# Management of Catastrophic Industrial/Construction Disasters from Prevention to Preservation

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## I. PLANNING FOR AND PREVENTING CATASTROPHIC EVENTS

Despite a company's best efforts to eliminate industrial accidents, they can and do occur. In an effort to avoid these accidents and to minimize the loss of human life, debilitating injuries, and substantial property loss, counsel must work closely with their clients in establishing pre-disaster protocols, while at the same time developing a plan for managing that loss and the aftermath of bodily injury and property loss such that those involved, and their families, will be systematically taken care of while minimizing negative public sentiment.

A significant chemical spill, release or explosion can cause substantial damage to a company. When faced with a sudden, catastrophic event of this kind, counsel and corporate decision makers must respond quickly on multiple fronts to diverse, complex issues that demand timely decisions and decisive action. Companies who take a proactive approach to disaster prevention and management are better equipped to protect the lives of their employees, prevent property damage and save substantial sums typically incurred in defense of citations by regulatory agencies, litigation costs, fines and penalties. The company's ability to avoid damage to stock value and reputation, as well as a potentially catastrophic damage award by a court or a jury, will depend in significant part on the ability of its counsel and management to navigate these dangerous waters.

### A. RISK ASSESSMENT

Every effective prevention plan begins with a proper risk analysis to identify potential hazards within your client's facilities and operations as well as areas where the client can create a safer work environment for its employees. A good starting point in this risk assessment is to become familiar with the industry regulations and standards applicable to your particular client and its business. Being thoroughly familiar with the industry standards applicable to your client will enable you to identify potential hazards which could ultimately result in a catastrophic event (a potential hazard that could be prevented) and, thus, avoid costly litigation as well as the defense of charges and citations issued by federal and state regulatory agencies.[1]

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In November 2009, OSHA issued its most costly citation to date to BP Products North America stemming from a follow-up investigation to the 2005 refinery explosion in Texas City, Texas in the amount of $87,430,000.00. This later penalty was in addition to the $21,361,500.00 originally issued to BP Products North America as a result of the initial investigation of the 2005 explosion. For the top 10 enforcement citations issued by OSHA, please see http://www.osha.gov/dep/bp/Top_Ten_Enforcement.html.

Every industry, whether it be construction, manufacturing or shipping, is regulated by some federal or state agencies, such as the U.S. Department of Labor's Occupational Safety and Health Administration (OSHA), Environmental Protection Agency (EPA) and the Department of Environmental Quality (DEQ), to name a few.[2] The recent West Virginia mine explosion highlighted the regulatory authority of the Mine Safety and Health Administration (MSHA). More recently, the BP Oil Platform Failure illustrated the fact that disasters may draw in other federal agencies such as Homeland Security that in the past had no role. Thus, it is imperative for companies and their attorneys to be familiar with the standards, statutes and regulations which govern their conduct. As counsel for these companies, it is our duty to ensure that our clients are aware of and comply with the applicable law in order to avoid fines, penalties or criminal charges for willful violations of applicable regulations. Should the regulatory agency issue a regulatory citation, the cost of defending that citation as well as any adverse findings by these agencies, can be only one of many problems. As an example, the cost associated with defending any claim brought, not to mention the client's reputation and ability to effectively bid jobs in the future due to the bonding issues, are all examples of the consequences of catastrophic events. With that said, more likely than not, companies will continue to be confronted with not only the defense of third-party claims and but also the claims of its employees. Therefore, possessing a keen understanding of the regulations pertaining to your corporate client's industry enable counsel to more easily plan for and then protect that client in the wake of a disaster.

It is also worth stressing that employee training is one of the best ways to prevent such accidents from occurring. In 2008, over 9,600 citations were issued by OSHA for training related deficiencies, including hazard communication (HAZCOM).[3] Additionally, OSHA documented 5,071 work-related fatalities during that same year.[4] While there currently is no data illustrating the correlation between the number of work-related fatalities and the number of training and HAZCOM citations issued for that year, it is reasonable to conclude

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2 See 29 C.F.R. §1910 and 29 C.F.R. §1926. See also 29 C.F.R. §1903 and 1904 regarding authority for inspections and reporting requirements.

3 See http://www.osha.gov/pls/imis/citedstandard.sicman?p_esize=&p_state=FEFederal.

4 See http://www.osha.gov for more information on fatal statistics.

that more stringent training of employees can reduce the number of work-related fatalities. OSHA has recognized that training deficiencies are such a major problem, that OSHA now offers training on general compliance with OSHA standards to members of the private sector through its OSHA Training Institute (OTI) and its OSHA Outreach Training. These programs are targeted at specific industries in which OSHA has identified as having an increasing number of deficiencies. Moreover, OSHA has recently launched a program called SHARP, targeting small to mid-sized businesses, and providing free, private consultations to assist business owners in recognizing on-site hazards such as training. The new program is designed to encourage businesses to focus on employee safety and reduce workplace hazards to lower the number of annually reported work-related injuries and fatalities. Businesses that participate in the SHARP program can receive certification exempting their business from programmed inspections by OSHA for up to two (2) years.[5]

Since OSHA has recognized that a sound and effective employee training program can reduce the number of work-related fatalities and injuries, so should you and your clients. History demonstrates that the best defense to a catastrophic disaster is an effective and proactive system which includes stringent employee training programs targeted at recognition of hazards associated with the work being performed. Many businesses around the U.S. have created programs, such as the K.A.D.A. ("Keep a Day Ahead") program and/or "tool box meetings" aimed at reducing the overall likelihood of work-related disasters by encouraging employees to plan a day ahead for work-related tasks and resolving issues. The idea behind the K.A.D.A. program is that if employees are trained to what potential hazards exist, they will be tuned-in to recognizing and eliminating hazards which have the potential for causing injury to fellow employees, third parties and costly down time during the ensuing investigation and possible litigation.

## B. CRISIS MANAGEMENT

Every business must have a plan in place to maximize the safety of employees and the public, while minimizing negative press, reducing the potential for accidents and resulting injuries and property loss, all which reduces the likelihood of litigation, and eliminate negative investor relations.

The planning process will be different for every company depending upon the number of employees and the type of business. However, there are several basic tenets of every disaster management plan, which include:

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[5] See http://www.osha.gov/dcsp/smallbusiness/sharp.html.

1. An established chain of command;
2. Implement a company policy on the manner in which disasters are to be documented;
3. Establish and define the roles of certain individuals within your company, setting forth specific responsibilities during and after the disaster;
4. Have an established public relations plan to control what information gets out into the public domain and when;
5. A chain of communication to notify others within the corporation of the disaster; and,
6. Establish communication protocols.

