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THE FEDERAL RULES OF EVIDENCE: A FEW SURPRISES

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I. INTRODUCTION

It has been nearly a decade since the Federal Rules of Evidence became effective.¹ During this period, the Rules have been a boon to judges, lawyers, and law school professors. In the courtroom, the Rules have afforded an enhanced degree of predictability and certainty to evidentiary rulings. In the classroom, the Rules have become the focal point of many courses on Evidence and the source of an overview of Evidence in virtually all of the courses. At the same time, however, the Rules have generated several surprises—at least to me. Some of those surprises have arisen out of what the Rules provide, some out of what the Rules do not provide, and a few out of what the courts have said the Rules provide. I would like to share some of my sense of surprise with you.

II. RULE 104 AND COCONSPIRATOR DECLARATIONS

Long before the enactment of the Federal Rules of Evidence, federal courts treated a coconspirator declaration as an exception to the hearsay rule and admitted it as evidence, provided the government offered independent evidence that the defendant and the declarant had been coconspirators and that the declaration had been made during the course and in furtherance of the conspiracy.² Most

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¹ Professor of Law, George Washington University.
² If A and B are engaged in a conspiracy the acts and declarations of B occurring

courts treated the admissible coconspirator declaration as conditionally relevant evidence. The condition precedent to relevancy was an

while the conspiracy is actually in progress and in furtherance of the design are provable against A, because they are acts for which he is criminally or civilly responsible, as a matter of substantive law. But B's declarations may also be proved against A as representative admissions, to prove the truth of the matter declared. . . . The courts have seldom discriminated between declarations offered as conduct constituting part of the conspiracy and declarations offered as vicarious admission of the facts declared, and even when offered for the latter purpose, generally have imposed the same test, namely that the declaration must have been made while the conspiracy was continuing, and must have constituted a step in furtherance of the venture.


3. See, e.g., United States v. James, 590 F.2d 575 (5th Cir.) (en banc), cert. denied, 442 U.S. 917 (1979). The Fifth Circuit stated:

[ Prior to the Federal Rules of Evidence,] the judge and the jury . . . share[d] the responsibility for determining whether these conditions [were] met . . . . [W]e held that the judge's role [was] to make a preliminary determination whether the government ha[d] presented sufficient evidence, independent of the hearsay itself, to support a finding by the jury that the alleged conspiracy existed and that the declarant and the defendant against whom the statement [was] offered were members of that conspiracy. This is the "prima facie case" standard. . . . If the judge [was] satisfied that this test ha[d] been met, then . . . the jury [was] instructed, both when the hearsay [was] introduced and at the final charge, that it may consider the hearsay against a particular defendant only if it first finds that the conspiracy existed, that the declarant and the defendant were members of it, and that the statement was made during the course of and in furtherance of the conspiracy. Id. at 577-78 (citations omitted). In United States v. Petrozziello, 548 F.2d 20 (1st Cir. 1977), the court explained that:

In this circuit, the jury has had a prominent role in deciding whether the co-conspirator exception can be invoked. Trial courts instruct the jury that a co-conspirator's hearsay may be used against a defendant only if the defendant's membership in the conspiracy has been established by independent, nonhearsay evidence.

Id. at 22. In United States v. Santiago, 582 F.2d 1128, (7th Cir. 1978), the court stated:

It has long been the general rule in this circuit that the defendant who failed to prevent the admission into evidence of co-conspirator statements by convincing the trial judge that a prima facie showing of the alleged conspiracy had not been established by the government by independent evidence was to be given a second chance to make a similar exclusion argument to the jury. The jury was then instructed that the acts and declarations of one of the alleged co-conspirators made during and in the furtherance of the conspiracy could not be used against another alleged co-conspirator until it had been established by independent evidence . . . that a conspiracy existed and that the other alleged co-conspirator was a member of that conspiracy.

Id. at 1131-32 (emphasis in original) (citation omitted); see also United States v. Honneus, 508 F.2d 566 (1st Cir. 1974), cert. denied, 421 U.S. 948 (1975); United States v. Lemon, 497 F.2d 854 (10th Cir. 1974).
affirmative jury determination, based on the independent evidence, that the defendant and the declarant had been coconspirators and that the declaration had been uttered during the course and in furtherance of the conspiracy. The jury was instructed that, if it made such an affirmative factual finding, based on the independent evidence, it was to consider the coconspirator’s declaration as evidence in determining whether the defendant was guilty beyond a reasonable doubt. On the other hand, the jury was instructed that, if, based on the independent evidence, it did not make such an affirmative factual finding, it was to disregard the alleged coconspirator’s declaration in deciding the guilt or innocence of the defendant.

Under the Rules, of course, a coconspirator’s declaration remains admissible over a hearsay objection; only the nomenclature has changed. Rule 801(d)(2)(E) characterizes a coconspirator’s declaration as nonhearsay rather than as an exception to the hearsay rule. Surprisingly, however, the pre-existing jury function of determining the existence of the condition precedent to relevancy has been usurped by the trial judge in every circuit to have considered the issue. In light of the language of rules 104(a) and 104(b), and the Advisory Committee note to rule 104(b), the judicial conclusion reached by the courts was unexpected.

Rule 104(a) requires that “[p]reliminary questions concerning

4. See cases cited supra note 3.
5. Id.
6. See United States v. Santiago, 582 F.2d 1128, 1131-32 (7th Cir. 1978); see also cases cited supra note 3.
7. “A statement is not hearsay if...[t]he statement is offered against a party and is...a statement by a coconspirator of [the] party [made] during the course and in furtherance of the conspiracy.” Fed. R. Evid. 801 (d)(2)(E).
8. In United States v. James, 590 F.2d 575 (5th Cir.) (en banc), cert. denied, 442 U.S. 917 (1979), the Fifth Circuit noted: “In reaching this conclusion, [that a determination as to the existence of the condition precedent to relevancy is to be made by the trial judge,] we...find ourselves in accord with the courts of appeals of all the circuits which have addressed the issue.” Id. at 580. Accord United States v. Jackson, 627 F.2d 1198, 1217-18 (D.C. Cir. 1980); United States v. Vinson, 606 F.2d 149 (6th Cir. 1979), cert. denied, 444 U.S. 1074, 445 U.S. 904 (1980); United States v. Continental Group, Inc., 603 F.2d 444 (3rd Cir. 1979), cert. denied, 444 U.S. 1032 (1980); United States v. Andrews, 585 F.2d 961 (10th Cir. 1978); United States v. Santiago, 582 F.2d 1128 (7th Cir. 1978); United States v. Stanchich, 550 F.2d 1294 (2d Cir. 1977); United States v. Petrozzillo, 548 F.2d 20 (1st Cir. 1977); United States v. Trotter, 529 F.2d 806 (3d Cir. 1976).
admissibility of evidence” are to be decided by the trial judge, “subject to the provisions of subdivision (b).”12 Rule 104(b) determines the relevancy of evidence which is conditioned upon the existence of a finding of fact. The trial judge is required to admit the evidence if there has been an introduction of evidence “sufficient to support a finding of the fulfillment of the condition.”13 The Advisory Committee’s note to rule 104(b) provides, in part, that

[i]f preliminary questions of conditional relevancy were determined solely by the judge, as provided in subdivision (a), the functioning of the jury as a trier of fact would be greatly restricted and in some cases virtually destroyed. These are appropriate questions for juries. . . . If after all the evidence on the issue is in, pro and con, the jury could reasonably conclude that fulfillment of the condition is not established, the issue is for [the jury].14

In light of that language, how have the circuits arrived at their conclusion that rule 104 has eliminated the pre-existing jury function of determining factually if the condition precedent to relevancy exists? Mechanically, the question is relatively easy to answer: by concluding that rule 104(a), and not rule 104(b), applies to coconspirator declarations.15 What is considerably more difficult to determine, however, is the rationale for the judicial conclusion that rule 104(b) is never applicable to coconspirator declarations.

The rationale offered by some decisions is purportedly predicated on the notion of fairness to the defendant.16 The expressed ju-

14. Fed. R. Evid. 104(b) advisory committee note (emphasis added).
15. See, e.g., United States v. Vinson, 606 F.2d 149, 152 (6th Cir. 1979); United States v. James, 590 F.2d 575, 579-80 (5th Cir.) (en banc), cert. denied, 442 U.S. 917 (1979); United States v. Santiago, 582 F.2d 1128, 1133 (7th Cir. 1978); United States v. Petrozziello, 548 F.2d 20, 22-23 (1st Cir. 1977).
16. The Fifth Circuit, in United States v. James, 590 F.2d 575 (5th Cir.) (en banc), cert. denied, 442 U.S. 917 (1979), explained:

We must look beyond the language of [Rule 104] to its underlying policies to determine who should decide the preliminary questions and what standard of proof should control the decision on admissibility. A rule that puts the admissibility of coconspirator statements in the hands of the jury does not avoid the danger that the jury might convict on the basis of these statements without first dealing with the admissibility question. . . .

We are therefore convinced that the preliminary questions of conditional relevancy envisioned by Rule 104(b) are those which present no such danger of prejudice to the defendant. They are questions of probative force rather than evidentiary policy. They involve questions as to the fulfillment of factual conditions which the jury must answer.
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dicial concern is that once the jury hears the coconspirator's declaration, the jury will find it difficult, if not impossible, to properly fulfill its function. First, the jury must decide whether the condition precedent to relevancy (i.e., a conspiracy between defendant and declarant) existed, based only on the independent evidence. Second, assuming a negative finding with regard to the condition precedent, the jury must disregard the alleged coconspirator's declaration in deciding the guilt or innocence of the defendant. Therefore, fairness to the defendant demands that the pre-existing jury function be eliminated.

There are several problems with such a "fairness" rationale. The first is a basic one: There seems to be absolutely nothing in rule 104(b), or the Advisory Committee's note thereto, which supports the judicial conclusion that rule 104(a), and not rule 104(b), applies to coconspirator declarations. Consequently, a judicial determination, based on those rules, which eliminates a long-standing jury function, is without explicit or implicit support. The second problem is less mechanical in nature, and of greater significance. Eliminating the jury function of determining the existence of the condition precedent to relevancy of a coconspirator's declaration does nothing, in fact, to protect the defendant. Quite the contrary, it eliminates a protection that the defendant had earlier enjoyed. With that jury function, there was at least the possibility that the jury might conclude, based on the independent evidence, that no conspiracy between the defendant and the declarant had existed. There was also the possibility that, given such a factual finding, the jury might, in accordance with the court's instructions, disregard the declaration in determining the guilt or innocence of the defendant. Once that jury function is eliminated, however, both possibilities are also eliminated and the defendant loses the potential of an ultimate jury determination to disregard the declaration. That certainly does nothing to benefit the defendant.

The admissibility of a coconspirator's declarations in a conspiracy trial, however, does pose problems precisely because they are relevant. Such evidence endangers the integrity of the trial because the relevancy and apparent probative value of the statements may be so highly prejudicial as to color other evidence even in the mind of a conscientious juror, despite instructions to disregard the statements or to consider them conditionally. As a result, such statements should be evaluated by the trained legal mind of the trial judge.

Id. at 579. See United States v. Jackson, 627 F.2d 1198, 1217-18 (D.C. Cir. 1980) (citing United States v. James, 590 F.2d 575 (en banc) (5th Cir.), cert. denied, 442 U.S. 917 (1979)).

