Breaking the Product Identification Chain

Excluding Hearsay Evidence and Expert Opinion

By Edward P. Tugade and James V. Weixel

Drawing from certain authorities and principles, defense counsel will have the ammunition to exclude hearsay product identification evidence, and ultimately, in some cases, a complete defense to a plaintiff's causation theory.

Plaintiffs in product liability cases often try to establish product identification with testimony about what a witness remembers about the contents of documents or other printed material. Such evidence is clearly hearsay, but is often portrayed as personal knowledge. An industrial laborer might testify that he or she often saw trucks bearing a supplier's logo at a jobsite, and thus he or she knew that the supplier delivered a hazardous material. Or a plaintiff might put up an industry expert to state that since purchasing records showed that a manufacturer's drill bits were supplied to a factory, the manufacturer must have been responsible for injury caused by a shattered bit of unknown make. Whatever the context, plaintiffs will try to bridge gaps in their causation theory with hearsay evidence in this manner. Several cases, however, provide a recent bulwark against such efforts.

Exclusion of Hearsay Testimony About the Contents of Documents

California appears to have finally put the brakes on the admission of hearsay testimony about what shipping or purchase documents supposedly stated about a product. Last October, in *Hart v. Keenan Properties, Inc.*, 29 Cal. App. 5th 203 (2018), the California Court of Appeal in San Francisco held that it was a violation of the hearsay rule for a plaintiff who claimed that he developed asbestos-related mesothelioma to offer the testimony of his foreman about the contents of invoices and shipping documents to prove that a particular supplier, Keenan, provided asbestos-containing materials to his jobsites.

The issue arose when the foreman testified that he saw shipping records indicating that Keenan had supplied Johns-Manville asbestos-containing Transite pipe to the plaintiff's jobsites in the McKinleyville, California, area in the 1970s. The fore-

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man could not recall how Keenan's name appeared on the records, but he did recall seeing "their K and stuff" on the records. He claimed that he knew that Keenan had supplied the JM pipe to which the plaintiff was exposed because (1) he checked in all the supplies received for the plaintiff's jobsites, (2) he saw the JM logo stamped on the pipes that the plaintiff used and worked with on the jobs; and (3) Keenan supplied all of the pipe that the company used in the McKinleyville area. *Hart,* 29 Cal. App. 5th at 205–06. The records themselves, however, were never offered into evidence at trial. *Id.* at 213. A Keenan representative identified an exemplar invoice as carrying the Keenan logo, which featured a prominent "K" on it. However, the representative testified that the company had no record of ever selling JM Transite pipe to the plaintiff's employer, nor to any purchaser that used the pipe in McKinleyville. *Id.* at 206.

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Keenan moved in limine to exclude the foreman's testimony about the supposed shipments of JM Transite pipe by Keenan to the plaintiff's jobsites. Keenan argued that the testimony about the content of the documents was hearsay since it was based on out-of-court statements (the content of the records) that were not admitted as evidence. Hart argued that his testimony was not hearsay because the foreman had testified from his own personal knowledge, rather than about the content of the invoices. The trial court denied the motion.

The California Court of Appeal held that the foreman's testimony about the content of the documents should have been excluded. The court observed that the information in the shipping documents about the products' supposed source "was an out-of-court statement used to show [that] Keenan supplied asbestos-containing pipes; the statement was offered for the truth of that matter." *Id.* at 212 (citing *Pacific Gas & Elec. Co. v. G.W. Thomas Drayage etc. Co.*, 69 Cal.2d 33, 42 (1968) ((holding that "invoices, bills, and receipts… are hearsay")). The court took no issue with the trial court's holding that the foreman's testimony about seeing a JM logo stamped on a piece of pipe was not barred by the hearsay rule, because it was personal recollection about what appeared *on the product itself.* However, that analysis clearly did not apply to *documents* purportedly containing the name of the product's *supplier,* but which were not admitted evidence. *Hart,* 29 Cal. App. 5th at 212. This distinction meant that "[the foreman's] testimony about the identity of the supplier of the pipe was based on hearsay" and was thus inadmissible.

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Having arisen in asbestos litigation, *Hart* will see its effects felt most heavily in that arena, at least in California. Both authors of this article have decades of experience defending asbestos manufacturers, suppliers, and premises owners, and we have seen countless instances in which a plaintiff avoided summary judgment by offering a declaration or deposition testimony from a co-worker or supervisor who gave vague indications of having seen a logo or other printing on jobsite records. Such evidence is often embellished with testimony—usually solicited by plaintiffs' counsel through blatantly leading examination—such as "I can't remember specifically, but I know it was there," or "I would assume so, because that's how every job was."

