The Admission of Government Agency Reports under Federal Rule of Evidence 803(8)(c)

By John D. Winter and Adam P. Blumenkrantz

John D. Winter

Adam P. Blumenkrantz

In product liability and other tort actions, plaintiffs may seek to introduce government records or documents, federal and nonfederal alike, to establish one or more elements of their claims. In this regard, plaintiffs attempt to rely on reports or letters written by government agencies responsible for overseeing the health, safety, and consumer aspects of the product at issue in the particular case. As the size of the administrative state grows, the number of agency records available for this purpose is increasing. Such reports and letters can be portrayed as powerful and persuasive evidence when described as comprehensive and detailed descriptions of an accident, a product, or an event. Further, because such reports are prepared by a government agency, a jury will likely give considerable deference to the conclusions in these reports or letters.

Government agency reports fall within the definition of hearsay set forth in Federal Rule of Evidence 801(c),[1] but because they are explicitly not statements made by a declarant testifying at a trial or hearing, Rule 803(8), enacted by Congress in 1974, provides an exception to this general prohibition on the admission of such statements. The "public records" exception, as it is commonly referred to, states that the following items are not to be excluded by the general hearsay rule:

> Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions . . . factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

This article focuses specifically on the third prong of the rule: the use of agency records in civil actions that result from an agency investigation made pursuant to authority granted by law. Though the language of Rule 803(8) (c) is broad and courts have generally interpreted the text in that manner, there are several recognized limitations to the exception. For several of the limitations, the precise boundaries remain unclear. Therefore, parties seeking to exclude such records from being admitted into evidence should closely analyze each of these requirements to determine the most effective manner of challenging the admission of a government report.

Ultimately, the party seeking to prevent the admission of a government record bears the burden of establishing that the report is not trustworthy or otherwise does not fall within Rule 803(8) (c). In other words, there is a "presumption of admissibility" that attaches to government reports, which the challenging party must overcome. Not surprisingly, district courts have significant discretion in deciding which reports may be admitted under the rule and which may be excluded, so litigants should not count on successfully appealing trial court evidentiary decisions. Appellate courts rarely find that a district court has abused its discretion when ruling on these types of matters.

The requirements and contours for having hearsay evidence admitted under Rule 803(8)(c) follow from the justifications for adopting the rule in the first place. The hearsay exception is premised on several conditions. First, the rule assumes that government employees will carry out their official duties in an honest and thorough manner.[2] This assumption results in the rule's presumption of reliability. Second, the rule is based on the government's ability to investigate and report on complex issues raised in many cases, from product liability claims to section 1983 actions against government officials. Government agencies generally possess levels of expertise, resources, and experience, including access to information that litigants cannot replicate. For example, an ordinary private litigant is unable to match the Federal Aviation Administration in conducting an investigation of the details of an airplane accident at the crux of a lawsuit between a crash victim and the air carrier or airplane manufacturer.[3] Finally, assuming that in-court testimony by a government employee would equal or exceed in accuracy and detail that offered in a report, Rule 803(8)(c) removes the burden on the government of having its personnel required to testify at trial about the contents of the report.

An obvious and significant hurdle to the admission of evidence pursuant to Rule 803(8)(c) is that the report or document be trustworthy. For those seeking a narrow application of the rule, the reliability of the report and a jury's ability to evaluate that reliability are major concerns. The narrow interpretation of Rule 803(8)(c) asserts that (a) agencies may not possess the expertise or qualifications to ensure that the report is comprehensive and reliable; or (b) the report might be biased to protect the reporting agency, sister agencies, or the implicated private parties.

