adopt Wigmore's test does not mean that we adopt it.[61]

Such preexisting concern for fairness, coupled with the language of the House advocating such fairness, could cause the Ninth Circuit to adopt the privity interpretation of the predecessor in interest term.

The Sixth Circuit recently adopted the *Lloyd* court's community of interest interpretation of "predecessor in interest" in *Clay v. Johns-Manville Sales Corp.*[62] The court held that the district judge erred in excluding the deposition of a doctor taken

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57. The corporate privity concept would result in a narrower definition than a common-law privity interpretation of the term "predecessor in interest." *See* Engel v. Teleprompter Corp., 703 F.2d 127, 134 (5th Cir. 1983); McDaniel v. Johns-Manville Sales Corp., 487 F. Supp. 714, 716 (N.D. Ill. 1978).

58. 682 F.2d 776 (9th Cir. 1982).

59. It is unclear whether rule 32 of the Federal Rules of Civil Procedure should control when determining the admissibility of depositions from other proceedings in light of rule 804(b)(1) of the Federal Rules of Evidence. *See* 8 C. WRIGHT & A. MILLER, *supra* note 28, at 166.

60. Huh v. Sun Valley Co., 682 F.2d 776, 778 (1982).

61. *Id.* at 778 n.*.

62. 722 F.2d 1289 (6th Cir. 1983).

in an asbestos liability proceeding that did not involve either of the present parties. The court cited the House's comments to rule 804(b)(1), emphasized the Senate's observations, and without any additional analysis, wholeheartedly embraced the position of *Lloyd*.[63] In applying the community of interest test to the present facts, the court held that the deposition should have been admitted since the defendant in the prior proceeding had a "similar motive in confronting" the testimony to the motive possessed by the defendant in the current litigation.[64]

Case law interpreting rule 804(b)(1) demonstrates that the courts have not reached the level of definitional unity, with respect to the term "predecessor in interest," that Congress and other proponents of the Federal Rules of Evidence had hoped for.[65] In fact, the present confusion surrounding the term is essentially equivalent to the controversy concerning the proper scope of the former testimony exception that existed before the rules were adopted.

D. Analytical Problems Associated with a Liberal Interpretation of the Term "Predecessor in Interest"

A number of significant problems surface when a "highly creative interpretation"[66] of the term "predecessor in interest" is adopted. Such an interpretation ignores the clear intent of the House in rejecting the similar interest and motive rule in favor of a stricter rule that more effectively balances the fairness interest of the party who did not cross-examine against the need for all trustworthy evidence.[67] For example, the *Lloyd* majority's community of interest analysis eliminates the predecessor in interest requirement of the rule entirely and would "automatically render admissible against a party evidence which was elicited in a different proceeding by an unrelated person."[68]

> The net result would be charging the party against whom the hearsay evidence is being offered with all flaws in the manner in which the witness was previously handled by another, and

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63. *Id.* at 1295.

64. *Id.*

65. *See supra* note 6.

66. 4 D. LOUISELL & C. MUELLER, *supra* note 28, at 1106.

67. *See infra* notes 76-89 and accompanying text. *Accord* Lloyd v. American Export Lines, Inc., 580 F.2d at 1192 (Stern, J., concurring); *In re* IBM Peripheral EDP Devices Antitrust Litig., 444 F. Supp. at 113.

