

A plaintiff sued an equipment supplier for breach of contract. The plaintiff alleged that the supplier failed to deliver equipment according to the terms of a contract between the parties. The supplier responded by general denial. At the time the suit was filed, the original contract was located at the supplier's corporate office. No copies of the contract exist. At trial, prior to calling the plaintiff to testify, the plaintiff's attorney asked the supplier's attorney for the contract so that the terms could be recited to the jury. The supplier's attorney responded that the contract remained at the supplier's office and that the supplier was not obligated to produce it. The plaintiff's attorney then sought to have the plaintiff testify to the contract's terms.

The supplier has objected to the plaintiff's testimony on the ground that it violates the best evidence rule.

Should the testimony be admitted?

- A. No, because the plaintiff bears the burden of proof in the contract dispute and therefore must produce his own documentary evidence of the contract.
- B. No, because the plaintiff did not specifically request that the supplier produce the contract at trial.
- C. Yes, because the best evidence rule does not apply.
- D. Yes, because the plaintiff alleged that the contract's terms were breached.

## Explanation:

### Party-opponent in possession of original document

(FRE 1004(c))

Court may admit other evidence of content when party against whom original would be offered:

had control of original

was put on notice that original would be subject of proof at trial *and*

failed to produce original

**FRE** = Federal Rule of Evidence.

The **best evidence rule** (ie, original document rule) applies when a witness relies on a document's contents while testifying or when the contents of a document are at issue, such as when the document has a legal effect (eg, contracts) **(Choice C)**. This rule generally requires that an **original or reliable duplicate** of a **recording, writing, or photograph** (referred to as "document") be produced to **prove its contents**. However, there are some exceptions.

One exception allows a party to introduce **other evidence** of the document's content (eg, testimony) when the **party against whom** the **original** would be **offered**:

had **control of the original**

was put **on notice** (by **pleadings** or otherwise) that the original would be a subject of proof at trial *and*

failed to produce the original at trial.

Here, the equipment supplier had control of the original contract between the parties and failed to produce it at trial. And though the plaintiff did not specifically request that the supplier produce the contract, the supplier was put on notice by the plaintiff's pleadings—which alleged breach of contract—that the contract would be a subject of proof at trial **(Choice B)**. Therefore, the plaintiff may use other evidence to prove the contract's terms, and his testimony should be admitted for that purpose.

**(Choice A)** The plaintiff *does* bear the burden of proof in the contract dispute. But since the defendant was put on notice that the contract would be a subject of proof at trial and failed to produce it, the plaintiff's testimony as to the contract's terms is admissible.

### Educational objective:

One exception to the best evidence rule allows a party to introduce other evidence of a document's content when the party against whom the original would be offered (1) had

control of the original, (2) was put on notice that the original would be a subject of proof at trial, and (3) failed to produce the original at trial.

### **References**

Fed. R. Evid. 1002–07 (best evidence rule).

Copyright © UWorld. All rights reserved.