The notes of the Federal Rules of Evidence Advisory Committee exhibit legitimate concern over the trustworthiness of agency reports. The committee

listed four nonexclusive factors that bear on trustworthiness: (1) the timeliness of the investigation; (2) the special skill or experience of the official; (3) whether a hearing was held and the level at which it was conducted; and (4) possible motivation problems (such as agency bias or motivation issues) suggested by *Palmer v. Hoffman*.[4] When a party opposing admissibility challenges the trustworthiness of a particular report, courts generally start their analysis with these factors. In addition, courts have supplemented these four factors with others, including whether the report in question is final and the extent to which the investigation complied with agency procedures.[5] However, given the factors that courts consider when assessing trustworthiness and the discretion they are afforded on these issues, it is often difficult to predict what conclusion a court will reach regarding the admissibility of a particular report.

Although litigants and courts frequently focus attention on the question of trustworthiness when evaluating the applicability of Rule 803(8)(c) to a specific report, the rule's other requirements should not be overlooked. This article discusses these additional requirements—more specifically, the requirement that a government report contain "factual findings resulting from an investigation" made by an agency.

Factual Findings

The requirement that a government report contain "factual findings resulting from an investigation" presents a significant hurdle for the party seeking to introduce the report into evidence. The factual finding requirement itself has several distinct prongs, each of which applies in different circumstances. A party challenging the admission of a government report should closely examine all of these individual conditions before determining how best to challenge the admissibility of a particular report. The following are a few of the areas for factual finding requirements.

Reliance on Third-Party Materials

Because the subjects of government reports often are complex and data-intensive, agencies tend to rely on materials produced by nongovernmental bodies to prepare their own findings and conclusions. In most instances, the use of such information will not in and of itself threaten the applicability of Rule 803(8) (c). Invariably, courts examine the reliability of the outside information relied upon by the agency and assess whether the agency adopted the outside materials without comment or additional analysis or instead built on the third-party data and materials to reach its own independent conclusions.[6] If the outside sources are reliable and the agency thoughtfully considered the data in the course of undertaking its own investigation, the reports are generally admitted if the rule's other requirements are met.[7] For example, in *Sabel v. Mead Johnson*,[8] a letter written by a division director at the U.S. Food and Drug Administration (FDA) prepared pursuant to the agency's statutory authority was admitted despite the letter's recommendations being based largely on data collected by and received from an outside party. The *Sabel* court found that the division director based his conclusions on reliable published reports in the medical literature, the same data that any expert in this field would rely upon for his or her analysis.[9] The use of third-party materials in this case, therefore, was not problematic.

> Courts are hesitant to treat as factual findings statements in a draft report or mere recommendations directed to a full agency or a third party.

When an agency report relies too heavily on third-party materials, however, courts have excluded them. For example, in *Brown v. Sierra Nevada Memorial Miners Hospital*,[10] the Ninth Circuit affirmed the exclusion of two reports sent to a state agency by outside consultants. The Ninth Circuit stated that "where 'a staff report is submitted to a commission or other public agency charged with making formal findings, only those factual statements from the staff reports that are approved and adopted will qualify as 803(8)(c) findings.'"[11] Noting that Rule 803(8) is premised on an administrative body's findings being "assumed to be trustworthy," the Ninth Circuit found that reports not produced by an agency do not fall under the rule's exception.[12]

Factual Finding versus Legal Conclusion

On its face, Rule 803(8)(c)'s coverage appears limited to those records that contain factual findings, as opposed to other types of statements. For many years, there was a split among the federal courts as to whether Rule 803(8)(c) reached opinion or evaluative statements or conclusions contained in a government report, in addition to factual findings, which were clearly covered. In *Beech Aircraft Corp. v. Rainey*,[13] the Supreme Court resolved this question in favor of those who broadly interpreted the phrase "factual finding." The Supreme Court concluded that the rule covered not only factual findings resulting from an agency's investigation, but also opinions or evaluative statements that followed from the factual findings.[14] This conclusion was based on the language of the rule, which states that reports that set forth factual findings, and not just the findings themselves, are admissible. In addition, the Supreme Court's conclusion was based on the practical difficulties of having to distinguish between factual statements and opinions in a given government document.[15]