17. See supra note 16.
Ironically, some of the courts which have eliminated that pre-existing jury function have recognized that its loss in fact jeopardizes the defendant. To compensate for that jeopardy, the courts have elevated the standard of proof which the government’s independent evidence of the conspiracy must meet. Previously, the government had to establish, by independent evidence, a prima facie case of the existence of a conspiracy between the defendant and the declarant before the coconspirator’s declaration would be admitted. In that context, prima facie seemed to mean evidence sufficient to support an affirmative jury finding. Now, the standard of proof has been raised to a preponderance of the evidence, which, I gather, is equivalent to “more likely than not.” Under the elevated standard, the government’s independent evidence must make the existence of a conspiracy between the defendant and the declarant more likely than not, before the coconspirator’s declaration will be admitted and given to the jury. That is the quid pro quo offered the defendant to compensate him for the loss of the pre-existing jury function of determining the existence of the condition precedent to relevancy. One wonders if it is an appropriate trade-off.

I do not believe that it is, for several reasons. First, I find it almost impossible to believe that anyone is capable of distinguishing between the independent evidence which would justify an affirmative jury finding of the existence of a conspiracy and the “more demanding” standard of independent evidence which would make the existence of the conspiracy more likely than not. This is not said to denigrate the competence or the evidentiary sensitivity of judges. I am perfectly willing to accept a judge’s capacity to distinguish between prima facie evidence and evidence beyond a reasonable doubt. I am even willing to accept a judge’s capacity to distinguish between prima facie evidence and clear and convincing evidence. I believe,

18. See, e.g., United States v. James, 590 F.2d at 580, where the court stated:

   It must be borne in mind that the prima facie test was used when the jury also
   had a part in determining the use of the statements. . . .
   
   Since we now conclude that the trial court has the responsibility for determining
   those questions of fact relating to admissibility of the statement, the standard by
   which the court makes this determination should be high enough to afford adequate
   protection to the defendant against whom the evidence is offered. . . .

1979), cert. denied, 444 U.S. 1032 (1980); United States v. James, 590 F.2d 575, 582-83 (5th
Cir.) (en banc), cert. denied, 442 U.S. 917 (1979); United States v. Petrozziello, 548 F.2d 20,
23 (1st Cir. 1977).

20. See cases cited supra note 19.

21. Id.
however, that the distinction between prima facie and more likely than not is more nebulous than real. I think it is an artificial distinction beyond the ability of the most competent and sensitive judge. Consequently, I do not believe that the "elevated" standard of evidence affords the defendant any meaningful protection.

Second, some of the circuits which have concluded that rule 104(a), and not rule 104(b), applies to a coconspirator's declaration have determined that the coconspirator's declaration may be considered in determining whether the government's evidence of the conspiracy between the defendant and the declarant has achieved the required standard of proof. There is, to be sure, an internal consistency to those conclusions. After all, rule 104(a) provides that "[i]n making its determination [of the admissibility of evidence, the court] is not bound by the rules of evidence." Therefore, if rule 104(a) applies, thus eliminating the jury function of rule 104(b), it would seem to follow, a priori, that the court, both in ruling on the admissibility of the coconspirator's declaration and in determining whether the government's evidence of the conspiracy has achieved the required standard, would consider the extrajudicial coconspirator's declaration as a part of the government's evidence. Accepting that "logical" conclusion, it becomes apparent that, in fact, the government is likely to find it considerably easier to meet the standard of proof required for the admission of the coconspirator's declaration. Eliminating the pre-existing requirement of independent evidence of the conspiracy, and, instead, considering both the independent evidence and the coconspirator's declaration, the court is almost certain to conclude that the government's evidence of the conspiracy justifies the admission of the coconspirator's declaration.

Finally, I believe this trade-off is inadequate because it usurps a legitimate jury function. No matter what the required standard of

22. See, e.g., United States v. Vinson, 606 F.2d 149, 153 (6th Cir. 1979), cert. denied, 444 U.S. 1074, 445 U.S. 904 (1980); cf. United States v. Petrozziello, 548 F.2d 20, 23 & n.2 (1st Cir. 1977) (while citing pre-Rules case law in opposition to "bootstrapping of this sort," the court—based upon "the logic of the new rule [rule 104(a)]"—leaves room for some consideration of such evidence by trial judges; the court does not, however, finally decide the issue). Contra United States v. James, 590 F.2d 575, 581 (5th Cir.) (en banc), cert. denied, 442 U.S. 917 (1979).

"The majority of circuits have . . . refus[ed] to permit the 'bootstrapping' of the admissibility of a statement of a conspiracy which is, at least in part, preliminarily proven by that same statement." Epstein, Joseph & Saltzburg, Emerging Problems Under the Federal Rules of Evidence, 1983 A.B.A. Sec. Litigation 246 (citations omitted) (report of the Trial Evidence Committee).

proof may be, and whether or not the extrajudicial declaration is a part of the evidence which may satisfy the standard, there will continue to be cases in which the alleged coconspirator’s declaration, received in evidence, is relevant evidence of the defendant’s guilt only if the defendant and the declarant were coconspirators. In other words, there will continue to be coconspirator declarations which are only conditionally relevant. Where the condition precedent to relevancy is a factual matter, its ultimate resolution should be left with the traditional fact finder—the jury. If the jury could rationally find that the condition precedent to relevancy—the existence of a conspiracy between the defendant and the declarant—did not exist, the jury should be instructed that, given such a finding, it should disregard the alleged declaration in determining the guilt or innocence of the defendant. Assigning that function exclusively to the court denies the defendant the potential benefit of a traditional and legitimate jury function,24 regardless of the standard of proof required for admissibility.

If eliminating the pre-existing jury function does in fact jeopardize the defendant and if raising the standard of proof required for the admission of the declaration does not adequately compensate the defendant for that jeopardy, then the stated rationale, fairness to the defendant, for the circuits’ conclusion that rule 104(b) is not applicable to coconspirator declarations is entirely unpersuasive. What then is the real reason for that judicial conclusion?

Here I shall attempt to tread lightly. When the stated rationale for a judicial conclusion proves unpersuasive, it becomes almost impossible not to speculate about alternative explanations. I think there may be two.

Even before the enactment of the Federal Rules of Evidence, when the jury function of determining conditional relevancy existed, there seemed to be a certain judicial uneasiness with that function. In the view of some judges, it permitted a jury to “second-guess” the court’s ruling on admissibility.25 “Once I rule the evidence admissible, no jury has the right to exclude it,” represents that particular judicial perspective. It is a perfectly rational perspective since ruling on admissibility is exclusively a judicial function. No jury has the

24. “In all criminal prosecutions, the accused shall enjoy the right to a . . . trial . . . by . . . jury . . . .” U.S. Const. amend. VI.
25. “This simple rule seems to me best: what goes into the record is the responsibility of the judge; what (of this) is credited, that of the jury.” United States v. James, 590 F.2d 575, 584 (5th Cir.) (en banc) (Gee, J., specially concurring), cert. denied, 442 U.S. 917 (1979).
right to usurp any part of that purely judicial role. Every judge would be entirely justified in feeling distressed by any such jury effort. There has always been, and continues to be, however, a significant distinction between a judge's ruling on admissibility and a jury's subsequent factual determination of the existence *vel non* of the condition precedent to relevancy. A simple example is offered in the Advisory Committee's note to rule 104(b): "[I]f a letter purporting to be from Y is relied upon to establish an admission by him, it has no probative value unless Y wrote or authorized it. Relevance in this sense has been labeled 'conditional relevancy.'"  

Assume that in a criminal prosecution the government offers into evidence an incriminating letter, purportedly written by the defendant. Through the testimony of a duly qualified handwriting expert, or that of a layman familiar with the defendant's handwriting, evidence is presented which would justify a jury's finding that the defendant wrote the letter. The court admits the letter as an admission. The defense then presents a duly qualified handwriting expert who testifies that, in his opinion, the defendant did not write the letter. Further, the defendant testifies that he did not write the letter. Ultimately, it will be for the jury to make a factual determination as to whether the defendant did or did not write the letter. If the jury finds that the defendant did write the letter, it will consider the letter in deciding the guilt or innocence of the defendant. If the jury finds that the defendant did not write the letter, it will disregard the letter in deciding the guilt or innocence of the defendant. Virtually no judge would be disturbed by the jury's performance of its legitimate function: Determining factually whether or not the condition precedent to relevancy existed. Should the jury conclude that the defendant did not write the letter, and thus disregard the letter in deciding the guilt or innocence of the defendant, virtually no judge would be disturbed by that jury conclusion, notwithstanding the fact that the judge had ruled the letter admissible. The purely judicial function of ruling on admissibility and the jury's function of determining factually the existence of the condition precedent to relevancy are clearly distinguishable. A similar distinction exists with regard to the purely judicial function of ruling on the admissibility of a coconspirator's declaration and the jury's subsequent function of determining factually the existence of the condition precedent to the

relevancy of the declaration. A failure to recognize that distinction in functions, and a resulting, but mistaken, judicial affront at a jury's "second-guessing" of the court's ruling on admissibility, is, I believe, one reason why the circuits have seized upon rule 104(a) as a basis for concluding that the pre-existing jury function no longer exists.

The second reason is, I believe, a failure to determine when a particular coconspirator's declaration is merely conditionally relevant and when it may be independently relevant. Prior to the enactment of the Federal Rules of Evidence, many of the circuits treated all coconspirator declarations as merely conditionally relevant, thus triggering the jury function of determining the existence of the condition precedent to relevancy in every case.\textsuperscript{29} As was noted previously, since the effective date of the Rules, all of the circuits to have considered the question have concluded that rule 104(b) and its treatment of conditionally relevant evidence is never applicable to coconspirator declarations.\textsuperscript{30} In my opinion, both conclusions are incorrect. I also believe that a tacit judicial uneasiness with the pre-Rules view, that all coconspirator declarations are conditionally relevant, has contributed to the post-Rules view that all coconspirator declarations are independently relevant. If a particular coconspirator's declaration is relevant, regardless of the status of the defendant and the declarant as coconspirators, there is no need, nor even any propriety, in having a jury determine the existence of any condition precedent to relevancy. To overcome the defendant's hearsay objection, the court's ruling on admissibility requires a judicial determination of the existence of a conspiracy between the defendant and the declarant as well as a determination that the declaration had been made during the course and in furtherance of the conspiracy. Once such an affirmative judicial ruling is made, the jury need not make an independent determination of those matters as a condition precedent to consideration of the declaration. If the declaration is independently relevant, rule 104(b), by its own terms, is inapplicable.

Let us consider a hypothetical example. Defendant Smith is charged with possession of heroin with the intention of distributing it. In the government's case, appropriate evidence is offered to prove that the defendant and the declarant were engaged in a conspiracy to sell the heroin. A government undercover agent offers to testify

\textsuperscript{29} See \textit{supra} notes 2-6 and accompanying text.

\textsuperscript{30} See cases cited \textit{supra} note 8.
that, during the course of that conspiracy, the declarant said to the
agent, "Smith will meet you next Monday at midnight to close the
deal." The defendant's hearsay objection will almost certainly be
overruled. Given the government's evidence, the court, applying rule
104(a), would conclude that the declaration was that of a cocon-
spirator of the defendant made during the course and in furtherance
of the conspiracy. Thus, under rule 801(d)(2)(E), the declaration
would be admissible.