68. Lloyd v. American Export Lines, Inc., 580 F.2d at 1192 (Stern, J., concurring).

> all flaws in another's choice of witnesses, the very result characterized by the House Judiciary Committee as "generally unfair."[69]

The majority in *Lloyd* assumes that the Senate did not comprehend the implications of adopting the predecessor in interest version of rule 804(b)(1). In effect, the court says the Senate considered the term "predecessor in interest" as equivalent to the term "similar interest and motive." Such a position is unfounded in light of the numerous statements found in *The Hearings Before the Senate Committee on the Judiciary,* all of which clearly indicated the intended interpretation and effect of the predecessor in interest language.[70]

The language of the Senate Judiciary Committee should not be used to circumvent the clear intent of the House. Courts do just that when they assert that the Senate intended a more expansive reading of the term "predecessor in interest" on the basis of the Senate's placative observation that the difference between the terms "predecessor in interest" and "similar interest and motive" is not great.[71] Such analysis overlooks the fact that only two widely accepted former testimony theories existed at the time rule 804(b)(1) was formulated.[72] One emphasized mutuality of parties, and the other mutuality of interest.[73] The Senate's acceptance of the House predecessor in interest version precluded acceptance of the competing similar interest and motive test. It is doubtful that the Senate intended, in its effort to provide a uniform system of evidence,[74] to magnify the existing confusion about former testimony by electing an unclarified po-

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69. *Id.*

70. *See Hearings of the Senate, supra* note 27, at 69, 175, 231-32, 388.

71. *Cf.* Clay v. Johns-Manville Sales Corp., 722 F.2d at 1294-95; Lloyd v. American Export Lines, Inc., 580 F.2d at 1185-86; Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 505 F. Supp. at 1253; *In re* Master Key Antitrust Litig., 77 F.R.D. at 109.

72. This is evidenced by the fact that before the adoption of the Federal Rules of Evidence commentators identified strict privity and similar interest and motive as the two competing former testimony standards. *See, e.g.,* B. JONES, *supra* note 19, at 240-43; C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 256 (E. Cleary 3d ed. 1984); 5 J. WIGMORE, WIGMORE ON EVIDENCE § 1388 (1974).

73. State legislatures have recognized that a selection between the two conflicting theories must be made and have been careful when adopting their own versions of rule 804(b)(1). Many of the states following Wigmore's similar interest and motive test have specifically deleted the predecessor in interest language in favor of the Advisory Committee's version of the rule. This provides additional support for the argument that the definitional problems with the term "predecessor in interest" are essentially a product of judicial obstinance. *See, e.g.,* HAWAII R. EVID. 804(b)(1); MONT. R. EVID. 804(b)(1).

74. *See supra* note 6.

sition existing between the two commonly articulated positions.[75]

E. Policy Implications Supporting a Narrow Interpretation of the Term "Predecessor in Interest"

The proper interpretation of the term "predecessor in interest" should reflect the policy objectives sought by Congress in adopting the Federal Rules of Evidence and rule 804(b)(1) in particular.[76] If more than one policy objective is identified, then the correct definition of the rule is the one that best preserves the dual objectives or at least the objective Congress considered most important.

The need for fairness in applying the rules is singled out in rule 102,[77] as well as in the comments accompanying the House revision of rule 804(b)(1).[78] The position that it is unfair to hold a party responsible for another party's selection of witnesses and manner of developing testimony through the cross-examination of such witnesses is not new or unique. Fairness was the principal objective of courts and the center of focus for commentators before the promulgation of the more recent similar interest and motive test.[79]

Professor Falknor, a leading authority on the hearsay exception, emphasized the need for fairness when he suggested that the similar interest and motive language of the Uniform Rules of Evidence be deleted in favor of the predecessor in interest lan-

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75. The courts' conclusion that the Senate intended a more expansive reading of the term "predecessor in interest" ignores another plausible interpretation of senatorial understanding of the two concepts involved. The Senate Committee of the Judiciary could have attributed a narrower interpretation of the "similar interest and motive" term, thus making the difference between the two not great, rather than giving the term "predecessor in interest" such an uncommonly expansive reading.

This conclusion is a product of congressional mind reading, but it is no less plausible than attributing a more liberal definition to the term "predecessor in interest." In fact, at the time of the adoption of rule 804(b)(1), the term "similar interest and motive" had its own definitional problems. Martin, *The Former-Testimony Exception in the Proposed Federal Rules of Evidence*, 57 IOWA L. REV. 547, 557-60 (1972).