### i. Identify a Response Team and a Chain of Command

A team of senior executives should be identified to serve as the company's team. The CEO should head the team with the top Public Relations officer and Legal Officer acting as chief advisors. If in-house staff does not have adequate expertise, secure a local communications agency. Their experience should be topically and geographically appropriate to the crisis at hand.

The disaster organization should meet regularly to analyze potential risks of daily operation and identify ways in which risks can be minimized if not eliminated. Finally, the team should organize a structure within itself in order to clearly delineate the responsibilities among team members. This includes:

> **Identify Spokesperson** - Designated team to make media contacts. The CEO should be among these, but not necessarily the primary spokesperson.
>
> **Establish Communication Protocols** - Crisis-related information can be found by any member of a company, from the CEO to the janitor. If a problem is discovered by lower-level management and their manager is out of town, then who should be notified and how? An emergency communications "tree" should be established and distributed to all company employees.

With the exception of the spokesperson, each individual tasked with a specific area of the response may find it beneficial to organize their own specialized team who, in the wake of a disaster, will assist the team member in efficiently carrying out those duties delegated and, thus, further solidify the chain of communication which is critical to the effectiveness of the implementation of any disaster recovery plan.

- **Identify and Know Your Audiences** - Audiences matter. Most companies care most about media, customers and prospects. Others might be more concerned about stated and federal regulatory agencies. For each audience, a complete mailing, fax, phone number and email list should be compiled in preparation of a crisis.

### ii. Confirm Notifications Required by Law in Company Policy and Procedures

Most companies have comprehensive emergency response plans and procedures and have spent time and money to ensure that company responders are trained on and familiar with those portions of the plan that address notification of governmental authorities, including local and state law enforcement, emergency response agencies, environmental agencies and regulatory agencies. Nevertheless, in the hours following a catastrophic event, it is not surprising that in the rush to address the most urgent of needs that all notifications called for by the plan are not always accomplished. While the failure to notify one or more governmental entities may seem trivial or without consequence, such an omission can be costly.

In addition to notification to governmental authorities, care should be taken to ensure that any company policies set up to deal with an event have been followed. Since plaintiffs' lawyers often look for issues that are inflammatory and can be spun in a manner to make the company look bad, a checklist should be developed to ensure that all internal policies have been followed. This applies to company procedures concerning matters such as closing of valves, safety devices and the implementation of other emergency mechanisms. Failing to follow the company response plan provides plaintiffs' lawyers with ammunition and arguments that, even if unconnected to the actual harm, can be lethal in practice.

### iii. Securing the Scene for Emergency Personnel/Search and Rescue

It is essential to create procedures for securing the scene of the disaster in order to allow the evacuation of personnel from the scene and to create a safe and accessible environment for first responders. For guidance, please see 29 C.F.R. 1926.35, which sets forth required elements which each employer must include in their emergency action plan.

Initially, securing the scene will involve the evacuation of all non-essential personnel from the scene and contacting emergency medical personnel, local fire

and police departments. Additionally, Disaster Management teams will want to develop a plan for coordination with local medical facilities to discuss the quickest routes of access to the company's facility in the event of a disaster, provide necessary information for first responders to bypass security at the site, etc. The company's primary concern at this point is to ensure that first responders can quickly locate and provide necessary medical assistance to any injured personnel prior to transporting them to local hospitals for additional care.

To prevent injury to personnel and first responders, protocols should be in place for a shutdown of any electrical power, natural gas, chemical and/or hazardous materials.

In instances where a death is involved, specific regulations address the methods of extraction and decontamination of the site of the incident prior to initiating any further investigation or recovery efforts.[6]

### iv. Preservation of Evidence

Finally, there must be procedures and policies for investigating the root cause of an event as well as policies regarding the preservation of evidence in anticipation of future reconstruction by others in connection with litigation. Governmental investigators often appear on the site of large events immediately and take control of the site and physical evidence. If an appropriate agency or law enforcement officer does not take control of the site and the physical evidence, it is important that the company and its investigators take appropriate steps to preserve evidence. Obviously, the priority concern must be the health and safety of the responders and the public including the extinguishing of any fires and stopping the release of product or other emissions, if applicable. The next level of concern should be preservation of the damaged equipment and other evidence. If care is not exercised, the equipment or product involved in the event may be forever changed and some details lost prior to analysis.

Photographs can provide a valuable tool to validate computer or other mathematical models. Not all photographs are created equal, however. Careful composition of the photograph is necessary to incorporate all of the relevant information, and these matters are frequently best left to qualified experts whose litigation experience will allow them to create the most effective and defensible photographic evidence.

In today's world, you must also preserve and maintain real time data recorded

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29 C.F.R. §1926.65 in general addresses requirements regarding hazardous waste operations and emergency response. Subparagraph (k) of that section further addresses decontamination of those areas of potential exposure.

during the event and maintained electronically or through the use of other media. Plaintiffs' counsel make every effort to identify all possible sources of information, especially data recorded by the company during the event. In some cases, such data are maintained in the regular course of business only for a short time and then later recorded over. If such information is lost or not preserved, your company will face the accusation that the documents were destroyed intentionally in order to hide the facts. This charge will be leveled even if the data was unconsciously or unknowingly deleted, but simply recorded over the normal course of business without conscious thought or deliberate conduct. While the company may have a valid argument that the data were insignificant to the real matters of dispute in the litigation to come and that such data can be obtained or reconstructed from other sources, in any litigation such issues can be dangerous.

The investigative coordinator and legal liaison should work with the predetermined reconstruction company to determine the root cause of a disaster in order to prevent a recurrence. This includes preservation of evidence for inspection by state and federal agencies such as OSHA and EPA, among others. The likelihood of personal injury and property damage claims mandate that every precaution be taken to preserve, secure and catalog every potential piece of evidence at the scene. Every state addresses spoliation differently, and as one can see from the table attached to this paper, it gives a breakdown, state by state and Internationally, of the law governing claims of spoliation, which provide remedies for adverse inference instructions at trial to a separate cause of action for spoliating evidence …

## C. MEDIA CONSIDERATIONS

What a client says in the wake of a disaster matters. Politicians, small business owners, lawyers, CEOs, publicists, crisis managers and business managers alike have a personal and financial stake when it comes to the media asking questions.[7] CEOs have lost jobs because of the way they managed their company's public relations. Politicians have resigned from office for off-the-cuff remarks made to the media. Therefore, with your client's reputation and future at stake, understanding how to manage the media in a time of crisis is becoming increasingly more important, particularly considering the current climate of public scrutiny of Corporate America.

The primary challenge with any crisis situation involves reaction. This is of particular concern because rarely in crisis situations do you have time to react in an orderly and thoughtful manner. That is simply the nature of the beast.