Is the admissible declaration independently relevant or only con-
ditionally relevant as to the defendant's guilt or innocence? Before
answering that question, consideration should be given to the ques-
tion of the admissibility of the declaration over the defendant's hear-
say objection. It seems clear that under rule 801(d)(2)(E) the decla-
ration is admissible because a coconspirator's declaration is
considered to be the rough equivalent of a vicarious admission in a
criminal context. The fact that the defendant impliedly authorized
the declarant to make the declaration, as a result of the conspiracy
between them, makes the declaration admissible against the defen-
dant over his hearsay objection as a vicarious admission.

Let us assume that, given the evidence presented, the jury could
reasonably conclude factually either that the defendant and the de-
clarant were coconspirators or that they were not. If the jury con-
cluded that they were not, would the declaration allegedly made to
the government agent be relevant as to the guilt or innocence of the
defendant? I believe the answer must be no. If the defendant and the
declarant were not parties to a conspiracy, there would be no basis
for finding that the defendant impliedly authorized the declarant to
speak for him. Therefore, the alleged declaration as to what the de-
fendant would do and when and why, entirely lacking in authority
from the defendant, would be no more than a wholly gratuitous as-
sertion having no legitimate inculpating effect on the defendant. In
other words, the declaration is only conditionally relevant, the condi-
tion precedent to relevancy being the existence of a conspiracy be-
tween the defendant and the declarant. In those circumstances, rule

31. The limitation upon the admissibility of statements of co-conspirators to those
made "during the course and in furtherance of the conspiracy" is in the accepted
pattern. While the broadened view of agency taken in [801(d)(2)(D), vicarious ad-
missions] might suggest wider admissibility of statements of co-conspirators, the
agency theory of conspiracy is at best a fiction and ought not to serve as a basis for
admissibility beyond that already established.
Fed. R. Evid. 801(d)(2)(E) advisory committee note.
104(b) should be deemed applicable.

Let us consider a slightly different hypothetical. The charge against defendant Smith remains the same. Again, the government offers appropriate evidence to prove that the defendant and the declarant were engaged in a conspiracy to sell the heroin. A government undercover agent offers to testify that, during the course of that conspiracy, the declarant said to the agent, "I've seen Smith's stuff and it's top quality." Once more, the defendant's hearsay objection will almost certainly be overruled. Given the government's evidence, the court, applying rule 104(a), would conclude that the declaration was that of a coconspirator of the defendant made during the course and in furtherance of the conspiracy. Thus, under rule 801(d)(2)(E), the declaration would be admissible.

Is the admissible declaration independently relevant or only conditionally relevant with regard to the defendant's guilt or innocence? Again, let us assume that, given the evidence presented, the jury could reasonably conclude factually either that the defendant and the declarant were coconspirators or that they were not. If the jury concluded that they were not, would the declaration allegedly made to the government agent be relevant as to the guilt or innocence of the defendant? I believe the answer is yes. Even if the defendant and the declarant were not parties to a conspiracy, so that the defendant would not have impliedly authorized the declarant to speak for the defendant, the declaration is evidence that the defendant possessed heroin. Given the charge against the defendant, that evidence is relevant evidence of possession. In other words, this declaration is independently, not merely conditionally, relevant. Its relevancy exists irrespective of the existence of a conspiracy between the defendant and the declarant. The existence of such a conspiracy is a condition precedent only to admissibility over the defendant's hearsay objection; it is not a condition precedent to relevancy. Consequently, rule 104(b) should be deemed inapplicable.

It seems clear that not all coconspirator declarations are always conditionally relevant. Yet they were treated as such by some of the circuits prior to the Federal Rules of Evidence.\textsuperscript{32} Thus, the jury function of determining the existence of the condition precedent to relevancy was overused. I believe that the circuits sensed that overuse, perhaps without realizing its cause. I also believe that the judicial dissatisfaction with that jury function arose, in part, out of

\textsuperscript{32} See supra note 3.
that tacit, perhaps even not fully appreciated, sense of impropriety.

I further believe that the sense of impropriety, felt by judges, arising out of the overuse of the jury function, contributed to the judicial overreaction that rule 104(b) is inapplicable to all coconspirator declarations.

The Supreme Court has not yet resolved the issue of the applicability of rule 104(b) to coconspirator declarations. When the Court does so, however, it should be sensitive to the fact that, while the existence of a conspiracy is a condition precedent to admissibility under rule 801(d)(2)(E), it is not always a condition precedent to relevancy. Some coconspirator declarations are independently relevant; as to them, rule 104(b) is inapplicable. Some coconspirator declarations are only conditionally relevant; as to them, rule 104(b) is applicable.

III. RULE 301 AND PRESUMPTIONS IN CIVIL ACTIONS

Rule 301 provides that in all civil actions:

a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.33

Is rule 301 intended to generate a rebuttable presumption or only a permissible inference? The rule, quite unexpectedly, does not provide an explicit answer to this basic question. Before attempting to answer that question, however, a distinction should be made between a rebuttable presumption and a permissible inference.

Let us assume that the plaintiff's evidence of facts A, B, and C generates a rebuttable presumption of X, the fact to be proven. Let us also assume that the defendant offers no evidence tending to rebut X. The plaintiff would be entitled to a jury instruction to the effect that, if the jury accepts the plaintiff's evidence of facts A, B, and C, they must accept X. That is a rebuttable presumption. If the fact finder accepts the evidence generating the presumption, and no rebutting evidence is offered, the fact finder must accept the presumption.34

34. Although some courts have described such a standardized [permissible] inference as a presumption, most legal scholars have disagreed. They have saved the term [presumption] to describe a significantly different sort of a rule, one that dic-
Now let us define a permissible inference. Assume that the plaintiff's evidence of facts A, B, and C generates only a permissible inference of X, the fact to be proven, and the defendant offers no evidence tending to rebut X. The jury would be instructed that, even if it accepts the plaintiff's evidence of facts A, B, and C, and even though the defendant offered no rebutting evidence, the jury remains free to accept or reject X. That is what makes it only a permissible inference. Even if the fact finder accepts the evidence generating the inference, and even though no rebutting evidence is offered, the fact finder remains free to accept or reject the inference.\textsuperscript{35}

The language of rule 301 seems to suggest a rebuttable presumption. Although the language of the rule does not explicitly shift the ultimate burden of persuasion onto the party against whom the presumption arises, it does explicitly impose on that party the burden of presenting rebutting evidence. That burden can be meaningful only if X, the fact to be proven, is treated as a rebuttable presumption.

The Conference Committee Report regarding rule 301 reads, in part, as follows:

Under the Senate amendment, a presumption is sufficient to get a party past an adverse party's motion to dismiss made at the end of his case-in-chief. If the adverse party offers no evidence contradicting the presumed fact, the court will instruct the jury that if it finds the basic facts, it may presume the existence of the presumed fact. . . .

The Conference adopts the Senate amendment.\textsuperscript{36}

\textsuperscript{35}This means that the inference . . . to be drawn from the circumstances is left to the jury. They are permitted, but not compelled to find it. The plaintiff escapes a nonsuit, or a dismissal of his case, since there is sufficient evidence to go to the jury; but the burden of proof is not shifted to the defendant's shoulders, nor is any "burden" of introducing evidence cast upon him, except in the very limited sense that if he fails to do so, he runs the risk that the jury may, and very likely will, find against him.

A mere permissible inference is "sufficient to get a party past an adverse party's motion to dismiss made at the end of his case-in-chief." More significantly, it is only with a permissible inference that the court would instruct the jury that, absent any rebutting evidence and even though the jury "finds the basic facts, it may presume the existence of the presumed fact." In such circumstances, a rebuttable presumption would require an instruction directing the jury that it must accept the presumed fact. The Conference Committee's language seems to have contemplated that rule 301 provides for a mere permissible inference. The language of the rule suggests a rebuttable presumption while the language of the Conference Committee (a significant source of legislative intent) implies a permissible inference.

This conflict is further complicated by two additional factors. In the rule originally submitted by the Supreme Court, "presumptions . . . were given the effect of placing upon the opposing party the burden of establishing the nonexistence of the presumed fact, once the party invoking the presumption established the basic facts giving rise to it." Congress rejected the concept of having a presumption shift the ultimate burden of persuasion. Consequently, the pre-legislative history of rule 301 is of little help in determining congressional intent. Moreover, the disagreement between the House and the Senate centered on the "bursting bubble" theory. The House version provided that, "even though met with contradicting evidence, a presumption is sufficient evidence of the fact presumed, to be considered by the trier of fact." The effect of the [House] amendment [was] that presumptions [were] to be treated as evidence." The Senate rejected that approach and apparently adopted, instead, the "bursting bubble" approach. Under the "bursting bubble" theory, the introduction of rebutting evidence causes the presumption to disappear, and the jury is instructed to weigh evidence against evidence. The Conference Committee expressly adopted the Senate amendment. It appears, however, that neither the Senate nor the House directed much attention to the distinction between a rebuttable presumption and a permissible inference. Rather, both Houses focused their concern on the status of the presumption after it was

38. Id. at 7056.
39. Id.
40. See id.
41. See supra text accompanying note 36.
met with rebutting evidence. In those circumstances, there is little, if any, practical difference between a rebuttable presumption and a permissible inference. Given an apparent conflict between the language of the rule and the language of the Conference Committee, with little or no help from pre-legislative history or from the difference of opinion between House and Senate, what is a poor judge to do?

Unfortunately, I am not able to tell you what the courts have done, because I have found no case which explicitly determines whether rule 301 was intended to generate a rebuttable presumption or a permissible inference. There is, however, the Supreme Court’s opinion in *Texas Dep’t of Community Affairs v. Burdine.* In *Burdine,* a Title VII employment discrimination suit, the Court found that the plaintiff’s evidence created a rebuttable presumption of discrimination on the part of defendant. The Court held, however, that the presumption did not shift the ultimate burden of persuasion onto the defendant; rather, “[t]he plaintiff retains the burden of persuasion.” What the rebuttable presumption favoring the plaintiff does is the following: (1) “If the trier of fact believes the plaintiff’s evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case;” (2) On the other hand, if the employer offers evidence “to rebut the presumption of discrimination,” the ultimate burden of persuasion remains on the plaintiff. That opinion of the Court would appear to be entirely consistent with the explicit language of rule 301 that a presumption does not shift the ultimate burden of persuasion but that it does impose on the adverse party a “burden of going forward with evidence to rebut or meet the presumption.” Moreover, the *Burdine* opinion would be consistent with the apparent intent of the language of rule 301, and inconsistent with the contrary suggestion of the Conference Committee Report, that rule 301 contemplates a rebuttable presumption, not merely a permissible inference. In light of this, why not read *Burdine* as an explicit interpretation of rule 301 by the Supreme Court?