76. *See* Tennessee Valley Auth. v. Hill, 437 U.S. 153, 194 (1978); Piper v. Chris-Craft Indus., Inc., 430 U.S. 1, 26 (1977); Sinclair Refining Co. v. Atkinson, 370 U.S. 195, 215 (1962).

77. The text of FED. R. EVID. 102 suggests that "[t]hese rules should be construed to secure *fairness* in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." (Emphasis added).

76. *See supra* note 24 and accompanying text.

79. *See supra* note 14 and accompanying text.

guage and common-law privity perspective.[80] Professor Falknor points out that the proper application of the former testimony exception to hearsay is contingent on the policy objectives sought.[81] He favors an emphasis upon the "adversary character of a common law trial . . . [when] the rules of evidence are envisaged as 'rules of fair play' formulated for the protection of the particular adversary."[82]

Wigmore and others focused on a policy objective that often competes with fairness. They emphasized the preservation of all trustworthy evidence in order to determine the true facts of the case and achieve a just and correct result.[83] The similar interest and motive test promotes this policy objective because it does not exclude evidence from a prior proceeding if a party with a similar interest and motive tested the trustworthiness of the evidence by an adequate cross-examination.[84]

The legislative history of rule 804(b)(1) indicates that the House considered fairness to be of primary importance.[85] Consequently, the attainment of fairness should naturally follow from the correct interpretation of the term "predecessor in interest." A similar interest and motive test does not best promote fairness since it subjects an uninvolved party to the poor selection of witnesses by a previous unrelated party.[86] Additional unfairness results if the prior party mishandled the cross-examination or decided not to cross-examine at all.[87] The fact that a party possesses a similar interest and motive does not mean that equal competence or skill is present or that the subsequent party would have handled the development of testimony in an identical manner.[88]

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80. Falknor, *supra* note 19, at 58. It is interesting to note that *Lloyd* lists Falknor as being supportive of the less restrictive similar interest and motive test. Careful reading of the article cited in *Lloyd*, 580 F.2d at 1187 n.15, indicates that Falknor not only rejected the outdated mutuality of parties requirement but clearly favored privity or identity of opponent over similar interest and motive. It appears that Falknor was one of the first to use the term "predecessor in interest" to define the limitations of the exception.

81. Falknor, *Former Testimony and the Uniform Rules: A Comment*, 38 N.Y.U. L. REV. 651, 655 (1963).

82. *Id.*

83. *Id.*; *see also* 5 J. WIGMORE, *supra* note 72, at 111; C. MCCORMICK, *supra* note 72, at 763-66.

84. 5 J. WIGMORE, *supra* note 72, at 111; C. MCCORMICK *supra* note 72, at 763-67; *see also supra* note 19 for relevant case law.

85. *See supra* note 24 and accompanying text.

86. Lloyd v. American Export Lines, Inc., 580 F.2d at 1192 (Stern, J., concurring).

87. Falknor, *supra* note 80, at 655; *see supra* note 69 and accompanying text.

88. The problems inherent in such situations are identified in R. LEMPERT & S.

If the only policy objective of rule 804(b)(1) were to assure that trustworthy evidence is admitted, then the similar interest and motive test would have significant appeal. But such is not the case. Fairness considerations, in this limited setting, should heavily influence the courts to adopt the House common-law privity interpretation of the term "predecessor in interest."[89]

SALTZBURG, A MODERN APPROACH TO EVIDENCE 477 (2d ed. 1982):

> Cross-examination is as much art as science. Different attorneys approach the examination of witnesses in different ways. . . . Fear of a devastating reply may lead some attorneys to waive cross-examination or to avoid a line of questioning despite a good chance that the results will be favorable. Others may spare the impeachable witness to avoid arousing jury sympathy. . . . It seems to us . . . that it is unfair to hold an individual who played no role in determining the scope of the earlier examination—not even the vicarious role of client—to the tactics and skill which influenced the earlier exam.