Nevertheless, several key limitations on what types of statements Rule 803(8) (c) covers remain. For one, the rule does not cover judicial or jury findings because neither judges nor juries are investigative bodies within the meaning of the rule. The Advisory Notes confirm that the rule was intended to cover executive agencies rather than judicial ones. Likewise, legal conclusions contained within government reports generally fall outside the scope of the rule's exceptions. This limitation is a nod to those concerned that a jury will improperly defer to an agency's conclusions. As the court explained in *Hines v. Brandon Steel Decks, Inc.*,[16] "legal

conclusions are inadmissible because the jury would have no way of knowing whether the preparer of the report was cognizant of the requirements underlying the legal conclusion and, if not, whether the preparer might have a higher or lower standard than the law requires."

Assessing Finality

The last prong of the factual finding requirement is that the report or record be final and official in nature. Although courts often assess finality in the context of the larger trustworthiness evaluation, it is more beneficial for purposes of this analysis and perhaps more consistent with the text of the rule to consider the finality element as a separate and distinct requirement under Rule 803(8) (c). Though the rule does not explicitly refer to finality, the degree to which a report is final or official affects a court's determination as to whether the report contains "findings resulting from an investigation" and is a product "of a public office or agenc[y]." For example, when a report is completed by employees of an agency but not explicitly adopted by the agency itself, courts are more likely to conclude that the statements do not emanate from the agency and are therefore inadmissible. Likewise, courts are hesitant to treat as factual findings statements in a draft report or mere recommendations directed to a full agency or a third party. In these cases, courts usually conclude that the document does not represent the findings of the implicated government agency. A number of circuit court decisions highlight this point:

- In *The City of New York v. Pullman Inc.*, the court affirmed the exclusion of an internal report because the report did not even purport to contain agency factual findings.[17] In reaching its conclusion, the Second Circuit attached significance to the fact that the report by the Urban Mass Transit Administration declined to state a conclusion on the issue most relevant to the trial.[18] According to the Second Circuit, rather than embodying the findings of the agency, the report merely contained the results of a partial staff investigation.[19]
- In *Figures v. Board of Public Utilities*, the court affirmed the exclusion of a government letter as hearsay not covered under Rule 803(8)(c).[20] The Tenth Circuit explained that the letter could not represent the findings of the agency because an affidavit accompanying the letter specifically stated that "the conclusions contained in this draft [letter] were never endorsed by the U.S. Department of Labor, nor was it officially signed or sent or otherwise transmitted to the Board of Public Utilities."[21]
- In *Smith v. Isuzu Motors Ltd.*, the court affirmed a decision to exclude three memorandums prepared by staff members of the National Highway Traffic Safety Administration (NHTSA), which supported the plaintiff's position regarding liability in the case.[22] The Fifth Circuit found that the memorandums did not reflect factual findings of the NHTSA because the agency did not ultimately accept the positions and opinions of the individual staff members who completed the report.[23]
- In *Toole v. McClintock*, the court reversed the admission of an FDA report under Rule 803(8)(c) because the report contained, by its own terms, only "proposed findings" still subject to revision and further study.[24] In reaching its conclusion, the Eleventh Circuit noted that the FDA report contained only proposed findings about the general area of products implicated in the case and not the specific product at issue.[25] According to the Eleventh Circuit, Rule 803(8)(c) did not extend to proposed findings not adopted or approved by the agency.
- In *United States v. Gray*, the court affirmed the exclusion of an Internal Revenue Service referral report pursuant to Rule 803(8)(c), because the report was only a tentative internal document that did not state any factual findings by the agency.[26]

These cases are not entirely representative of all case law addressing finality. Indeed, many courts treat finality as only one of many factors to evaluate in the course of determining whether a report is trustworthy.[27] In that context, finality is not a *sine qua non* for the purpose of applying Rule 803(8)(c). Nevertheless, the decisions do highlight that finality can be a significant hurdle for parties seeking to admit government documents under Rule 803(8)(c).