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7 Mark Macias. *Beating the Press: Your Guide to Managing the Media*, 2008.

However, corporate clients can take certain steps to limit the exposure created by media ambush through intra-corporate training of its employees. First, as previously discussed, trained company representatives should make immediate contact with any injured employees and their families. Such contact not only assists in the investigation of the accident by keeping communication channels with the injured workers open, but it also allows your client to establish a relationship with the families which, more likely than not, will be a calming influence on the those members of a injured worker's family, such that any comments to the media would not be divisive. It is equally important for a company involved in a disaster that the spokesperson for your client express an appropriate amount of concern for any injured workers, as this tends to soften the image of the company in the eyes of those viewing one-sided reports by media on the occurrence. In short, imagine is everything since venue in civil actions cannot be changed based on the media's reporting of events.

The spokesperson should be well-experienced with addressing the media. It should be stressed that precautionary measures are being taken to prevent a similar occurrence while also being mindful that "no comment" is, in most circumstances, the worst possible answer.

Finally, it should be noted that the company spokesperson should only comment on information known and documented. Do not speculate. Be frank and genuine with the media as they are already skeptical of any message being disseminated from a company and will be listening for inconsistencies in the messages. The last thing your client needs is to have the case tried in the media before a lawsuit has even been filed. To be cliché, sex sells, so the more inconsistencies the media takes from the message of one's spokesperson, the more likely negative interpretations of information will be published. In short, keep the message short, consistent, positive, and sympathetic to those injured.

In today's litigious society, lawsuits are now considered part of the cost of doing business. They also represent one of the most common sources of negative publicity for companies and institutions. Regardless of the merits of the suit, allegations contained in a complaint can be extremely damaging to an institution's reputation, if not adequately refuted. In litigation, there is no reason to say "no comment." Consider the following provided by a media consultant:

- The common misconception among business executives is that the company cannot or should not say anything about a suit that has been filed.

- News reports about lawsuits often include the defendant company quoted as saying things like, "We cannot comment on that because it is in litigation."

- Why not comment? Do executives think readers and viewers do not

believe the accusations made in the lawsuits, or that a lawsuit magically provides a protective shield for their company's reputation? It doesn't work that way.

- Attorneys often counsel clients not to talk about the allegations contained in lawsuits fearing that something they say will come back to haunt them later. However, the trial, if it goes that far, will likely be months or years in the future. People reading about the suit will be influenced *today*.

- Another reality is that the dismissal or settlement of a lawsuit - even a defense judgment in court - usually does not get the same media attention as the filing of the suit.

- How do most people react to reading that someone who is accused of doing something wrong or harmful has refused to comment? "GUILTY!" So if you say "no comment," you might as well just say "guilty," because that's what people will read.

- Another often-used corporate statement seen in the news reports is, "We haven't seen the complaint yet, so we can't comment." This reads exactly the same as "No comment. GUILTY!"

- It's true that you should never speak specifically about a complaint you haven't seen. However, you can *ask the reporter seeking comment to first fax you a copy of the complaint.* And, you can always speak to the policy rather than to the specifics of the suit.

- Example: A woman claimed she found a dead mouse pressed into a half-eaten loaf of bread. The spokesperson for the bakery talked about the process of baking and packaging the bread: "It's virtually impossible that a mouse could have been wrapped into a loaf of bread in our bakery," he said. "Each loaf passes through a high-speed automatic slicer and an automated wrapper . . . "How different from just saying, "We haven't seen the complaint."

- On the other hand, when the former Tinseltown was sued by nine employees for refusing to stop blatant sexual harassment by a supervisor, including obscene demands for sex, the Orange County Register said the company's attorney said, "The case is being litigated but declined to comment further." You can draw your own conclusions. The reader certainly will.

- If a newspaper is going to write about a lawsuit, it is vitally important that the defendant's story be told in that first article. It's sometimes suggested by lawyers that waiting several days after the initial media disclosure

before commenting is good because it would allow the chance to better understand the situation and get a game plan together. That kind of thinking can be devastating to a company's reputation. Most readers and viewers will make up their minds about a story as soon as they read or see it. Follow-up stories typically don't get the same kind of prominent play or consumer interest.

- In a crisis, don't clam up for fear of liability. During times of crisis, executives and attorneys often decide not to comment for fear their statements will be used against them later in lawsuits. But these points should be remembered:

  - Liability is usually not the only issue; loss of sale, strain on important relationships and damage to your reputation are also risks.

  - The lawsuits will be resolved months or years in the future; the court of public opinion will judge you immediately.

- People form lasting impressions about companies in crisis; make sure your client is acting in its best interests.

## D. PREPARING FOR AN INTERVIEW

Do not allow your client to be ambushed by the media. One of the keys to successful presentation to the public is to anticipate and prepare for an interview. The following tips may assist your client in this endeavor:

- If a reporter shows up in your client's office at a time when your client is unprepared, the interview should be rescheduled for a time when your client will be comfortable.

- Understanding that reporters are usually working on a deadline, your client should call right back, right away. When a reporter calls, one should always determine what kind of deadline the reporter is facing.

- As for the reporter's name and the media organization for which he or she is reporting, it is best not to play favorites when deciding whether or not to grant an interview to a specific reporter. It may seem like a good idea in the short run; but in the long run, it will damage your client's relationship with reporters and may come back to haunt them.

- Your client should think of two to three points it would like to make about the subject and then gather facts, figures and anecdotes to support those points.

- Anticipate questions the reporter might ask and have responses ready.

- Have printed materials to support information whenever possible in order to help the reporter minimize errors. If time allows, offer to fax or mail the reporter printed information in advance of the interview.

- Be aware that reporter's schedules are determined by the "breaking news" of the day. As such, an interview may get canceled or rescheduled because a more urgent story that arises.

- Tips for successful interviews:

    - News is whatever the editor says it is!
    - When speaking to reporters, you are really speaking to their audience.
    - There is no such things as "off the record."
    - Avoid saying "no comment."
    - Don't be defensive.
    - Use analogies and stories whenever possible.
    - Use gestures to help visually and orally.

- There are three ways to address any question:

    - "Here is the answer to your question . . . "
    - "I don't know, but will find out . . . "
    - "I know, but I cannot say because . . . But here's what I *can* say."

## E. SOCIAL MEDIA CONSIDERATIONS

The previous discussion addressed the manner in which a company can help to "control" the spin that arises from an incident. However, in today's environment, you must also be prepared for social media. Blogs, FaceBook and other social media vehicles that did not exist 10 years ago can have as harmful an effect on a company's reputation as ill-advised comments to CNN.