Such testimony is exactly what *Hart* now prohibits in California. Defense counsel can thus expect to see far fewer instances in which hearsay testimony about what a witness remembers about the contents of records will be allowed into evidence. In fact, the trial judge in *Hart* was principally responsible for the management of asbestos cases in Alameda County (which includes Oakland, a favorite venue for asbestos plaintiffs), and was known by the defense bar for giving short shrift to hearsay objections to testimony such as the testimony encountered in *Hart.* The California Court of Appeal's plain and direct holding is expected to correct that course, and to make clear that hearsay and other unfounded and inadmissible statements will no longer be cognizable.

Hart joins cases from other jurisdictions in which witnesses' product identification testimony, based on documents that are not admitted into evidence, has been excluded as hearsay. For instance, in *Sternhagen v. Dow Co.*, 108 F. Supp. 2d 1113 (D. Mont. 1999), the court held that a plaintiff's product identification testimony based on a label on herbicide that he mixed as a teenager in the 1940s was hearsay and thus inadmissible to prove his exposure to the defendant's product. And in *Sherin v. John Crane-Houdaille, Inc.,* 47 F. Supp. 3d 280 (D. Md. 2014), the court allowed a plaintiff to describe a manufacturer's name printed on a chemical container. However, the court did not permit the plaintiff to testify about what the ingredients inside the container actually were, ruling that such testimony was intended to prove the truth of the matter asserted in the out-of-court statements printed on the label and was thus hearsay. Id. at 290 (citing *Reemer v. State*, 825 N.E.2d 1005, 1007–09 (Ind. 2005)).

In other cases, courts have not addressed the hearsay aspects of such testimony, but they consistently have excluded testimony about the content of a product based on what the witness read or heard from other sources. *See, e.g.*, *Goldman v. Johns-Manville Sales Corp.,* 33 Ohio St.3d 40 (1987) (holding that a product's asbestos content cannot be established through lay witness's testimony about what products he saw at jobsites or what he heard about them

from other workers). Even those cases reinforce the same basic principle as the hearsay cases: that a witness's testimony must be based on personal knowledge, not secondhand information from other people or documents that are not admitted evidence.

Guidance can also be drawn from the rule's application in criminal cases, some having applied the rule more strictly than others. In one instance, a conviction for inhalant abuse was overturned on the grounds that the prosecution could not rely on the mere listing of toluene as an ingredient in the label of a spray paint can to establish that a defendant intentionally inhaled the substance. *Ledyard v. State,* 23 Ga. App. 237 (1999). In another, the Indiana Supreme Court held that testimony about a product label's list of ingredients was hearsay, but the court ultimately found it admissible under the state's hearsay exception for "market reports" or compilations of information relied on by experts. *Beemer,* 835 N.E.2d at 1007–09 (construing Ind. R. Evid. 803(17)).

Some states, however, have admitted such labeling information into evidence as proof that the product contained a controlled substance, on the basis that such labeling is required by federal and state laws and is thus generally trustworthy. *See, e.g.*, *Commonwealth v. Harvey,* 446 Pa. Super. 395 (1995) (alcoholic beverage) *In re Michael G.,* 19 Cal. App. 4th 1674 (1993) (toluene). Of course, as with most every hearsay case, the rulings differed due to variances in local law and the different purposes for which the hearsay testimony was being offered.

Someone might think that this problem is less common than it is, because the metes and bounds of the hearsay rule are fairly familiar to most litigators and judges. However, it is the authors' experience that testimony about ingredient listings on labels, products described in shipping documents, and the like is routinely offered by plaintiffs' attorneys to prove those facts *without* attempting to admit the actual label or document into evidence. The principle is so common that, in most instances, the resulting appellate opinion goes unpublished, meaning that it cannot be cited (at least in California), and it is thus of no instructional value. Defense practitioners should therefore be ready to use their local evidentiary rules to keep such unsupported hearsay testimony away from the jury's consideration.

Effect of Excluding Hearsay Testimony on Plaintiffs' Expert Opinions

The rule espoused by *Hart* and other cases cited above can also serve to cut off another tactic used by the plaintiffs' bar in product cases, especially toxic torts, in which the plaintiff offers the opinion testimony of a purported expert to fill in holes in the plaintiff's theory of product identification.

In asbestos litigation and other toxic tort cases, the threshold element of a plaintiff's case is the requirement to prove exposure to a particular defendant's hazardous product. As many plaintiffs' allege exposures from decades ago that involved the products of long-defunct manufacturers, records that the manufacturers provided such products to the plaintiffs' jobsites—as well as witnesses who can authenticate or explain them—are often long gone. Even more recent records may have been destroyed through disaster or just ordinary document retention policies. This leaves plaintiffs or their successors with no means of identifying a particular hazardous material as having been at a worker's jobsite, and thus causing that plaintiff to be exposed to harm.