44. See 450 U.S. at 252, 254 & n.7.
45. *Id.* at 256.
46. *Id.* at 254.
47. *Id.*
48. *Id.* at 254-56.
49. FED. R. EVID. 301.
The short answer is that the Court, in *Burdine*, merely cited rule 301 in a footnote, and did so without elaboration.⁵⁰

Would it nevertheless be appropriate to conclude that rule 301 is applicable to the issue resolved by the Court in *Burdine*, and that, therefore, *Burdine* should be deemed dispositive of the issue even absent elaborate discussion of rule 301? By its own terms, rule 301 is applicable to “all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules.”⁵¹ I know of no other provision in congressional enactments (nor did the *Burdine* Court cite any), or in the Federal Rules of Evidence, regulating the presumption arising in a Title VII action; presumably, then, rule 301 applies. Moreover, the Court in *Burdine*, like Congress, ultimately embraced the “bursting bubble” theory.⁵² Apparently, both considered and resolved that issue. Since both the Court and Congress dealt with the procedural effect to be given a presumption and since the language of rule 301 suggests its applicability to *Burdine*, I am inclined to read that case as a tacit conclusion by the Court that rule 301 contemplates a rebuttable presumption, not a mere permissible inference.⁵³

I find this reading of rule 301 preferable for another reason. As was previously discussed, the basic dispute between Senate and House concerned the “bursting bubble” theory and the basic thrust of the Conference Report, and its use of the word “may”, seems clearly to have been directed toward that dispute. Frankly, I do not believe that either the House Committee or the Conference Committee directed serious attention to the distinction between a rebuttable presumption and a permissible inference. In those circumstances, it seems more appropriate to give effect to the apparent intent of the rule itself—a rebuttable presumption—rather than to the Conference Committee’s use of the single word “may” and its suggestion of

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⁵⁰ 450 U.S. at 255 n.8.
⁵¹ FED. R. EVID. 301.
⁵² See 450 U.S. at 255 n.10.
⁵³ In *Burdine*, the Court’s conclusions as to the effect of the presumption generated by the plaintiff’s evidence rest on the Court’s earlier decision in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). The Court’s opinion in *Burdine* notes that it was in *McDonnell Douglas* that “we set forth the basic allocation of burdens and order of presentation of proof in a Title VII case alleging discriminatory treatment.” 450 U.S. at 252 (footnote omitted). Since the *McDonnell Douglas Corp.* decision was a pre-Rules decision, one could conclude that, in *Burdine*, the Court had simply overlooked the direct applicability of rule 301. I find it a more felicitous reading of *Burdine* to infer that the Court tacitly concluded that rule 301 contemplated a rebuttable presumption.
a permissible inference. Consequently, I believe that the presumption governed by rule 301 is a rebuttable presumption.

That conclusion leads to another surprising result. A res ipsa loquitur case brought in a state court may have the procedural effect of generating either a rebuttable presumption of negligence or a mere permissible inference of negligence, depending on the particular state, and in some states, depending on the particular facts. Given that disparity in treatment by the states, how should a federal court react to a res ipsa case? If the case is in federal court on diversity grounds, rule 302 provides a quick and easy answer: "the effect of a presumption . . . is determined in accordance with State law." What procedural effect should be given to the case, however, if it is in federal court as a federal cause of action, such as an action brought pursuant to the Federal Tort Claims Act or the Federal Employers' Liability Act, and the plaintiff's evidence generates a res ipsa case? In those circumstances, I believe rule 301 applies. I have already concluded that rule 301 contemplates a rebuttable presumption, not a mere permissible inference. The unexpected result here is that the applicability of rule 301 to a res ipsa case in a federal cause of action seems not to have been discerned.

For instance, in Wilson v. United States, the Ninth Circuit affirmed the granting of the defendant's motion to dismiss. The plaintiff argued that his evidence had generated a res ipsa case of

54. There exists persuasive and scholarly support for that conclusion:
The only change that the Senate Committee stated that it wanted to make was deletion of the provision in the House draft that would treat presumptions as evidence. The Senate Committee did not indicate that it wanted to weaken the traditional force of presumptions . . .

Thus, we conclude that the Senate Committee, and ultimately the Conferences, were confused as to the traditional Thayer approach to presumptions and that there is no demonstrable intention on the part of the Congress to depart from the traditional approach. We recognize that the language of both the Senate Committee Report and the Conferences' Report can be read otherwise, but we do not believe that the cryptic wording concerning a permissive instruction to be given a jury represents the view of the House Committee . . . or the Senate Committee . . . Thus, we believe that both Houses of Congress thought they were adopting the [traditional] approach and that the Rule should be read as if they did.


59. 645 F.2d 728 (9th Cir. 1981).
negligence, but the Ninth Circuit noted that the trial “judge found that [the plaintiff's] evidence did not support an inference of negligence. This is a finding of fact. It is not clearly erroneous . . .”. If that language was intended to mean that the plaintiff's evidence did not create a legally sufficient res ipsa case, I have no serious quarrel with the language or the result. Earlier on, however, the court's opinion reads: “In this circuit, the application of the doctrine of res ipsa loquitur simply makes it permissible to draw an inference of negligence from a set of facts. Invocation of the doctrine does not establish a presumption of negligence or shift the burden of proof.”

That language troubles me. Given a federal cause of action to which rule 301 applies and a res ipsa case, I do not believe the various circuits are free to determine independently the procedural effect to be given. Congress has made that decision. Rule 301, while not shifting the ultimate burden of persuasion, does impose on the adverse party “the burden of going forward with evidence to rebut or meet the presumption.”

If our reading of legislative intent is correct, then Congress has mandated a rebuttable presumption, not a mere permissible inference. Is rule 301 applicable to a res ipsa loquitur case in a federal cause of action? I believe the answer is yes. Congress apparently concluded that there should be one basic rule governing presumptions in federal causes of action, whether a particular presumption was based on social policy or logical inference. Thus, whether the presumption of negligence in a res ipsa case is the product of policy or logic, it should be governed by rule 301. Further, given our reading of the rule, the presumption provided for is a rebuttable presumption.

IV. RULE 407, SUBSEQUENT REMEDIAL MEASURES AND STRICT LIABILITY ACTIONS

Rule 407, entitled “Subsequent Remedial Measures,” provides that any remedial measures taken after the event that gave rise to the cause of action are “not admissible to prove negligence or culpable conduct in connection with the event.” Such evidence, however,
may be admitted for other purposes, "such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment." The rule seems to be fairly consistent with the pre-Rules practice and apparently rests on the same policy consideration: "encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety." If a defendant or a potential defendant knew that remedial measures effected after injury would be admissible evidence against him in a case brought by the injured party, the defendant (actual or potential) might be dissuaded from effecting such measures, with a resulting loss of safety to society as a whole. Then why the exception when such evidence is offered to prove ownership, control, or feasibility, "if controverted"? The answer seems to be that, while ownership, control, or feasibility might become a critical issue in a particular case, no issue is likely to be as conclusively determinative as fault. As to those less determinative issues, the defendant has a practical option: he can avoid the admissibility of the remedial measures by admitting ownership, control, or feasibility, or he can controvert the assertion and suffer admission of the evidence.

The conclusion reached by the Eighth Circuit in several cases—that the exclusion of evidence of subsequent repairs under rule 407 is inapplicable to strict liability cases—is surprising. For example, in Unterburger v. Snow Co., the plaintiff sought damages from defendant ("Snowco") "for injuries he suffered in a grain auger accident." Snowco had manufactured the auger. "Unterburger's fingers came into contact with moving parts [of the auger], drawing his arm in so that it became entangled with the lower end of the uncovered main drive shaft. Unterburger's arm had to be amputated just below the elbow." The plaintiff alleged that the auger had been defective because of the absence of an effective guard

64. Fed. R. Evid. 407.
67. See, e.g., Unterburger v. Snow Co., 630 F.2d 599, 603 (8th Cir. 1980); Farner v. Paccar, Inc., 562 F.2d 518, 528 (8th Cir. 1977); Robbins v. Farmers Union Grain Terminal Ass'n, 552 F.2d 788, 792-93 (8th Cir. 1977). For a discussion of Unterburger, see infra text accompanying notes 68-76.
68. 630 F.2d 599 (8th Cir. 1980).
69. Id. at 601. "A grain auger is a device used to move grain short distances for storage or shipment." Id.
70. Id.
71. Id. at 602.
Evidence was received indicating that subsequent models made by Snowco had a modified guard system. Snowco appealed from a judgment for the plaintiff. Snowco asserted "that the district court committed prejudicial error by failing to limit the evidence and testimony regarding . . . the modified Snowco auger. Snowco contend[ed] that this . . . was evidence of a subsequent remedial measure, inadmissible under Fed. R. Evid. 407 . . . ." The Eighth Circuit affirmed, finding that Snowco's "argument lacks merit. As the district court noted at trial, Fed. R. Evid. 407 does not apply to actions based on strict liability; hence this evidence was admissible under the strict liability count."

The plaintiff had both strict liability and negligence theories submitted to the jury. Of principal concern, however, is the legal conclusion that rule 407 "does not apply to actions based on strict liability."

It is true, of course, that rule 407 excludes evidence of subsequent measures when offered to prove "negligence or culpable conduct." It is also true that strict liability according to section 402A of the Restatement (Second) of Torts may be imposed irrespective of negligence. Even the Restatement, however, requires, as a condition precedent to liability, that a defendant sell a defective and unreasonably dangerous product. The sale of a defective product implies fault or "culpable conduct." The Advisory Committee's note to rule 407 states: "The rule incorporates conventional doctrine which excludes evidence of subsequent remedial measures as proof of an admission of fault." Moreover, the basic policy reason for rule 407 would seem to be particularly applicable to the manufacturer. A Section 402A defendant must be engaged in the business of selling

72. Id.
73. Id.
74. Id. at 601.
75. Id. at 603.
76. Id.
77. Id. at 601. I confess I find it somewhat difficult to accept the jury's ability to consider the evidence of modification as to the strict liability theory and disregard it as to negligence. But only somewhat, since I have enormous faith in the competence and conscientiousness of juries.
78. 630 F.2d at 603.
79. See Restatement (Second) of Torts § 402A (1965).
80. "One who sells any product in a defective condition unreasonably dangerous to the user of consumer . . . is subject to liability . . . ." Id. at § 402A(1) (1965).
such products. This requirement implies that thousands, perhaps tens of thousands, of people will have continuing contact with the defendant's products. The well-being of those users and consumers will be enhanced if the manufacturer is not dissuaded from improving the product's safety features by a concern that such improvements will be admissible evidence in personal injury and wrongful death actions arising before the improvements are implemented.

In 1983, in *DeLuryea v. Winthrop Laboratories*, the Eighth Circuit explained the basis of its earlier decision in *Robbins v. Farmers Union Grain Terminal Association* stating: "[T]he 'public policy' assumption justifying [rule 407]—that modifications would not be made in the absence of the rule—is invalid in products liability actions because the manufacturer of mass-produced goods is motivated by economic self-interest to make the product safer." That statement may have some validity. If it is valid, it confronts the manufacturer with an economic riddle. The Eighth Circuit's view assumes that potential liability arising from subsequent product use will compel the manufacturer to make the change, even at the cost of having that change received in evidence in all cases arising from prior product use. Still, the manufacturer would be put to the economic task of determining which course of conduct—product modification or nonmodification—is likely to produce the greater liability. That economic task may be complicated by the manufacturer's belief that a safety modification may make the product less attractive to the public. With all of the calculations thus imposed on the manufacturer, I am inclined to think that the public's safety is better served by a rule that would exclude evidence of modifications, thus making it somewhat more likely that the manufacturer will effect such changes.