Take for example the recent BP oil disaster. There are no less than 100 FaceBook pages dedicated to the boycotting of BP oil. These FaceBook pages have such clever names as:

> Hey, BP oil, Thanks for the oil spill a—holes.
> Make British Petroleum pay for the Gulf oil spill.
> Boycott BP until they clean up the Gulf oil spill.

A similar number of pages exist on FaceBook for the upper big branch mine

disaster and its owner Massey Energy.

Unlike the media, the company can do very little to control the information on these sites or prevent its dissemination. Similarly, blogs critical of the company and its response to a particular event would be critical but cannot be controlled.

It is critical that the company designate a team responsible for indentifying the existence of negative social media sites and monitor those sites. While it is possible and often helpful to populate those sites with positive information, it is also important to monitor those sites for negative or untruthful information that could make its way to the mainstream media and be believed.

## F. PREVENTING BREAKDOWN OF COMMUNICATION

The very nature of a catastrophic event creates chaos among those involved, which can lead to an eventual breakdown of communication. However, the creation of an adequate and efficient 48 hour plan which delegates and divides duties among the company's personnel, limits the responsibilities any one individual may have, helps minimize breakdowns in communication in the wake of a disaster. In delegating individual responsibilities, the disaster management team must be cognizant of the governmental agencies, local authorities and the concerns of families of those injured, media outlets, etc., and should have contact lists to open those various lines of communication.[8]

## G. COMMUNICATION AMONG AFFECTED PARTIES

In addition to having a sound chain of command within your corporation, do not overlook the necessity of communicating with the injured workers and their families as well as other groups involved. Costs can be minimized and litigation avoided by keeping an open and honest line of communication with the others involved.

### i. The Injured and Their Families

When it comes to maintaining lines of communication with injured workers and their families, companies and counsel must walk a fine line. A demonstration of compassion for the injured workers and their families may be misinterpreted as an admission of responsibility for the event which lead to injury or death of a loved one. However, such a risk must be

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8 29 C.F.R. §1904.39(a)

balanced by the knowledge the injured have about the events leading up to and at the time of the events. For example, an injured worker may have observed things such as a general contractor's employees in an unauthorized area moments before the disaster. Another employee may have heard some unusual noises prior to an explosion or detected a leak. So while the injured workers or subcontractor/third parties usually will possess information useful in determining the root cause of the event and how to ultimately defend claims from contractual disputes over indemnity, or personal injury claims of subcontractor employees, keeping the lines of communication open between the injured workers, their families and your client may also help prevent the injured worker from becoming alienated by an ill-perceived callousness of the company and thus refuse to cooperate during those first critical hours.

### ii. Owners/General Contractors/Sub-Contractors

Contrasted with the approach often taken with those injured is the approach taken with the corporate entities. Often times, counsel and corporations mistakenly take the approach of working with other defendants, blindly and willingly sharing information with one another under the mistaken assumption that all of the corporate parties will be similarly situated with respect to the personal injury suits. However, doing so may be to the corporation's detriment. Nevertheless, encouraging your client to fully evaluate each potential claim, whether it be a claim made by an injured worker or the claims of subcontractors and their employees, could either be beneficial or adverse to your client's interests.

An example of the adverse interests of defendants who may be otherwise similarly situated can be found in the realm of Worker's Compensation Law. While each state has its unique body of Worker's Compensation law, most jurisdictions incorporate some sort of a statutorily created exclusive remedy for employees injured while acting within the course and scope of their employment in the form of Worker's Compensation.[9] Such an exclusive remedy creates a proper and powerful defense for a statutory employer who might otherwise be subjected to personal liability through defending third party claims. Oftentimes, a conflict between multiple entities involved in a disaster arise out of the effects that the Workman's Compensation exclusive remedy defense has on the company who may enjoy that defense but then finds itself in the unenviable position of having tenders for defense made by others. For example, should your client be a

[9] See *Worker's Compensation Act as furnishing exclusive remedy for employee injured by product manufactured, sold, or distributed by employer*, 9 A.L.R. 4th 873. Also see the relevant statute in your jurisdiction pertaining to your state's Worker's Compensation exclusive remedy defense; Miss. Code Ann. §71-3-9- Exclusiveness of Liability.

property owner or a general contractor, subject to a personal injury action by the injured workers, and have the intention of seeking indemnification from the subcontractor, who enjoys the statutory employer immunity, you may potentially have a conflict with the subcontractor whose best interest would be to point the finger at the either the property owner or the general contractor in order to avoid having to later indemnify the general contractor for the contractor's own negligence.[10]

In short, every business should fully evaluate every aspect of the potential claims against them in the wake of a disaster prior to entering into any type of joint defense agreement. In evaluating those potential claims, counsel should always be thinking a step ahead in contemplating issues that may arise such as indemnity, spoliation, additional insured status, third-party claims as well as personal injury, wrongful death and/or property damage claims.

### iii. Insurers

Any catastrophic event resulting in bodily injury and property damage will trigger a variety of insurance coverages. The nature of the business, the risk involved as well as the locations affected by the event will determine what coverages are affected. However, in an abundance of caution it is most prudent to put all potentially effected insurers on notice of the loss.

To effectively convey the proper notice, the response team should include the risk manager for the Company as well as the insurance broker. In the event contractors or sub-contractors are involved, any prudent risk management plan should have the contact information not only for that Company's Risk Manager, but also all of their relevant coverage information. With any contractor, sub-contractor or affiliates, an understanding should be reached as part of the contractual process as to who and when it is responsible for putting their carriers on notice and time periods for doing so. In the event of a loss, the owner should take care to ensure that contractors have in fact put their carriers on notice and made the appropriate reporting.

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**10** Again, please refer to the statute in your jurisdiction pertaining to a party's ability to seek indemnity in a construction contract. For a list of known statutes, please see the reference table attached to the end of this article. Recent trends in this area can be observed in *General Portland Land Devel. Co. v. Stevens*, 395 So.2d 1296 (Fla. Dist. Ct. App. 1981); *Estate of Willis v. Keiferbaum Const. Corp.,* 357 Ill. App. 3d 1002 (2005); *Fishchbach-Natkin Co. v. Power Processing Piping*, 157 Mich. App. 448 (Mich. Ct. App. 1986); *Ralph M. Parsons Co. v. Combustion Equipment Associates,* 172 Cal. App. 3d 211 (Cal. Ct. App. 1985); *Dutton v. Charles Pankow Builders, et. ano.,* 296 A.D.2d 321, 745 N.Y.S.2d 520 (N.Y. App. Div. 2002); *Brooks v. Judlau Contracting*, 11 N.Y.3d 204 (N.Y. 2008); *Ramos v. Browning-Ferris*, 103 N.J. 177 (N.J. 1986); and *Azurak v. Corporate Property Investors*, 175 N.J. 2003).