Although traditionally limited to the context of draft or nonfinal reports, the requirement that a record contain factual findings of an agency has applicability in other contexts as well. There is a range of documents and records created by agencies that can be potentially detrimental to a litigant if admitted into evidence and that, by their very nature, are neither a finding of an agency nor a product of an agency's investigation. For example, the court in *Ariza v. The City of New York* affirmed the exclusion of portions of a police department report that merely "summarized the discussions" of several police officers and made "generalized recommendations regarding future departmental behavior."[28] According to the *Ariza* court, the report was "the product of a 'research project' in which [23] groups of [12–15] officers each convened to participate in guided group discussions." As such, the report did not contain the type of factual findings based on an agency investigation contemplated by Rule 803(8)(c).

An FDA "untitled letter" is another area in which Rule 803(8)(c)'s finality requirement has been a limiting force. By definition, an FDA untitled letter is not a formal warning to a manufacturer of an impending agency enforcement action.[29] Rather, the FDA uses untitled letters as initial correspondence to identify

Research suggests that early intervention and treatment can effectively permit a child to lead a normal life.

possible violations that an agency compliance official believes the recipient may have committed. An untitled letter:

- can be issued by "any" FDA "compliance officer"
- does not threaten to release adverse information to other federal agencies
- "does not include a warning statement that failure to take prompt correction may result in enforcement action"
- does not require "mandated district follow-up"
- merely "requests (rather than requires) a written response"[30]

Accordingly, the degree to which the agency has undertaken a factual investigation to reach its decision to send a letter is questionable. The letter is submitted to the FDA's Office of Chief Counsel prior to issuance for the purpose of reviewing its legal sufficiency and consistency with agency policy, but it does not necessarily receive FDA's full imprimatur. These factors make the agency's letter less of a "determination" than a recommendation to the recipient.[31] As such, it is questionable whether an untitled letter satisfies the requirements of Rule 803(8)(c).

Conclusion

A party challenging the admission of a government report or record in a product liability or other civil action has several routes to consider. In addition to asserting that the report is untrustworthy using the multifactor test that many courts have adopted for that analysis, the party also may argue that it does not contain "factual findings resulting from an investigation" by the agency. This line of argument may be promising for exclusion if the record at issue is not final in nature or does not represent the reasoned and evaluative judgment of the full agency. Moreover, if the agency has merely adopted information or conclusions from a third party, one may contest whether the agency's conclusions are actually a product of the agency's own investigative efforts. Each of these arguments represents an important limitation on the admissibility of reports pursuant to Rule 803(8)(c). ■

John D. Winter is a partner at Patterson Belknap Webb & Tyler LLP; he focuses his practice on the defense of pharmaceutical and medical device cases. Adam P. Blumenkrantz is an associate in the litigation department of Patterson Belknap Webb & Tyler LLP.

Endnotes

1. Federal Rule of Evidence 801(c) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."

2. *See* Bradford Trust Co. v. Merrill Lynch, Pierce, Fenner and Smith, Inc., 805 F.2d 49, 54 (2d Cir. 1986).

3. *See* Note, *The Trustworthiness of Government Evaluative Reports under Federal Rule of Evidence 803(8)(c)*, 96 Harv. L. Rev. 492, 495 (1982).

4. 318 U.S. 109 (1943).

5. *See* Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 505 F. Supp. 1125, 1147 (E.D. Pa. 1980) (listing seven criteria, including several that refine the Advisory Committee's criteria, which the court considered as part of its trustworthiness evaluation).