Indeed, even the Eighth Circuit has seen fit to limit its interpretation of rule 407. In *DeLuryea*, the plaintiff asserted that her use of the defendant's pharmaceutical product had caused serious tissue damage and that the package insert accompanying the product at the time of plaintiff's use contained no adequate warning of such a risk. Subsequently, the package insert was modified to reflect such

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82. The seller is subject to liability if "the seller is engaged in the business of selling such a product . . . ." *Restatement (Second) of Torts* § 402A(1)(a) (1965).
83. 697 F.2d 222 (8th Cir. 1983).
84. 552 F.2d 788 (8th Cir. 1977).
85. *DeLuryea v. Winthrop Laboratories*, 697 F.2d at 228.
86. *Id.* at 223-24.
a risk more explicitly.87 Appealing from a judgment for the plaintiff, the defendant asserted that the district court had erred in receiving evidence of the modified package insert.88 The Eighth Circuit concluded that its earlier opinions holding rule 407 inapplicable to strict liability cases did “not apply to the circumstances in this case.”89

The distinction drawn by the court rested on two facts: (1) that DeLuryea involved an alleged failure to warn,90 and (2) that the product was an unavoidably unsafe pharmaceutical product,91 thus triggering application of comment k to section 402A of the Restatement (Second) of Torts.92 Those facts led the court to conclude that, in DeLuryea “the standard[s] for liability under strict liability and negligence are essentially the same.”93 Consequently, “Rule 407 requires exclusion of evidence of subsequent remedial changes in [the defendant’s] warning literature.”94 I believe that the similarity between “the standards for liability under strict liability and negligence,” which the court found in DeLuryea, exists in virtually all strict liability cases. It is not surprising, therefore, that DeLuryea has marked a change in direction by the Eighth Circuit as to the applicability of rule 407 to strict liability cases.95

There is one additional reason that leads me to believe that rule 407 should be deemed applicable to strict liability cases. The second

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87. Id. at 227-28.
88. Id. at 227.
89. See Id. at 228.
90. Id. at 228-29.
91. Id. at 229.
92. See id. Comment k of Section 402A of the Restatement (Second) of Torts states in part:

Unavoidably unsafe products. There are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use. These are especially common in the field of drugs. . . . Such a product, properly prepared, and accompanied by proper directions and warning, is not defective, nor is it unreasonably dangerous.

RESTATEMENT (SECOND) OF TORTS § 402A comment k (1965) (emphasis in original). Comment k is cited in DeLuryea, 697 F.2d at 229.

93. 697 F.2d at 229.
94. Id.
95. See, e.g., Kehm v. Procter & Gamble Mfg. Co., 724 F.2d 613 (8th Cir. 1983). In Kehm, the court noted that “[s]ince the trial court’s decision in this case, this court had refined and qualified its position that negligence-like considerations do not come into play in products liability cases.” 724 F.2d at 621 (discussing DeLuryea v. Winthrop Laboratories, 697 F.2d 222 (8th Cir. 1983)).

In Kehm, the court concluded that rule 407 would be applicable even though the product involved was not an inherently and unavoidably unsafe product, such as a pharmaceutical product. See 724 F.2d at 621.
sentence of rule 407, setting forth those instances in which evidence of remedial measures may be admitted, does not contain a general exception for strict liability cases. Consequently, I believe that the conclusion that rule 407 is not applicable to strict liability cases is not required by the language of the rule. Because that conclusion is not required by the rule and because it is contrary to the basic policy reason for the rule, I believe that construction of rule 407 should be rejected.

V. RULE 501 AND PRIVILEGE ISSUES IN DIVERSITY CASES

Rule 501 provides that in diversity cases, "the privilege of a witness . . . shall be determined in accordance with State law." 6 In a choice-of-law situation, however, concerning the privilege issue, a question arises as to which state's law a federal court should apply.

Does the Rule require the federal court to resolve the choice-of-law problem as it would be resolved by the highest appellate court of the state in which the federal district court sits, and apply that state privilege law which that court would apply, or does the Rule permit the federal district court to resolve the choice-of-law problem independently and apply that state privilege law which seems most appropriate to the federal district court? Put another way, does Klaxon Co. v. Stentor Electric Manufacturing Co., 313 U.S. 487 (1941), govern the determination of a choice-of-law privilege issue under . . . Rule 501? 7

Some commentators thought Klaxon should be deemed applicable, 8 others thought not. 9 The federal courts have concluded that Klaxon

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96. FED. R. EVID. 501.
In Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487 (1941), the Supreme Court held that:
The conflict of laws rules to be applied by the federal court [exercising diversity jurisdiction in a particular state] must conform to those prevailing in [the courts of the state wherein the federal court sits] . . . It is not for the federal courts to thwart such local policies by enforcing an independent "general law" of conflict of laws.
Id. at 496 (footnote omitted).
98. See, e.g., 2 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 501[02], at 501-23 (1982) ("The courts . . . since the enactment of Rule 501, have, for the most part, continued to apply Klaxon."); Seidelson, Rule 501, supra note 97, at 26-29.
99. With the enactment of the Federal Rules of Evidence it has been suggested that the premises underlying the Klaxon opinion have been swept away. This would authorize the federal courts, for the first time, to adopt a federal choice-of-laws rule
Perhaps the most influential case dealing with this issue is *Samuelson v. Susen.* The plaintiff in *Samuelson*, an Ohio neurosurgeon, sued two physicians, asserting defamation and tortious interference with business and professional relations. The diversity action was brought in a federal district court sitting in Pennsylvania. The plaintiff sought to depose six physicians and administrators of two Ohio hospitals. Deponents sought protective orders, based on an Ohio statute which extended a privilege to matters relating to medical evaluation and review committees. The Third Circuit wrote, "We believe Rule 501 requires a district court exercising diversity jurisdiction to apply the law of privilege which would be applied by the courts of the state in which it sits." Looking to the choice-of-law decisions of the Supreme Court of Pennsylvania, the Third Circuit concluded that if the Pennsylvania court were faced with this case, it would apply the privilege law of the state of Ohio.

After reviewing the pre-legislative and legislative history of rule 501, the *Samuelson* court found that:


101. 576 F.2d 546 (3d Cir. 1978); see cases cited supra note 80.

102. 576 F.2d at 548.

103. Id. at 546.

104. Id. at 548.

105. Id.


107. 576 F.2d at 549.

108. See id. at 551.

109. Id. at 549-50.
[a] federal court's application of the law of privilege which the forum states' courts would apply in cases like the instant one, seems to us to be consistent with Congress' goal of effectuating state substantive rights, laws and policies in controversies where there is no substantial federal interest. Such an approach furthers Congress' goal of preserving the domain of state privilege law in diversity cases by achieving outcome identity between state and federal courts of the forum state on choice of law, thus discouraging forum shopping. Such an approach also takes cognizance of the fact that a forum state's choice-of-law rules may reflect important policy underpinnings of its own law and are an integral part of it. 110

That conclusion and its rationale surprise me only because they are entirely consistent with the conclusion I reached and the rationale I developed eight years ago. 111

There is, however, a limitation on the applicability of Klaxon to privilege issues in a diversity case. If the diversity court concludes that the choice-of-law result which would be achieved by the highest appellate court of the forum state is unconstitutional, the diversity court would not be required, or even permitted, to utilize it. 112

That limitation was reinforced by the United States Supreme Court decision in Allstate Insurance Co. v. Hague. 113 The Court affirmed the Minnesota choice-of-law decision to apply its own local law, permitting the stacking 114 of uninsured motorist coverage, rather than Wisconsin's local law prohibiting such stacking. The Court concluded that Minnesota's decision was permissible under the full faith and credit clause 115 and consistent with the insurance carrier's right of due process 116 because of Minnesota's "significant contact[es]... creating state interests, with the parties and the occurrence or transaction [giving rise to the litigation]." 117 Absent such contacts, the Minnesota court would have been precluded constitutionally from applying its own local law. 118

How does Hague apply to rule 501? If a diversity court con-

110. Id. at 550.
111. See Seidelson, Rule 501, supra note 97, at 26-29.
112. See id. at 36-38.
114. "Stacking" insurance coverage is achieved by combining the separate coverage on each automobile held by an owner to provide a higher total coverage amount to that owner. See generally Allstate Insurance Co. v. Hague, 449 U.S. 302, 305-07 (1981).
115. U.S. Const. art. IV, § 1.
117. See 449 U.S. at 308 (footnote omitted).
118. See id. at 308, 310-13.
froneted with a privilege issue looks to the choice-of-law result which would be achieved by the highest court of the forum state, as rule 501 and Samuelson indicate it should, and the court finds that the result would be violative of either the full faith and credit clause or the due process rights of the litigant adversely affected, then it should eschew that result. The result would be constitutionally impermissible if the privilege law which the highest court of the forum state would apply was that of a state having no interest in the issue. Let us consider a hypothetical example. The plaintiff brings a libel action against the defendant, a newspaper publisher, in a federal district court sitting in State A and exercising diversity jurisdiction. The plaintiff seeks to depose the newsman who wrote the allegedly libelous article. Pursuant to a stipulation entered into by the parties, the deposition is to take place in State B. During the course of the deposition, the newsman is asked, and refuses to answer, questions regarding the identity of his sources, asserting that he had assured his sources confidentiality. The plaintiff then seeks an order from a federal district court judge in State B directing the newsman to reveal his sources. The deponent asserts the newsman's privilege statute of State A as the basis for his refusal to answer, noting that his relationship with his sources existed exclusively in State A. State B has no similar privilege statute.

The federal judge in State B, confronted with a choice-of-law problem relating to a privilege issue in a diversity case, should recognize that rule 501 and Samuelson direct him to resolve that issue as it would be resolved by the highest appellate court of State B. Let us assume that the court's examination of the decisions of that state court lead to the conclusion that State B would apply its own local law, which contains no privilege, but rather, compels the deponent to reveal his sources. Should the federal court in State B so rule? I think not.

Presumably, the underlying reason for the newsman's privilege in State A is to encourage reluctant sources to "open up" to newsmen, thus tending to assure a more informative press and a better informed citizenry. Since the relationship between the informants and the newsman existed exclusively in State A, that state would

119. See supra notes 100 & 107-10 and accompanying text.
120. See supra notes 113-18 and accompanying text.
121. The facts of this hypothetical (but not the local laws) are fashioned after In re Cepeda, 233 F. Supp. 465 (S.D.N.Y. 1964).
122. See supra notes 100 & 107-10 and accompanying text.
seem to have a significant interest in the application of its protective local law. The reason underlying State B’s local law—no newsman’s privilege—is, presumably, a determination that preserving the integrity of the judicial process requires the evidentiary availability of the identity of even confidential sources. Does that reason, by itself, create a significant interest on the part of State B? I believe the answer is no. State B is simply the deposition state, thus its role is merely ancillary to the role of State A. State B really has no inherent or self-serving need for the information sought from the deponent. Consequently, State B has no significant interest in the issue which would be furthered by the application of its own local law. Under Hague, application of State B’s local law by a State B court would violate both the full faith and credit and due process clauses. Application of that law by the federal “deposition” court sitting in State B would be similarly unconstitutional. In those circumstances, therefore, the federal court in State B should apply the newsman’s privilege law of State A and deny plaintiff’s requested order directing deponent to reveal his confidential sources.

To summarize, I acquiesce wholly in the Samuelson conclusion that a diversity court confronted with a choice-of-law privilege issue is required by rule 501 to resolve that issue precisely as it would be resolved by the highest appellate court of the state in which the district court sits, with the following caveat: so long as that state court would apply the privilege law of a state having a legitimate interest in the privilege issue thus resolved. Absent such an interest, the choice-of-law result would be unconstitutional and, therefore, neither binding on nor available to the diversity court.