Part of any disaster plan should include a coverage tree which on one document outlines all of the coverages available to the site from both the owner as well as any third parties. That coverage tree should include policy period information and a contact person. Care should be made to ensure that all excess carriers are part of that coverage tree as well as workers' compensation carriers.

In the event of a construction site or industrial project, special consideration should be given to the Owner Controlled Insurance Policy. Under an owner-controlled insurance program or (OCIP) the owner buys insurance for all of the participants in a particular project whether it be construction or renovation. The owner then requires the participants to reduce their price by eliminating all of their insurance costs in their bid in exchange for the owner provided coverage. And OCIP will cover the contractor and sub-contractors, and OCIP may also include design professionals. The coverage can include general liability, builders' risk, workers' compensation, designs, errors and omissions as well as excess, umbrella and other special coverages. And OCIP provides an improved risk control and risk management and claims handling as all of the coverages are centralized.

All insurers should be provided immediate access to the scene and depending on the nature of the loss, a particular insurer may wish to take control of the same. (e.g. boiler and machinery coverage). Of course, care should be taken in dealings with the insurers to preserve any privileges that counsel wishes to keep in connection with the law.

## H. SPECIAL CONSIDERATIONS FOR THE FIRE SCENE

The purpose of this is to provide a systematic technique to managing complex fire scenes and investigations, while utilizing scientific methodologies. Strategies to develop this paper were compiled through the unique perspectives of an experienced Forensic Engineer. Emphasis is placed on the practical use of NFPA 921 *Guide for Fire and Explosion Investigations*, as recommended by the National Association of Fire Investigators (NAFI), and the International Association of Arson Investigators (IAAI). This paper will include a focus on scientific methodology and legal considerations throughout an investigative process, in the aftermath of complex fires and explosions.

### i. Introduction

Whenever there is a fire or explosion, after the responding agencies contain the incident or extinguish the fire, the subsequent question is always "What caused this to happen?" In order to adequately answer that question, an investigation

must be conducted before the scene loses its evidentiary value, which can provide clues as to the sequence of events leading up to the incident. Whether a small dwelling fire, or a large industrial explosion, the investigation must be managed. The management of a fire or explosion investigation will fall in two categories:

1. Basic Investigations, usually involving a single family home or vehicle without any fatalities.

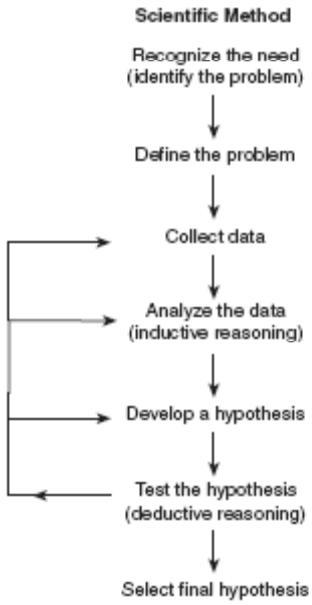
2. Complex Investigations, which may include fatalities, but more often than not involve a large-scale building or industrial complex. In addition, industrial or commercial processes that utilize various systems such as electrical, mechanical, or chemical may be involved.

The management of either of these investigations should be done in a systematic manner, so that all available information or data is collected and preserved, in order to assist the investigators in developing their hypothesis of what happened.

### ii. Scientific Methodology

According to various sources, Roger Bacon, a 13th Century English Franciscan Monk, is credited with defining the modern scientific method, as he believed knowledge should be gathered by close observation and experimentation. Application of the scientific method involves the creation of a working hypothesis based on first hand information, and if additional information is gathered, it must be evaluated to determine if the preliminary hypothesis should be modified or remain unchanged.

The scientific method has been modified and arranged to assist individuals in various fields in an attempt to find a systematic approach to scientifically derive answers to a proffered question. From a historical standpoint, this systematic approach to answering the question of what caused a fire or explosion to occur was addressed in 1992, when the National Fire Protection Agency's (NFPA) Technical Committee on Fire Investigations developed NFPA 921, *Guide for Fire and Explosion Investigations.* The purpose of this guide was to assist in improving the fire investigation process, as well as the quality of information on fires resulting from the investigative process. The guide is intended for use by both the public sector, who have statutory responsibility for fire investigation, and private sector persons conducting investigations for insurance companies or litigation purposes. The goal of the committee guide is to provide guidance to investigators and is based on accepted scientific principles or scientific research. The diagram illustrated below is an example of the scientific method, as outlined in the 2008 NFPA 921 guide, on Page 921-16.




### iii. Management of the Investigation

Application of the scientific method, as it applies to the management of complex investigations, must address the first two areas of the diagram as shown above:

1. Recognizing the Problem (There was an incident).

2. Defining the Problem (Identify the scene dynamics and logistical parameters to determine when data collection efforts may or may not occur).

Benefits related to utilizing a systematic approach when managing a complex investigation includes enhanced coordination of scene control. A consistent framework reduces the time to perform an investigation, aids in minimizing or eliminating disputes between interested parties, and has the added benefit of reducing the cost of the investigation as work is performed in a timely and efficient manner. However, before these benefits can be realized, you must first be permitted to gain access to the scene.

### iv. Who is Invited

After a fire or explosion occurs, the first agency to arrive at the scene will typically be the local fire department. Following suppression efforts, the investigative phase begins. The question of “Who’s in Charge?” when managing fire scene investigations must be addressed at the onset. Initially, representatives of local, state, and/or federal agencies will establish Incident Command. Depending on the number of participating agencies, there will be only one Incident Commander or a Unified Command that will be responsible for establishing and maintaining

scene control. From that point forward, anyone who is not a participating member of these organizations will have to receive an invitation from the lead agency (The Host) to access the site. Depending upon the complexity of the incident, and whether it is considered a crime scene or not, the following parties may receive an invitation to perform tasks that pertain to their respective areas of expertise:

1. Medical examiner
2. Forensic specialist
3. Bomb disposal technician
4. Evidence custodian
5. Safety specialist (structural engineer, etc.)
6. Insurance agency representative
7. State Fire Marshal/Fire Department Investigator
8. Bureau of Alcohol, Tobacco & Fire Arms (ATF)
9. Occupational Safety and Health Administration (OSHA)
10. Environmental Protection Agency (EPA)
11. Police Department
12. Photographer (still, digital, video, etc.)
13. Logistics specialist

### v. Challenges and Benefits Related to the Scene

The challenge of any investigation begins with the collection of data, or information, as it relates to the incident. While the scene is under the control of another party, such as a governmental entity, it presents particular challenges to an investigator. Those challenges are often related to one of the following issues:

- Scene access
- Compromised scene integrity
- Public safety concerns
- Tools/equipment
- Resources such as laborers or laboratory/x-ray facilities

Access to the scene may be temporary, due to the government authorities performing their investigation. Inclement weather conditions, safety monitoring issues, or building demolition due to public safety concerns may cause permanent denial of scene access.