6. A similar scenario will arise when the agency record contains statements that are themselves hearsay. This creates the familiar problem of having hearsay within hearsay. Although Rule 803(8)(c) provides an exception for the report itself, the party seeking admission often is required to offer a second exception to cover the individual hearsay statements in the report. *See, e.g.*, United States v. Mackey, 117 F.3d 24, 28–29 (1st Cir. 1997) ("In line with the advisory committee note to Rule 803(8), decisions in this and other circuits squarely hold that hearsay statements by third persons . . . are not admissible under [Rule 803(8)(c)] merely because they appear within public records."). In other instances, courts assess the reliability of the hearsay statements within the report as a means of determining whether the report should be admitted.

7. An agency also may delegate its duty to report on matters under its care to third parties without forfeiting the right to have its final report admitted as evidence pursuant to Rule 803(8)(c). In *United States v. Central Gulf Lines*, 974 F.2d 621 (5th Cir. 1992), the court affirmed a decision to admit quarantine certificates kept by the Commodity Credit Corporation as public records under Rule 803(8)(c) even though the records were prepared by foreign port authorities who were not public agencies authorized to report. The Fifth Circuit noted that the "duty to prepare the report can be delegated, under government regulations, to an independent agency or to a foreign government without the report losing its character when submitted through the appropriate U.S. agency, as a report of a department or agency of the United States." *Id.* at 627 (quoting United States v. Lykes Bros. S.S. Co., 432 F.2d 1076, 1077 (5th Cir. 1970)).

8. 737 F. Supp. 135, 140–42 (D. Mass. 1990).

9. *Id.* at 142–43.

10. 849 F.2d 1186, 1189–90 (9th Cir. 1998).

11. *Id.* at 1189 (quoting Zenith Radio Corp. v. Matsushita Elec. Ind. Co., 505 F. Supp. 1125, 1145 (E.D. Pa. 1980)).

12. *Id.* at 90. Rule 803(8)(c) does not extend to documents that do not contain any *agency-produced* factual findings, such as when a report contains only a transcript of statements or information provided by a third party. *See* United States v. Ortiz, 125 F.3d 630, 632 (8th Cir. 1997).

13. 488 U.S. 153 (1988).

14. *Id.* at 170.

15. *Id.* at 168.

16. 886 F.2d 299, 303 (11th Cir. 1989).

17. 662 F.2d 910 (2d Cir. 1981).

18. *Id.* at 914.

19. *Id.* at 915.

20. 967 F.2d 357, 360 (10th Cir. 1992).

21. *Id.* at 360.

22. 137 F.3d 859, 862–63 (5th Cir. 1998).

23. *Id.* at 862.

24. 999 F.2d 1430, 1434–35 (11th Cir. 1993).

25. *Id.* at 1434.

26. 852 F.2d 136, 139 (4th Cir. 1988).

27. *See, e.g.*, Hawa Abdi Jama v. INS, 334 F. Supp. 2d 662, 680–81 (D.N.J. 2004) ("In this case the findings of the Interim Report are sufficiently firm for the Report not to be untrustworthy under the rule. The fact that they may have been in some respects preliminary findings, that further investigation of the same set of facts may have been contemplated, does not by itself require a finding that they are unreliable.").

28. 139 F.3d 132, 134 (2d Cir. 1998).

29. For additional information about FDA untitled letters, see U.S. Food and Drug Administration Regulatory Procedures Manual, ch. 4, Advisory Actions, § 4-2 (2008), *available at* www.fda.gov/ora/compliance_ref/rpm/default.htm.

30. *See id.* § 4-2-1 (Untitled Letters – Policy), *available at* www.fda.gov/ora/compliance_ref/rpm/chapter4/ch4-2.html.

31. Schering-Plough Healthcare Products, Inc. v. Schwarz Pharma, Inc., 547 F. Supp.2d 939, 946–47 (E.D. Wis. 2008). *See also* Summit Technology, Inc. v. High-Line Medical Instruments Co., 933 F. Supp. 918, 934 & n.9 (C.D. Cal. 1996); Kociemba v. G.D. Searle & Co., 683 F. Supp. 1582, 1584 (D. Minn. 1988).