VI. RULE 803(3) : THE STATE OF MIND EXCEPTION AND THE LIMITATION ON Hillmon

Rule 803(3) provides, in part, that a “statement of the declarant’s then existing state of mind” may be received over a hearsay objection. This rule, however, expressly excludes from the hearsay exception “a statement of memory of belief [offered] to prove the fact remembered or believed.” Any discussion of the state of mind

123. See supra notes 110-18 and accompanying text.
124. See id.
126. Fed. R. Evid. 803(3).
127. Id.
exception to the hearsay rule, and certainly one focusing on rule 803(3), must begin with the Supreme Court’s decision in Mutual Life Insurance Co. v. Hillmon. In Hillmon, the defendant insurance companies denied a claim made on a life insurance policy covering Hillmon. The defendants asserted that the body found at Crooked Creek, Kansas, was that of one Walters, rather than that of the insured. The Supreme Court held that two letters written by Walters, one to his fiancée and one to his sister, both indicating Walter’s intention to travel to Crooked Creek with Hillmon, should have been admitted as evidence tending to show that Walters’s body was the body found at Crooked Creek. The Court concluded that “[t]he letters in question were competent . . . as evidence that . . . [Walters] had the intention of going, and of going with Hillmon, which made it more probable that he did go and that he

129. Id. at 285, 87.
130. Walters’s letter written to his fiancée:

Wichita, March 1, 1879

Dearest Alvina: Your kind and ever welcome letter was received yesterday afternoon about an hour before I left Emporia. I will stay here until the fore part of next week, and then will leave here to see a part of the country that I never expected to see when I left home, as I am going with a man by the name of Hillmon, who intends to start a sheep ranch, and as he promised me more wages than I could make at anything else I concluded to take it, for a while at least, until I strike something better. There is so many folks in this country that have got the Leadville fever, and if I could not of got the situation that I have now I would have went there myself; but as it is at present I get to see the best portion of Kansas, Indian Territory, Colorado, and Mexico. The route that we intend to take would cost a man to travel from $150 to $200, but it will not cost me a cent; besides, I get good wages. I will drop you a letter occasionally until I get settled down; then I want you to answer it.

Id. at 288-89.
131. Walters’s letter written to his sister:

Wichita, Kansas

March 4th or 5th or 3d or 4th —
I don’t know — 1879

Dear sister and all: I now in my usual style drop you a few lines to let you know that I expect to leave Wichita on or about March the 5th, with a certain Mr. Hillmon, a sheep-trader, for Colorado or parts unknown to me. I expect to see the country now. News are of no interest to you, as you are not acquainted here. I will close with compliments to all inquiring friends. Love to all.

I am truly your brother,
FRED. ADOLPH WALTERS

Id. at 288.
132. Id. at 299-300.
133. See id. at 295-96.
went with Hillmon . . . .”134 There is an apparent conflict between that language and rule 803(3). The Court in Hillmon held that the state of mind declarations set forth in the letters were admissible not only to prove that the declarant, Walters, planned a particular itinerary, but also, that he planned to travel with Hillmon. With regard to that latter element, Walters must have been relying on his belief that Hillmon planned a similar itinerary. Rule 803(3) explicitly provides that a state of mind declaration may not be received to prove the existence of the fact believed by the declarant.

The Advisory Committee’s note to rule 803(3) provides: “The rule of [Hillmon, . . . . allowing evidence of intention as tending to prove the doing of the act intended, is, of course, left undisturbed.”135 The Report of the House Judiciary Committee, however, states that “the Committee intends that the Rule [803(3)] be construed to limit the doctrine of . . . Hillmon . . . so as to render statements of intent by a declarant admissible only to prove his future conduct, not the future conduct of another person.”136 Obviously, the House Committee’s Report, which is potent evidence of legislative intent, takes precedence over the pre-legislative Advisory Committee’s note. Rather clearly, then, rule 803(3) was intended to circumscribe the Hillmon opinion; Walters’s declarations today would be admissible as evidence of his future travel, but not that of Hillmon. Why did Congress find that limitation necessary?

Perhaps we should begin with a somewhat broader question: Why is the state of mind declaration treated as an exception to the hearsay rule? I believe the elements of competence, contemporaneousness and ingenuousness are the basis for this hearsay exception. As I explained several years ago:

[E]ach of us is “the world’s foremost authority” as to our own state of mind. Our manifestations of that state of mind, therefore, come from the most competent source possible, at least in terms of capacity to know the state of mind. If, in addition to recognizing that capacity, it is possible to negate substantially any error of recollection and any motive to be disingenuous in regard to the declaration manifesting the state of mind, the circumstances would bespeak trustworthiness in the most emphatic manner. Consequently, a declaration evidencing the declarant’s presently existing state of mind . . . made in circumstances where the declarant would have no

134. Id. (emphasis added).
135. FED. R. EVID. 803(3) advisory committee note.
reason to misrepresent his state of mind . . . would be an extraju-
dicial declaration resting on a substantial foundation of
trustworthiness.\footnote{137}

In \textit{Hillmon}, the declarant's statements regarding his own travel
plans were made contemporaneously with his state of mind and were
made to his fiancée and to his sister. Thus, those statements satisfy
adequately the three elements which form the basis for this hearsay
exception. The declarant's statements made in the letters regarding
Hillmon's travel plans, however, were based on what the declarant
\textit{believed} those plans to be. Obviously, Walters, the declarant, was
not an authority on Hillmon's state of mind; consequently, Walters
could have been mistaken in his belief. That is precisely the problem
Congress had to confront. There were, I think, two basic alternatives
available to Congress: (1) permit the state of mind declaration to
evidence another person's future conduct where the total evidence
indicates that, while there was a possibility that the declarant may
have been mistaken in his belief as to the other's plans, that possibil-
ity is very slight,\footnote{138} or (2) preclude the use of the state of mind dec-
laration to evidence another person's future conduct in all cases. As
is known, Congress chose the second alternative.\footnote{139} Congress was
most likely aware that

\begin{quote}
[t]he state of mind exception [is] . . . the most pernicious of the
many hearsay exceptions. The perniciousness arises from the poten-
tial capacity of the exception to consume the entire rule. After all,
in one way or another, every declaration to some extent evidences
the declarant's then existing state of mind. Were the exception
made applicable to every extrajudicial declaration, the hearsay rule
itself would virtually disappear.\footnote{140}
\end{quote}

Apparently, then, Congress deemed it necessary to circumscribe
\textit{Hillmon} to preserve the integrity of the hearsay rule.

Perhaps the most nearly perfect set of facts available to drama-
tize the difference between \textit{Hillmon} and rule 803(3) occurred in
\textit{United States v. Pheaster}.\footnote{141} Hugh Pheaster and Angelo Inciso ap-
ppealed their convictions of conspiring to kidnap 16-year old Larry
Adell. Inciso argued that the trial court had erred in permitting gov-

\begin{footnotes}
\footnote{138}{That would have been my own preference. \textit{See id.} at 258-61.}
\footnote{139}{\textit{See supra} note 136 and accompanying text.}
\footnote{140}{Seidelson, \textit{State of Mind}, \textit{supra} note 137, at 251-52 (footnote omitted).}
\footnote{141}{544 F.2d 353 (9th Cir. 1976), \textit{cert. denied}, 429 U.S. 1099 (1977).}
\end{footnotes}
ernment witnesses to testify that, shortly before his disappearance, Adell had told the witnesses "that he was going to meet Angelo at Sambo's North at 9:30 P.M. to 'pick up a pound of marijuana which Angelo had promised him for free.'" As the Ninth Circuit noted in Pheaster, Inciso's contention was "premised on the view that the statements could not properly be used by the jury to conclude that Larry did in fact meet Inciso in the parking lot of Sambo's North at approximately 9:30 P.M. . . . ." Let us attempt our own resolution of that contention. Under Hillmon, the state of mind declarations of Larry Adell might be admissible as evidence of both his future conduct and that of Angelo, since the conduct of both was related, as was the future conduct of Walters and Hillmon. Under rule 803(3), however, the state of mind declaration may not be used "to prove the fact . . . believed." Clearly, Adell's declarations indicated his belief as to what Angelo was going to do. Just as clearly, Adell was not an authority on Angelo's state of mind. Adell may have been mistaken in his belief that Angelo intended to meet him. Consequently, under the House Judiciary Committee Report, which provides that "statements of intent by a declarant [are] admissible only to prove his future conduct, not the future conduct of another person," the declarations of Adell would not be admissible to prove that Angelo in fact met Adell. Yet the Ninth Circuit affirmed Inciso's conviction, stating that "we cannot conclude that the district court erred in allowing the testimony concerning Larry Adell's statements to be introduced."

The court carefully reviewed Hillmon, rule 803(3), and the rule's pre-legislative and legislative history. Indeed, the court found that

[t]he notes of the House Committee on the Judiciary are significantly different [from the Advisory Committee's note.] The language used [by the House Committee] suggests a legislative intention to cut back on what that body also perceived to be the prevailing common law view, namely, that the Hillmon doctrine could be applied to facts such as those now before us.

142. United States v. Pheaster, 544 F.2d at 375.
143. Id.
144. Fed. R. Evid. 803(3).
146. Pheaster, 544 F.2d at 380.
147. Id.
Then why the affirmance? I think the answer lies in the language used by the court: “Although the new Federal Rules of Evidence were not in force at the time of the trial below, we refer to them for any light that they might shed on the status of the common law at the time of the trial.”

Apparently, the court concluded that rule 803(3), in force at the time of the Ninth Circuit’s decision, but not at the time of trial, was, for that reason, inapplicable.

Congress, however, provided the following language with respect to the applicability of the Federal Rules of Evidence:

> [T]he following rules shall take effect on the one hundred and eightieth day beginning after the date of the enactment of this Act. These rules apply to actions, cases, and proceedings brought after the rules take effect. These rules also apply to further procedure in actions, cases, and proceedings then pending, except to the extent that application of the rules would not be feasible, or would work injustice, in which event former evidentiary principles apply.

The Ninth Circuit did not cite to that language. Apparently, it did not recognize that rule 803(3) was applicable to the case before it, absent a judicial determination that such application “would not be feasible, or would work injustice.” That is certainly a surprise.

Perhaps even more surprising, however, is the conclusion asserted by the Second Circuit in United States v. Moore. The court stated:

> [Appellant] contends that Fed.R.Evid. 803(3) was approved by Congress with the understanding that it be construed to limit the Hillmon rule to render statements of intent by a declarant admissible only to prove his future conduct, not that of a third person. . . . As the Government points out, however, the Advisory Committee Note to Rule 803(3) left the Hillmon doctrine “undisturbed,” and the courts have held that Hillmon declarations of intent are admissible as evidence of actions of the declarant and others. See United States v. Stanchich, 550 F.2d 1294, 1297-98 n. 1 (2d Cir. 1977); United States v. Pheaster, 544 F.2d 353, 379-80 (9th Cir. 1976), cert. denied sub nom. Inciso v. United States, 429 U.S. 1099. . . .