If temporary access is denied, the investigator will need to speak to the representative of the lead agency to determine if there are tool or equipment constraints that are hindering that agency in their investigation and thus delaying access to others. It is important to note that outside investigators are sometimes in a position to provide necessary tools and equipment, such as an overhead crane or earth moving equipment, to move the investigation forward. This assistance may lead you to being invited access the scene.

As an invited guest, you must adhere to policies, procedures, and guidelines that govern scene access and control. Therefore, after gaining access to the scene, an investigator must determine what documentation protocol must be followed. Documentation can be accomplished with the use of still photography, video, or by sketching floor plans and elevation views. It is important to also understand that there may be instances in which still photography or video recording may not be allowed. In those instances when access is permanently denied, be sure to search for and, if possible, obtain blue prints, site plans, or schematics. These resources may become instrumental in scene reconstruction and evaluating any building systems or items which might have been located in the area of interest, prior to the fire occurring. Understanding the building systems present at the time of the incident will assist with reconstructing the scene by piecing together parts of the debris and rubble, as if it were a jigsaw puzzle, when all interested parties are present to process the scene.

### vi. Communication Among Interested Parties

After documenting the scene of the fire or explosion, the scene must be processed by physically sifting through the debris with all interested parties present. However, in order for that process to begin, parties who are potentially affected by the fire must be provided with a schedule. These parties will receive notification to inform them of the investigative process. The communication between all parties will typically involve outlining activities related to the tasks to be completed, and by which individual or group. At that time, the interested parties will decide when to conduct a joint inspection. It should be noted, many investigations may take weeks or months; and in some cases, the investigations may continue for years. The associated timeframe of the investigation schedule depends upon the size and scope of the incident. Some scene operations may only concern certain entities. However, it is imperative to have someone from or representing your group onsite at all times. In particular, investigations involving government agencies may not wait for all parties to be available before

continuing their investigation. Depending on the situation, schedule changes may result due to an unforeseen set of circumstances. It is your responsibility to have representation available; otherwise, your group may miss out on valuable investigative information.

Once all interested parties are notified and present at the scene, a preliminary meeting of those parties takes place to update everyone on the progress of the investigations. Discussion of predetermined understandings and agreements between parties should take place in an effort to reduce the time and cost of the investigation for everyone. Understandings and Agreements are normally in the form of Protocols that have been created and, if agreed to by all parties, may be modified in the field. These agreements are designed to coordinate multiple investigations, occurring simultaneously, by different entities. It is important to note that these agreements only pertain to gathering information or identifying evidence, not agreeing on proffered opinions.

### vii. Evidence Identification and Collection

During the processing of the scene with multiple parties onsite, items of interest will be identified and treated as potential evidence. Before evidence is identified, agreements should be made to determine who will be the custodian of the evidence. This will entail the preserving, transporting, sorting, and storing of the evidence in a secured position. In certain instances, a third party or contracted company will be utilized to physically mark and collect the evidence based on the agreed upon methods. However, the investigators of each participating entity (interested parties), must perform or assist in the identification of the evidence. Timely and well documented evidence collection is critical to a complex investigation and possible litigation. Thus, the methods and procedures outlined in the ASTM E860-97 “Standard Practice for Examining and Testing Items That Are or May Become Involved in Litigation” may be utilized as an industry resource when the processing of evidence commences.

### viii. Scene Safety and Access Control

From the time that an investigator is invited onto the scene, until the time that the scene investigation has been completed, it is the responsibility of that person to identify and address any safety concerns. As an example, until the investigator physically verifies that the controlled energy sources for the scene have been isolated, they must always treat the building systems as if they are energized. For that reason, adherence to 29 Code of Federal Regulation (CFR) 1910.147 for isolation of hazardous energy (lockout/tag-out) systems is critical.

Beyond the hazardous energy systems, a hazard/risk assessment of the scene should be conducted prior to processing the scene, to identify any safety issues unique to that scene. Those hazards could be as simple as unstable second

story floors through which an investigator may fall through, or as complex as chemicals onsite requiring a Ty-Vek chemical suit with a self-contained breathing apparatus (SCBA) be worn prior to entering the scene.

Whether exposure to hazardous energy systems or unique hazards associated with the scene itself, safety must be the first priority of all involved with a simple or complex fire investigation.

In summary, the management of complex fire investigations can be accomplished through strategic collaboration, effective means of communication, and implementation of a systematic approach using scientific methodology, industry regulations, and legal considerations as a guide. Additionally, vigilant adherence of scene control guidelines which include the overarching theme of personnel and scene safety, will aid in expediting the investigation process and minimizing possible litigation. Through incorporation of these key concepts into the management of complex fire investigations, a framework has been built in a systematic manner. In using this type of framework, the investigative process, which ultimately leads to the discovery of valuable information, will serve as a catalyst in developing supporting documentation to reconstruct a series of events and eventually determine the cause of the fire/explosion, consistently.

## I. ESTABLISHMENT OF PROTOCOLS FOR PROTECTING CONFIDENTIALITY, PRESERVATION OF EVIDENCE, GENERAL MANAGEMENT OF INVESTIGATION

Notwithstanding the need for communication with other potential defendants arising out of a catastrophic disaster, a legal liaison should always keep in constant contact with the other known parties of interest when considering the preservation of evidence. In the hours after first responders have been able to remove any and all personnel who may have been injured or killed as a result of an industrial accident, your client's disaster team legal liaison should be anticipating the tactical maneuvering of the other parties involved, posturing the company for future prosecution and/or defense of regulatory citations and litigation arising out of the disaster.

Protocols for the preservation of evidence, whether it be physical components of a liquid nitrogen storage tank after an explosion, derailment of train tank cars of chemicals, or other catastrophic events, documentary evidence related to maintenance of the tank(s), photographic and videographic images, and electronic data used for monitoring temperatures and pressures inside the storage tank, are essential in the hours after a disaster to ultimately determine the root cause of the disaster while posturing one's claim for future litigation. As discussed below, these protocols will not only help one's client organize the investigation after a disaster, but does avoid spoliation concerns and thus additional defense costs.

When creating protocols for the preservation of evidence, the disaster team, legal liaison and the investigation coordinator should set goals for the protocols, taking into consideration the proper notice to provide all potential entities and persons known or which we can anticipate will become involved in the public sector, including media personnel; trade publications and regulatory agencies who will, within 24 hours, contact the designated liaison for comment upon the events. Further, they should consult with any experts with whom they have previously worked and retained to assist in the investigation and recovery. Aside from an expert's ability to maximize the effectiveness of protocols in his/her individual specialty, their extensive knowledge in the field of that area of expertise can help narrow the issues related to the root cause during the investigation.