To complete the chain of causation, plaintiffs resort to using a product identification "expert" to testify that he or she knew the offending product to have been at a jobsite, based on personal recollection of the working environment and the contractors, materials, or suppliers used during the relevant timeframe. For example, in asbestos litigation, one recurring "expert" offered by plaintiffs is a former worker at the Long Beach Naval Shipyard and other maritime facilities. The worker typically testifies—or more accurately argues—that he knew that a particular product was in use somewhere at Long Beach Naval Shipyard while a plaintiff worked there, because the worker recalled seeing records, trucks, or workers from particular suppliers while he was there, and he knew that those suppliers provided asbestos-containing products to the shipyard. On occasion, the worker's testimony is rejected by trial courts. But more often than not, it is accepted as competent and founded in personal knowledge.

Hart stands to put an end to, or at least some limits on, similar testimony by such plaintiffs' experts. As *Hart* makes clear, testimony about the content of delivery records, or about logos or writing on the sides of vehicles, is inadmissible hearsay. Expert witnesses have historically been given a wide berth to rely on hearsay as a basis for their opinions, because professionals often rely on the knowledge of others to reach their own conclusions. *See, e.g.*, *People v. McDowell,* 54 Cal. 4th 395, 429 (2012). It is through this mechanism that product identification testimony from such purported experts has typically been proffered.

Several courts have restricted such testimony, however. In *People v. Sanchez,* 63 Cal. 4th 665 (2016), the Supreme Court of California held that an expert could not rely on hearsay to relate case-specific facts about which the expert has no independent knowledge. The court acknowledged that expert opinion testimony is often elicited through the use of hypothetical questions, in which the expert witness is asked to assume that certain facts are true. That is permissible, however, only if some independent, competent evidence of those facts exists. If a hypothetical is based on case-specific facts that exist only in hearsay form, however, the expert cannot be asked to assume that those facts are true. *Sanchez,* 63 Cal. 4th at 676–77. The effect of *Sanchez* is thus to prevent expert witnesses from offering opinion testimony based on *case-specific* facts that are set forth in hearsay evidence.

Sanchez was a criminal matter, and thus the court concentrated heavily on the implications of the Confrontation Clause in considering the bounds that should be applied to expert opinions and their reliance on out-of-court statements. *Id.* at 679–82. However, the *Sanchez* court held as a general principle that opinion testimony, to the extent that it is based on hearsay, is merely a mechanism for the offering party to put such inadmissible matters before the jury. This is because by offering those matters as support for the soundness of the expert's conclusions, the jury is necessarily being asked to assume that *those matters are true.* That, of course, is in direct conflict with the basic nature and purpose of the hearsay rule. Therefore,

the court held, an expert may not express an opinion that is based on case-specific facts that are hearsay in nature. *Id.* at 684.

Since *Hart* did not involve *expert* testimony, but merely the testimony of a *percipient* witness, it did not discuss the limitations set down in *Sanchez.* However, *Hart* did hold that testimony regarding the content of shipping records, logos, or other printed material when those items are not admitted evidence, and which is offered to prove that a certain company's products were at a jobsite, is plainly inadmissible hearsay. Such evidence was being offered in *Hart* to prove case-specific facts—that being to identify the product allegedly provided by a particular supplier at a plaintiff's jobsite, and to which he was allegedly exposed. In asbestos and other litigation, plaintiffs often seek to establish that proof, in turn, through supposedly "expert" testimony, in addition to percipient lay witness testimony.

The rule applied in *Sanchez* has been followed by other courts in other instances and contexts. For example, in *Linn v. Fossum,* 946 So.2d 1032 (Fla. 2006), the Florida Supreme Court held that a physician offered as an expert witness in a medical malpractice case should not have been allowed to testify about whether the defendant met the professional standard of care, when the expert's opinion was based, at least in part, on her discussions with other physicians who did not testify during the trial. Since the group consensus was hearsay, the expert could not deliver that opinion at trial without resorting to that hearsay. The court relied on a series of Florida cases prohibiting experts from testifying about hearsay facts that the jury would be required to consider if the opinion were to be accepted. *Id.* at 1037–38 (citing, *e.g.*, *Erwin v. Todd,* 699 So.2d 275 (Fla. Dist. Ct. App. 1997)); *Riggins v. Mariner Boat Works, Inc.,* 545 So.2d 430 (Fla. Dist. Ct. App. 1989); *Gerber v. Iyengar,* 725 So.2d 1181 (Fla. Dist. Ct. App. 1998) (noting that by offering expert testimony about the expert's conversation with the author of a treatise, the party was attempting to introduce inadmissible hearsay by means of the expert's opinion testimony). The court thus held that the expert's opinion should have been excluded. *Linn,* 946 So.2d at 1039. And in *Perdomo v. Madden,* 2018 U.S. Dist. Lexis 198049 (C.D. Cal. Oct. 3, 2018), the district court excluded the opinion testimony of a police witness offered as a gang expert who testified about what he believed to be a history of feuds between two gangs. The court held that by offering this testimony, the state intended to prove case-specific facts—in other words, that the defendant had committed a shooting in furtherance of the feud—with hearsay evidence about the existence and scope of the feud. *Id.* at *80–81. Because "the jury necessarily had to believe these out-of-court statements in order to properly evaluate [the police expert's] opinions that [the victim's] murder was gang-motivated and gang-related," the opinion had to be excluded. *Id.* at *81–82.