148. Id. at 379.
150. 571 F.2d 76 (2d Cir. 1978).
151. Id. at 82 n.3 (emphasis in original) (citations omitted).
That assertion is surprising for several reasons. Given the apparent inconsistency between the Advisory Committee's note and the House Judiciary Committee Report, the latter would seem to be the more significant indicator of legislative intent. That conclusion would seem to take on an a fortiori significance, given the specificity of the language of the Committee Report: "[T]he Committee intends that the Rule be construed to limit the doctrine of . . . Hillmon, . . . so as to render statements of intent by a declarant admissible only to prove his future conduct, not the future conduct of another person." 152

Second, the cases cited by the Second Circuit in support of its conclusion in Moore hardly constitute persuasive authority. As was previously discussed, in Pheaster the Ninth Circuit applied the law as it existed prior to the effective date of the Rules. Indeed, the Pheaster opinion indicates that the result might have been different had rule 803(3) been applied. United States v. Stanchich, 153 the other case cited in Moore, hardly supports Moore's conclusion. In Stanchich, the Second Circuit opined:

The exception allowing the admission of a declaration of a state of mind not simply to show the state of mind but a subsequent act of the declarant is, of course, the rule of . . . Hillmon, . . . which the Advisory Committee Note to Federal Rule of Evidence 803(3) expressly left undisturbed, and which the House of Judiciary Committee Report . . . meant to "limit" only by rendering statements of intent admissible solely to prove the declarant's future conduct, not the future conduct of another. 154

Finally, and perhaps most surprising, the facts of Moore did not require a determination of the scope of rule 803(3) and the court recognized that fact. The defendants, Moore and Burnell, were charged with "conspiracy to kidnap [Henry "Buster"] Huggins," with the "actual kidnapping," with "conspiracy to transmit in interstate commerce a communication containing a demand for ransom for Huggins' release," and with "actually transmitting in interstate commerce such a ransom demand." 155 To prove that the defendants "willfully transported [Huggins] in interstate or foreign commerce," 156 the government introduced evidence of a declaration al-

153. 550 F.2d 1294 (2d Cir. 1977).
154. Id. at 1298 n.1 (emphasis added).
155. Moore, 571 F.2d at 78 (footnote omitted).
156. Id. at 81 (quoting 18 U.S.C. § 1201 (a)(1)(1976)).
allegedly made by Burnell to his girlfriend, to the effect that Moore "would have somebody take [Huggins] out of the states." The trial court received the declaration "as the statement of a conspirator, made in furtherance of the conspiracy and, on the authority of . . . Hillmon . . . , as a statement of intent admitted to show that the intended act was subsequently performed."

Let us assume, for the sake of analysis, that the declaration was properly admissible as a coconspirator declaration. That would indicate that: (1) the government had introduced appropriate independent evidence of a conspiracy between Burnell and Moore; (2) Burnell's declaration was made while the conspiracy was ongoing; and (3) the declaration was made in furtherance of the conspiracy. In those circumstances, would the declaration be admissible to prove the future conduct of Moore? I think the answer must be yes. Assuming the existence of a conspiracy between Burnell and Moore, the latter would be deemed to have impliedly authorized the former to speak on Moore's behalf, even with regard to the latter's future conduct. Thus, the declaration would have been admissible to evidence Moore's future conduct under rule 801(d)(2)(E), and reference to rule 803(3) would have been unnecessary.

Suppose, however, that Burnell's declaration was not a coconspirator's declaration—perhaps, because it was not made in furtherance of the conspiracy—would the declaration then be admissible under rule 803(3) to evidence the future conduct of Moore? On that point, the Second Circuit concluded that no decision was required because, even assuming the admissibility of the declaration, and even assuming its admissibility to prove the future conduct of Moore, the declaration was "not sufficient . . . to prove that any actual interstate transportation of Buster Huggins ever occurred." Therefore, the court concluded that "we need not re-examine [the trial court's] decision to admit [Burnell's declaration]." Ultimately, the court's language indicating that Burnell's declaration could evidence the future conduct of Moore under rule 803(3) turns out to be pure dictum. It seems unfortunate that the court saw fit to assert its negating

157. Id. at 79, 81.
158. Id. at 81.
159. Id.
161. See supra text accompanying note 37. In those circumstances, however, I believe that rule 104(b) should be deemed applicable.
162. Moore, 571 F.2d at 82 (emphasis in original).
163. Id.
reading of the House Judiciary Committee Report when that reading was unnecessary to the court's decision. The misfortune is enhanced by a realization that today's dictum often becomes tomorrow's decision. Other circuits, confronted with the problem, have given effect to the restrictive language appearing in the House Judiciary Committee Report. I hope that courts facing the issue in the future will give appropriate effect to the rather clear congressional intent reflected in the House Judiciary Committee Report.

VII. Rule 804(b)(2) and "Dying Declarations"

Prior to the enactment of the Rules, the traditional judicial treatment of dying declarations was to admit them only in homicide prosecutions. Rule 804(b)(2) dramatically broadened the applicability of the dying declaration exception to the hearsay rule by making such declarations admissible "[i]n a prosecution for homicide or in a civil action or proceeding." The sound rationale for that change is suggested in the Advisory Committee's note to rule 804(b)(2):

164. The Fourth Circuit, commenting on the House Judiciary Committee Report, stated: "Approving the Rule in its submitted form, the Congress directed . . . that it be construed to confine the doctrine in Hillmon so that statements of intent by a declarant would be admissible only to prove the declarant's future conduct, not the future conduct of others." United States v. Jenkins, 579 F.2d 840, 843 (4th Cir.) (emphasis in original) (citations omitted), cert. denied, 439 U.S. 967 (1978). The dissent in Jenkins noted: "The hearsay exception for statements of a declarant's existing state of mind is applicable only to admit proof of the declarant's future conduct, not that of third persons." Id. at 845 (Widener, J., dissenting).

The First Circuit noted with respect to this issue: "[T]he statements that this declarant. . . is claimed to have made concerning his intention of seeing [the] defendant . . . would not be admissible against [the defendant]. See Rule 803(3), Fed. R. Evid., 28 U.S.C.A., note to paragraph (3)." Gual Morales v. Hernandez Vega, 579 F.2d 677, 680 n.2 (1st Cir. 1978).

In another decision, even the Second Circuit viewed this as an open question: "Are the Senate and the President or, for that matter, the members of the House who were not on the Committee to be considered to have adopted the text of the Rule, as glossed by the Advisory Committee's Note that Rule 803(3) enacted Hillmon, or the House Committee's 'construction' which, in effect, seriously restricts Hillmon?" United States v. Mangan, 575 F.2d 32, 43 n.12 (2d Cir.), cert. denied, 439 U.S. 931 (1978).

165. The first of these [arbitrary limiting rules] is the rule that the use of dying declarations is limited to criminal prosecutions for homicide. . . . [N]early all courts . . . now refuse to admit dying declarations in civil cases, whether death actions or other civil cases, or in criminal cases other than those charging homicide as an essential part of the offense . . . .

The concept of necessity limited to protection of the state against the slayer who might go free because of the death of his victim, spins out into another consequence. This is the further limitation that not only must the charge be homicide, but also the defendant in the present trial must be charged with the death of the declarant.

McCORMICK'S EVIDENCE, supra note 2 § 283, at 682 (2d ed. 1972) (footnotes omitted).

166. Fed. R. Evid. 804(b)(2) (emphasis added).
The common law required that the statement be that of the victim, offered in a prosecution for criminal homicide. While the common law exception no doubt originated as a result of the exceptional need for the evidence in homicide cases, the theory of admissibility [—that powerful psychological pressures are present to assure trustworthiness—] applies equally in civil cases.\(^{167}\)

Given that dramatic broadening of the scope of the admissibility of such declarations, I anticipated that rule 804(b)(2) would promptly and frequently be applied in wrongful death actions brought in federal courts. I envisioned dozens of cases in which plaintiff's counsel would offer into evidence a decedent's dying declaration tending to inculpate the defendant, exculpate the decedent or both. In fact, I anticipated some personal injury actions in which plaintiff's counsel would offer the declaration of the surviving, but gravely injured, plaintiff that tended to inculpate the defendant or exculpate the plaintiff or both. After all, under rule 804(b)(2), "[u]navailability is not limited to death."\(^{168}\) The prior declaration of a plaintiff "unable to be present or to testify at the hearing because of... then existing physical or mental illness or infirmity"\(^{169}\) would be admissible.\(^{170}\)

My expectations were predicated on three factors. First, it is clear that rule 804(b)(2) was intended to encompass the aforementioned use of "dying declarations." Second, every plaintiff's lawyer must be sensitive to the enormous impact that "the last words" of a decedent or a gravely injured plaintiff are likely to have on a jury. Finally, such use had been attempted, albeit unsuccessfully, in state courts prior to the enactment of the Federal Rules of Evidence.\(^{171}\)

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167. Fed. R. Evid. 804(b)(2) advisory committee note. The Advisory Committee explained that, "[w]hile the original religious justification for the exception may have lost its conviction for some persons over the years, it can scarcely be doubted that powerful psychological pressures are present." Id. (citations omitted).

168. Id.


170. See Fed. R. Evid. 804.

171. See, e.g., Phillips v. Dow Chem. Co., 151 So. 2d 199 (Miss. 1963) (wrongful death action; dying declarations are inadmissible in other than homicide cases); Cummings v. Illinois Cent. R.R., 364 Mo. 868, 880-81, 269 S.W.2d 111, 119-20 (1954) (controversy arose as to whether the decedent's declaration was a true "dying declaration"; although the court "assum[ed] without deciding" that the declaration fit that category, the court ruled it inadmissible in the civil action); see also 31A C.J.S. § 238, at 643 & n.12 (1964) ("It has been generally held that dying declarations are not admissible in civil cases... "). For a further discussion of Cummings, see infra text accompanying notes 172-82.
In *Cummings v. Illinois Central Railroad*, the decedent sustained a fatal work-connected injury. A wrongful death action was brought against the employer-railroad under the Federal Employers’ Liability Act. Under that act, there exists concurrent jurisdiction between federal and state courts. The plaintiff’s counsel elected to sue in state court. The decedent in *Cummings* had died from burns he received while starting a fire at work. The plaintiff alleged that the defendant had negligently permitted gasoline to be stored in a can intended for kerosene. The defendant asserted that the gasoline which had caused the fire had not come from a container maintained by the defendant. A witness called by the plaintiff testified to a purported dying declaration made by the decedent which indicated that the gasoline had come from a kerosene can maintained by the defendant. Judgment for the plaintiff was reversed by the appellate court, which concluded that the dying declaration exception was not available in civil cases. If the same case arose today, and if plaintiff’s counsel opted for a federal court, the decedent’s declaration, assuming it was a dying declaration, would be admissible.

Moreover, there is reason to believe that the federal courts would be delighted to embrace the enlarged application of 804(b)(2). Even before the Rules were enacted, some of the courts evidenced their discomfort with the conclusion that a dying declaration, admissible in a homicide prosecution where the defendant’s liberty or even his life was at stake, was inadmissible in civil litigation. Indeed, in *United Services Automobile Association v. Wharton*, the trial court admitted into evidence the dying declaration of an automobile passenger indicating that the driver, the declarant’s husband, had intentionally caused the fatal collision.