It is a given that courts today have the discretion and power to impose a wide variety of sanctions for violations of the rules of discovery. Furthermore, today's legal climate, being in a stage of litigation reform has led to our courts becoming more aggressive in imposing fines and sanctions on companies who skirt the rules of discovery.[11] The effects of failing to properly preserve and/or produce evidence can result in a court granting an adverse inference jury charge at trial, thus informing the jury that a company's failure to produce certain evidence in and of itself is evidence that the items not produced would have been adverse to the company's position. Further, any hindrance in the ensuing litigation through the imposition of sanctions or having to defend any unnecessary discovery motions creates added cost for our clients and unnecessary headaches that could have been prevented on the front end. Therefore, the proper implementation of well-thought, broad sweeping protocols aimed at preserving evidence and maintaining transparency in the investigation can reduce the overall cost of litigation while bolstering defenses that might not otherwise be available. Many aspects of your investigation can be broken down into several different types of protocols. They are listed as follows:

### i. Protocols to Maintain Confidentiality

Many companies, both large and small, possess documents, equipment, processes or other tangible items that are considered proprietary in nature. As such, these corporations strive to maintain such proprietary information as confidential. However, in the wake of a catastrophic disaster, protection of proprietary information can become difficult as there are many eyes focused on that company and its investigation of the root cause of the disaster. Thus, many companies with multiple entities

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Schumacher; Kuchler. *Preventing and Managing Chemical Catastrophes: A Practical Guide for In-house and Outside Counsel*, 58 Fed'n Def. & Corp. Couns. Q. 319 (2008).

involved in an accident may find it useful to require all parties investigating a disaster to sign confidentiality agreements.[12] Confidentiality agreements, like any contract, must be valid and enforceable to be effective in the instance of a breach. As such, they are subject to the basic requirements of contracts and interpreted accordingly.[13] Of course, when a catastrophic event occurs, such as the 2005 BP explosion in Texas, many parties with different investigators take thousands upon thousands of photographs as part of their root cause analysis. Therefore, there are ample opportunities for information deemed proprietary to wind up in the public domain, increasing the need for a confidentiality agreement. Furthermore, the ease of access to the Internet has created further concerns in drafting confidentiality agreements, in that it makes information disclosed in violation of a confidentiality agreement harder to track to the original source. Regardless, proper implementation of a confidentiality agreement can save a company time, money and effort in keeping proprietary information out of the public domain as well as curb the publicity associated with a catastrophic disaster.

An example of one effective confidentiality protocol is to require all parties, including photographers and investigators, to upload daily any and all photographs taken during their investigation onto a central repository hard-drive. Furthermore, restricted use of cellular telephones equipped with digital cameras and designated special locations in which phones could be utilized is critical. In effect, it minimizes the opportunities for proprietary information to escape through an internal investigative sharing program. It also encourages the parties to conduct a thorough investigation while monitoring what information is being uncovered through the various investigations. Therefore, if any information makes its way into the public domain, it is easily traceable to the original source. However, one concern with the use of a central repository hard-drive is who maintains custody and control of it and inputs the information shared. To alleviate issues of control, designation of a neutral, disinterested party can be established.

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In order to claim trade secret protection, the owner thereof must have taken measures to prevent the secret from becoming available to persons other than those selected by the owner to have access thereto for limited purposes. Such measures must be reasonable under the circumstances to maintain its secrecy. However, extreme and unduly expensive procedures need not be taken. *Hertz v. Luzenac Group,* 576 F.3d 1103 (10th Cir. 2009). See also *Tubular Threading, Inc. v. Scandaliato,* 443 So.2d 712 (La. Ct. App. 1983); *Dicks v. Jensen*, 172 Vt. 43 (Vt., February 9, 2001); *Enter. Leasing Co. v. Ehmke*, 197 Ariz. 144 (Ariz. Ct. App., December 2, 1999)

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See *Restatement 2d of Contracts* _188 - Ancillary restraints on competition.

### ii. Protocols for the Inspection of Evidentiary Materials

The next type of protocol to consider is a protocol regarding the inspection of evidentiary materials. When considering this type of protocol, it is easiest to picture the method by which the NTSB investigates a plane crash. First, they round up all of the pieces of the wreckage. Then they take them to a secured area where the pieces are laid out based upon their pre-accident location on the plane; and finally, they are observed by the investigators in an attempt to piece the puzzle together of why the plane crashed in the first place.

When creating a protocol of this type, your client should take into consideration the logistics of transporting the materials that are part of the investigation to a nearby secured location: The methods of securing the evidentiary items should be clear and agreeable by all participating parties. The inspection area should remain accessible by the parties throughout all hours of the day and, if not, designate the times of accessibility to the materials by all representatives of the parties; maintain a record of individuals entering and exiting the inspection area, by an appointed "gatekeeper," etc. The idea behind the protocol again is to keep a thorough record of what evidentiary items have been recovered and who is inspecting them. This will minimize the concerns over spoliation as well as make it easier to find the source of any evidentiary item that might be missing. Finally, each item removed should be labeled, logged in and photographed such that any attorneys who were not involved at the onset is assured of the evidence preservation, thus helping to avoid any claims of spoliation.

### iii. Protocols for the Retention of Electronic and Documentary Information

With today's discovery rules allowing for the discovery of metadata and other electronic information, protocols aimed at maintaining electronic records are vital to the preservation of your corporation's position in litigation arising out of a catastrophic disaster.[14] Thus, it is imperative for a corporation to notify all personnel to retain any and all documentation, including electronic data, that may have relevance to the project and/or disaster. Company personnel should be schooled regarding the existence of metadata in electronic formats and the effects of altering/revision

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See *Pension Committee of the University of Montreal Pension Plan v. Banc of America Sec.*, 2010 U.S. Dist. LEXIS 4546 (S.D. N.Y. January 15, 2010)(citing *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 217 (S.D. N.Y. 2009)("*Zubulake V*")). But also see *Rimkus Consulting Group, Inc. v. Cammarata*, 2010 U.S. Dist. 14573 (S.D. Tex. February 19, 2010).

documents, which could lead to issues of spoliation. Once a document hold is in place, all relevant documentation and electronic data should be reviewed by counsel as soon as possible to assess whether the information may be responsive or privileged, preventing it from being produced in later discovery.[15]

By implementing a protocol for the retention and review of electronic and documentary evidence that may be relevant to the disaster, your client can save countless time and resources by knowing what documents have been logged in and available for inspection as new parties enter the picture, thus further posturing a successful defense to spoliation. Furthermore, with tight discovery deadlines, especially in federal court, getting a leg up on discovery can make the whole discovery process more efficient and less of a burden on the parties involved.