Federal Application

Federal courts have imposed similar restrictions on experts' reliance on hearsay through the application of Rule 703 of the Federal Rule of Evidence. The rule provides that expert witnesses may base their opinions on hearsay if it is reasonable for experts in that field to do so. However, that general rule is to be tempered by considering whether the probative value of such otherwise inadmissible facts in helping the jury's evaluation of the expert's opinion *substantially* outweighs the prejudicial effect of such facts. Fed. R. Evid. 703. *See also United States v. Garcia,* 447 F.3d 1327, 1336 (11th Cir. 2006); *Turner v. Burlington Northern Santa Fe R.R.,* 338 F.3d 1058 (9th Cir. 2003). With hearsay evidence, the danger of prejudice is heightened, since hearsay is inadmissible precisely because of its unreliability and the jury's inability to determine whether credence should be lent to it. Attempting to prove case-specific matters through such unreliable secondhand evidence is even more fraught with the danger of error. Therefore, expert opinions based on case-specific hearsay evidence are excluded from trial more often than in other cases.

This heightened exclusionary rule has been applied in a number of federal court cases. In *Mike's Train House, Inc. v. Lionel, L.L.C.,* 472 F.3d 398 (6th Cir. 2006), the court held that an expert who relied chiefly on the opinion of a non-testifying expert could not deliver his own opinion during the trial, because to do so would have a prejudicial effect on the opposing party's ability to refute that opinion. Since the testifying expert's opinion was based almost entirely on what he had learned by way of hearsay from the non-testifying expert, the effect of the admission of the testimony into evidence was held to be prejudicial. *Id.* at 409–10. And in *Turner,* the Ninth Circuit held that an arson investigator could not rely on a report that stated gasoline was found at the origin of a fire that had burned the plaintiffs' property, since the probative value of that report, which was clearly hearsay, was substantially outweighed by its prejudicial effect, since the lab personnel who had prepared the report were not called to testify at trial. *Turner,* 338 F.3d at 1061–62.

In contrast, in *United States v. Copeland,* 291 Fed. Appx. 94 (9th Cir. 2008), the Ninth Circuit upheld the admission of expert testimony about the source of injuries to a defendant's child. Although the expert did rely, in part, on a non-testifying expert's opinion in forming his own, the court observed that the non-testifying expert's opinion was a minor part of the universe of facts relied on by the expert at trial (the rest being based on personal observation), and was mentioned only briefly in the discussion of the opinion. Therefore, the court held that no prejudice existed in admitting the opinion. *Copeland,* 291 Fed. Appx. at 97. And in *Garcia,* the Eleventh Circuit held that it was not an abuse of discretion for the trial court to allow the government's expert to testify about the meaning of code words used in a drug-trafficking enterprise, since any prejudice that such hearsay evidence could have presented was lessened by the fact that the original informant who provided those terms was subjected to cross-examination during the trial. *Garcia,* 447 F.3d at 1335–36.

Turner's holding provides some interesting authority for the premise that expert opinions founded on hearsay evidence should be presumed inadmissible. In explaining its holding and the effect of the 2000 amendment to Federal Rule of Evidence 703 (which added the requirement of the probative value/prejudicial effect calculus), the Ninth Circuit noted that the drafters of the 2000 amendment to the rule had commented that "the amendment provides a *presumption* against disclosure to the jury of information used as the basis of an expert's opinion and not admissible for any substantive purpose, when that information is offered by the proponent of the expert." *Id.* at

Hearsay, continued on page 66

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1062 (emphasis added) (citing 4 Weinstein's Federal Evidence §703.05 (2d ed. 2003) (noting comments of advisory committee on the 2000 amendments to Rule 703)). Accordingly, someone could argue that using hearsay evidence to support an expert's conclusions should be presumed to be prejudicial and must be excluded if it is not substantially outweighed by its probative value.

Synopsis

Taken together, these authorities and principles should provide better grounds on which to object to the admission of not only percipient testimony about product identification that is based on hearsay, but also to the admission of expert testimony that seeks to establish that a plaintiff was injured by a particular product. These cases provide defense counsel with the ammunition to exclude hearsay product identification evidence, and ultimately, a complete defense to a plaintiff's theory of causation. FD