172. 364 Mo. 868, 269 S.W.2d 111 (1954).
173. Id. at 871, 269 S.W.2d at 114.
175. Id. at § 56 (1972).
176. *Cummings*, 364 Mo. at 871-72, 269 S.W.2d at 114.
177. *See id.* at 872, 269 S.W.2d at 114.
178. *See id.* at 873-74, 882-83, 269 S.W.2d at 115-16, 121-22.
179. *See id.* at 873, 269 S.W.2d at 115.
180. Id. at 883, 269 S.W.2d at 122.
181. *See id.* at 881-82, 269 S.W.2d at 120-21.
184. Id. at 258, 260.
Based on that declaration, the court concluded that the driver’s liability insurance policy was inapplicable to the event.\textsuperscript{185} Four years later, the Fourth Circuit concluded that a decedent’s dying declaration, indicating the cause of a fatal fire, “was probably admissible under...Wharton.”\textsuperscript{186}

What surprises me is that I have found no post-Rules civil cases in which “a statement made by a declarant while believing that his death was imminent, concerning the cause or circumstances of what he believed to be his impending death,”\textsuperscript{187} was offered in evidence.\textsuperscript{188} No wrongful death actions exist, nor personal injury actions. Why? One possible explanation, of course, is that no civil actions involving such a declaration have gone to trial in a federal court since the effective date of the Rules. I confess, however, that it is, difficult for me to accept that explanation. There must be a significant number of wrongful death actions tried in federal courts every year, some there as federal causes of action, and others as diversity cases. In some of those cases, the decedent, speaking in extremis, is likely to have uttered something concerning the cause of his death which either inculpates the eventual defendant or exculpates himself. I recognize that the number of personal injury actions in federal courts, either as federal causes of action or diversity cases, in which the

\textsuperscript{185.} Id. at 260.
\textsuperscript{186.} Tug Raven v. Trexler, 419 F.2d 536, 547 (4th Cir. 1969).
\textsuperscript{187.} FED. R. EVID. 804(b)(2).
\textsuperscript{188.} Apparently, my inability to find a post-Rules federal civil action in which a “dying declaration” was offered in evidence is not unique. In J. WEINSTEIN, J. MANSFIELD, N. ABRAMS & M. BERGER, CASES AND MATERIALS ON EVIDENCE 842 n.5 (7th ed 1983), the authors note that rule 804(b)(2) makes dying declarations admissible in civil actions but cite no cases. In E. GREEN & C. NESSON, PROBLEMS, CASES, AND MATERIALS ON EVIDENCE 343-45 (1983), the authors quote rule 804(b)(2) and pose a wrongful death action hypothetical, but cite no such actual case. In Epstein, Joseph & Saltzburg, supra note 22, at 295, the discussion of rule 804 contains no cases under 804(b)(2). In M. GRAHAM, EVIDENCE: TEXT, RULES, ILLUSTRATIONS AND PROBLEMS 264 (1983), the author notes the applicability of rule 804(b)(2) to civil actions but cites no case. In R. LEMPERT & S. SALTZBURG, A MODERN APPROACH TO EVIDENCE 482-85 (2d ed. 1982), the authors discuss the extension of the dying declaration exception to civil cases, cite rule 804(b)(2), but cite no federal civil action. In E. CLEARY & J. STRONG, EVIDENCE, CASES, MATERIALS, PROBLEMS 662-63 (3d ed. 1981), the authors cite rule 804(b)(2), refer to its applicability in civil actions, but cite no federal civil case. In C. MCCORMICK, F. ELLIOTT & J. SUTTON, JR., CASES AND MATERIALS ON EVIDENCE 814 n.2 (5th ed. 1981), the authors refer to dying declarations in civil cases, cite United Servs. Auto. Ass’n v. Wharton, 237 F. Supp. 255 (W.D.N.C. 1965), see supra text accompanying notes 183-85, but cite no post-Rules federal civil action. In G. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE 258-59 (1978), the author quotes rule 804(b)(2), notes that it applies “to any civil case,” but cites no federal civil action. Still, I expect and hope that some of those who read this article will be aware of such cases and will be kind enough to bring them to my attention.
plaintiff is physically or mentally unable to testify at trial and, while still able to speak, uttered a declaration inculpating the defendant or exculpating himself, is likely to be substantially lower than the number of such wrongful death actions. Combining both types of actions, however, it becomes difficult to accept the conclusion that no opportunity to utilize rule 804(b)(2) in a civil case has arisen since the effective date of the Rules. Then what explanation can there be for the omission?

It is possible, I suppose, that lawyers, long accustomed to having “dying declarations” received in evidence only in homicide prosecutions, have not recognized the availability of that hearsay exception in civil actions in federal courts. I should emphasize that the possibility is simply a product of my own speculative efforts to explain the absence of civil actions in federal courts in which “dying declarations” have been offered in evidence. That possibility may be enhanced slightly with regard to those lawyers practicing in the many states which retain the traditional limited role for such declarations. There may be some inclination toward assuming that, if the declaration is inadmissible in a state court, it is likely to be inadmissible in a federal court. The truth, of course, is that the broadened availability of the declaration in rule 804(b)(2) may (and perhaps should) be a critical factor in plaintiff’s counsel’s opting for a federal court in every instance where a choice exists, not only in federal actions, but in diversity cases as well. The admissibility of such a declaration could make the difference between a directed verdict for the defendant and a legally sufficient case for the plaintiff. At the very least, it could make an already sufficient case enormously more persuasive to the fact finder, judge or jury. The time has come for plaintiffs’ lawyers to start utilizing rule 804(b)(2).

There is a second surprise lurking in rule 804(b)(2), one generated by a Supreme Court opinion having nothing to do with a dying declaration. For years, state and federal courts have assumed that the receipt in evidence of a dying declaration which inculpates the defendant in a homicide prosecution does not violate the defendant’s sixth amendment right of confrontation, even though the accused has no opportunity to confront and cross-examine the declarant.


190. One commentator notes: “The confrontation clause never has been read so literally as to preclude generally the use of hearsay evidence in criminal trials. . . . Even admission
That assumption has rested primarily on the ancient opinion of the Supreme Court in Mattox v. United States.\textsuperscript{191} In Mattox, however, the Court held that the homicide victim’s dying declaration, \textit{exculpating} the accused, was admissible.\textsuperscript{192} Obviously, where the accused offers the exculpating dying declaration in evidence, his sixth amendment confrontation right is not implicated. Still, the Court in Mattox did say: “Dying declarations are admissible on a trial for murder as to the fact of the homicide and the person by whom it was committed, in favor of the defendant \textit{as well as against him}.”\textsuperscript{193} That italicized dictum became the foundation for the apparently unanimous view that the receipt in evidence of such a declaration does not do violence to the defendant’s confrontation right.

Today, as the result of a much more recent Supreme Court opinion, a firmer foundation exists. In Ohio v. Roberts,\textsuperscript{194} the Court held that, where the declarant is unavailable\textsuperscript{195} through no fault or neglect attributable to the prosecution,\textsuperscript{196} and the declaration constitutes “a firmly rooted hearsay exception”\textsuperscript{197} or possesses “particularized guarantees of trustworthiness,”\textsuperscript{198} the declaration may be received in evidence against the accused without violating his confrontation right.\textsuperscript{199} Obviously, the unavailability of a homicide victim is not likely to be attributable to prosecutorial fault or neglect. Just as obviously, a dying declaration is a firmly rooted hearsay exception. Apparently then, Roberts, while dealing with preliminary hearing testimony rather than a dying declaration,\textsuperscript{200} converts the dictum of Mattox into something much closer to a decision that the accused’s confrontation right does not bar the receipt in evidence of an inculpating dying declaration.

\begin{quote}
against the accused of dying declarations apparently is permissible . . . .”
\end{quote}

G. Lilly, \textit{supra} note 188, at 274 (1978) (footnote omitted).

191. 146 U.S. 140 (1892).
192. \textit{Id.} at 152-53.
193. \textit{Id.} at 151 (emphasis added).
195. \textit{See} Fed. R. Evid. 804(a) (“definition of unavailability”).
196. \textit{See} Ohio v. Roberts, 448 U.S. at 75-77.
197. \textit{See id.} at 66.
198. \textit{See id.}
199. \textit{See id.}
VIII. CONCLUSION

Of the surprises noted in this article, some seem to be the product of a less than ideal working relationship between Congress and the courts with regard to the Federal Rules of Evidence. I believe that the courts have "used" rule 104(a) to subvert the apparent applicability of rule 104(b) to coconspirator declarations in order to eliminate a judicial annoyance with jury "second-guessing" of judicial rulings on admissibility. As I discussed earlier, I do not believe that the annoyance is well-based. Rather, I believe that the problem rests on a judicial overuse of conditional relevancy prior to the effective date of the Rules and a judicial overreaction after the effective date. That overreaction could be remedied by a Supreme Court decision holding rule 104(b) applicable to those coconspirator declarations which are only conditionally relevant.

With regard to rule 301 and presumptions in federal actions, both Congress and the courts can be faulted. Clearly, Congress could have enacted a rule expressly creating a rebuttable presumption and thus eliminated any ambiguity arising out of either the less than explicit language of the rule or the potential inconsistency between the language of the rule and that of the Conference Committee Report. It is equally clear that the Court in Burdine, with a more explicit reliance on rule 301, could have eliminated the ambiguity without changing either the result achieved or any other portion of the opinion. That the Court did not rely more explicitly on rule 301 implies that the Court may have overlooked the direct applicability of the rule and Congress's rather clear intention that, "[i]n all civil actions . . . not otherwise provided for by Act of Congress, or by these rules," the rule is to apply. That the Court overlooked the direct applicability of rule 301 makes it a little less surprising that a circuit court may have overlooked the rule entirely in a res ipsa case. Traditionally, federal courts fashioned judicial rules governing presumptions and, admittedly, old habits are hard to change. But when Congress, having the legislative authority to fashion rules of evidence for federal courts, exercises that authority, the federal courts are bound to comply with the will of Congress. I believe Congress has adequately (if not perfectly) expressed its will in rule 301; the obligation is on the courts to comply.

The apparent reluctance of the Second Circuit in Moore to extend significance to the explicit language of the House Judiciary

201. Fed. R. Evid. 301.
Committee limiting *Hillmon*, and the same circuit’s characterization of the issue as an open one in *Mangan*, imply to me a reluctance to abandon the traditional judicial treatment of state of mind declarations, even in the face of the express limiting language found in the legislative history of Rule 803(3). As with rule 301, I believe that the courts have an obligation to comply with the congressional decision, even if that decision alters the traditional judicial treatment. In enacting the Federal Rules of Evidence, Congress had no obligation to perpetuate judicial rules of evidence; had that been the case, the Rules would have been superfluous. Rather, the obligation is on the courts to effectuate the will of Congress. Fortunately, the First Circuit in *Morales* and the Fourth Circuit in *Jenkins* recognized that obligation. Emulation of their reaction by the other circuits would now seem appropriate.

In the Eighth Circuit’s opinions declining to apply rule 407 to strict liability cases, I see no judicial reluctance to comply with the will of Congress; rather, it seems to me, the Eighth Circuit arrived at a conclusion not clearly inconsistent with the Rule and having an articulated rationale. And, if I read *De Luryea* correctly, that circuit may be in the process of distinguishing away its own rationale. Similarly, in the nonuse of dying declarations in civil actions under rule 804(b)(2), there is no evidence of a judicial reluctance to comply with the will of Congress. Rather, the problem seems to be one of counsel not having afforded the courts opportunities to receive dying declarations in civil actions. And in *Samuelson* and the opinions accepting that case’s application of *Klaxon* to privilege issues arising in diversity cases, the courts appear to have displayed a high level of sensitivity to the decision made by Congress in rule 501.

Overall, I believe the Federal Rules of Evidence have had a beneficial effect in court and in the classroom. I think that effect can be enhanced if the federal courts strive to achieve a conscious awareness that, to the extent that the Rules may have changed traditional evidentiary rulings with regard to presumptions and the scope of *Hillmon*, those traditional rulings were intended to be supplanted. I think that the beneficial effect would be enhanced, too, if the Supreme Court were to demonstrate by decision that rule 104 was not intended by Congress to make every coconspirator declaration independently relevant. Add to that recipe a growing awareness by counsel of the admissibility of dying declarations in civil actions, and the next decade under the Rules should be even better than the first near decade.