This is further evidence by the numerous legal publications empbasizing the tremendous impact the selection of witnesses and method for developing testimony can have on a lawsuit. *See, e.g.*, DEPOSITION STRATEGY, LAW AND FORMS (1983); B. GOLDMAN & W. BARTHOLD, DEPOSITIONS AND OTHER DISCLOSURE (1986); J. IANNUZZI, CROSS-EXAMINATION: THE MOSAIC ART (1982); F. WELLMAN, THE ART OF CROSS-EXAMINATION (4th ed. 1936); Blumenkopf, *Deposition Strategy and Tactics*, AM. J. TRIAL ADVOC. 231 (1981); McCormick, *The Scope and Art of Cross-Examination*, 47 NW. U.L. REV. 177 (1952); Suplee, *Depositions: Objectives, Strategies, Tactics, Mechanics and Problems*, 32 DEF. L.J. 425 (1983).

89. Adoption of such a position may not mean that similar interest and motive testimony is not admissible. Rule 804(b)(5) provides another avenue through which former testimony could be admitted.

> (5) *Other exceptions.* A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, [is admissible] if the court determines that (A) tbe 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 intarests of justice will best be 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.

Tbe four prerequisites for admitting evidence create a higher standard of judicial scrutiny than the automatic admittance of 804(b)(1), resulting in a "balancing of ths potential unfairness [to the party who was not involved in the prior proceeding]—tbe factor with which Congress was so concerned—against the proponent's compelling need for the testimony." Lloyd v. American Export Lines, Inc., 580 F.2d at 1193 (Stern, J., concurring); *see also In re* Screws Antitrust Litig., 526 F. Supp. at 1319.

Some courts have refused to interpret rule 804(b)(5) as a means of admitting testimony that does not quita fit in one of the articulated hearsay exceptions. The courts intarpret 804(b)(5) as applying only to new and unanticipated situations of rare and exceptional circumstances. *See* Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 505 F. Supp. at 1261-63. Otherwise, the courts argue that 804(b)(5) could be used to circumvent the hearsay restrictions specifically imposed by Congress. *In re* IBM Peripheral EDP

III. Conclusion

Striking a balance between fairness to a party who did not have the opportunity to test former testimony and the need for trustworthy evidence is a difficult and sensitive task. Before the adoption of rule 804(b)(1), the courts were divided on the issue of which policy objective weighed more heavily, with some opting for a privity requirement and others a similar interest and motive test. The inclusion of the predecessor in interest terminology in 804(b)(1) resolved the controversy and affords an opportunity for the courts to adopt a unified position concerning the former testimony exception to hearsay.

The plain meaning of the term "predecessor in interest" and Congress's promulgation of a balancing test that protects the interests of the uninvolved party suggest the need for privity under rule 804(b)(1). The unclarified observation of the Senate should not be used to support a position that ignores the obvious intent of the House, particularly since the Senate specifically acquiesced in the House's version of the rule. Congressional intent, as manifest in the legislative history of the rule, clearly supports a privity interpretation of the term "predecessor in interest" to promote fairness and preserve the adversarial rights of individual parties. Courts should accept the policy determination of Congress and cease distorting the meaning of the term "predecessor in interest" to preserve the similar interest and motive test, a test that was specifically rejected by Congress.

Allen D. Haynie

Devices Antitrust Litig., 444 F. Supp. at 113.

The narrow interpretation of 804(b)(5) is not without some analytical support, but recent scholarly materials suggest that the more liberal interpretation is correct. *See* Imwinkelried, *The Scope of the Residual Hearsay Exceptions in the Federal Rules of Evidence*, 15 San Diego L. Rev. 239 (1978); Sonenshein, *The Residual Exceptions to the Federal Hearsay Rule: Two Exceptions in Search of a Rule*, 57 N.Y.U. L. Rev. 867 (1982).