### iv. Protocols for Non-Destructive Testing

In the course of an investigation, your corporation should also consider the creation of a protocol for non-destructive testing. A non-destructive testing protocol created in the wake of a catastrophic disaster should incorporate issues such as the selection of key pieces of evidence by each party; a method of cataloguing any and all evidentiary pieces selected by the parties; who will be conducting the testing; transportation issues with the selected evidentiary items to the testing facility (if off-site); who will bear the cost of transportation and testing the selected evidentiary items; what non-destructive tests will be performed; what is the expected utility of the results to be gained from the testing; where will the selected evidentiary items be stored during and after the testing; and who will bear the cost of storing the evidentiary items. This protocol will, in essence, incorporate many different issues of the investigation and should be implemented only after providing notice to all parties involved and allowing a reasonable opportunity for them to object or offer any additional testing that they wish to be performed. This will prevent any spoliation allegation and allow for maximum effectiveness and efficiency in testing.

### v. Protocols for Destructive Testing

Protocols aimed at destructive testing, while immensely useful in determining the root cause of a disaster, must be carefully considered before being implemented. Aside from the fact that destructive testing

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Schumacher; Kuchler. *Preventing and Managing Chemical Catastrophes: A Practical Guide for In-house and Outside Counsel*, 58 Fed'n Def. & Corp. Couns. Q. 319 (2008).

protocols will more than likely be established with the assistance of one's consultant, potentially exposing your expert's mental impressions and/or preliminary opinions as to potential causes of the disaster, when your company considers destroying evidence for the purpose of determining the root cause of the disaster, Pandora's box is opened in the sense that whatever the results from the testing turn out to be, they will be available through ordinary discovery channels.[16] As such, your corporation might consider reserving any destructive testing unless and until it is required for proof upon the ultimate issue of negligence or required by a governmental agency involved in the investigation. However, if and when the time becomes ripe for destructive testing, your corporation should consider the following:

1. Where will the testing be performed;

2. What evidentiary items will be tested;

3. Will the proposed testing be performed in a way which accurately reflects the manner the component was used prior to the disaster;

4. What parties will be provided notice of the testing;

5. Who will pay for the cost of testing the various evidentiary pieces;

6. Who will devise the protocol for the testing;

7. What will become of the evidentiary pieces after the testing has concluded; and

8. How will the results be documented and maintained?

Your client should again consider providing notice to all parties, including any injured employees or other anticipated plaintiffs, prior to conducting any destructive testing. As discussed above, this will avoid the increased cost of having to defend any spoliation claims or discovery motions seeking sanctions by creating transparency in the investigation and

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See *Mirchandani v. Home Depot, U.S.A., Inc.,* 235 F.R.D. 611 (DC Md. 2006); *Dabney v. Montgomery Ward & Co.*, 761 F.2d 494 (8th Cir. 1985) cert. denied 474 U.S. 904, 106 S.Ct. 233, 88 L. Ed.2d 232 (1985); *Spell v. Kendell-Futro Co.*, 155 F.R.D. 587 (E.D. Tex. 1994).

permitting a reasonable opportunity for all parties to raise and resolve any objections they may have to the testing and/or the results.

## II. COOPERATION WITH GOVERNMENTAL AGENCIES DURING AND AFTER THE INVESTIGATION.

Significant disasters will draw a response from different levels of state and federal government. Depending on the type of product or the type of circumstances surrounding the release, spill or explosion, state and federal environmental agencies, the National Transportation Safety Board, the Federal Bureau of Investigation, the Department of Homeland Security, the Department of Transportation, the State Labor Board or OSHA, the Federal Emergency Management Agency, local law enforcement, firefighters and other emergency response officials may all respond. These governmental representatives will vary widely in terms of knowledge and sophistication as well as degree of oversight and participation in the emergency response. Regardless of the relative degree of sophistication, it is hoped that company representatives will previously establish and maintain a good rapport with all levels of government.

If a large event occurs, counsel should ensure that not only required notifications are made pursuant to any applicable law, but also encourage the appropriate company officials to make courtesy calls to known contacts with significant regulatory responsibility and have employees who work with these individuals on a regular basis involved in responding to the incident and maintaining open lines of communications with the regulators. Invariably, governmental agencies like the NTSB, the U.S. Environmental Protection Agency and other government representatives will demand company records and interview with company employees. This will happen immediately and there is little you can do to cut down the information flow to the agency. The agency will get the information one way or another.

Another significant event that could occur is that the governmental agency may take control of the scene. If the particular government agency has reason to believe that the event in question may be the result of criminal or other illegal activity, there is the real possibility that the governmental agency will take control of the scene and maintain that control until its investigation is through. In that event, not only does the scene fall under the control of the government, but also the records, employees and other individuals. As a result, the Company should endeavor to try and minimize the damage that occurs from this loss of control. Among the ways to minimize the damage are:

### i. Designate a Single Point of Contact

This will permit the Company to keep track of what information the government has requested and received. It keeps a separate copy of everything provided to the government**.**

### ii. Prepare Company Employees for Interviews with the Government Investigators

While the Company's position will almost always be to cooperate with the governmental investigation, an employee should be encouraged to do the same. Employees frequently need to be reminded to avoid speculating or making statements beyond their knowledge. Irrelevant, misleading and even erroneous speculation by employees can create havoc with the Company's subsequent defense in civil litigation. Employees need to understand that "I don't know" is an acceptable answer if it is the truth.

### iii. If Permissible, Monitor Governmental Investigator Interviews

If permitted by the regulatory authority, the presence of counsel or a company representative in the governmental interview will give the Company contemporaneous possession of the same information as the government. If governmental representatives refuse to allow a company representative to be present, it is very important to interview the employee as soon as possible to determine what the government asks and what answers were given. In the case of individual employees who may have some responsibility or culpability for the event, the Company should consider retaining separate counsel for those employees.

### iv. Maximize the Use of Available Privileges

Maximize the use of available privileges, including attorney-client work product, investigative privileges (if supported by applicable law), and any statutory privileges. While pure facts are generally not privileged, the attorney work-product privilege may be effectively used in appropriate circumstances for investigations conducted by counsel or under counsel's direction to shield the analysis inherent in employee interviews and the analytical review of key engineering and technical information. Careful thought must be given to the Company's overall investigative effort before potentially troubling memoranda are prepared by engineers and other technical employees outside of any reasonable claim of privilege. In this regard, remember that e-mail is virtually permanent and equal care must be exercised with these messages as with any other written document.

### v. Was There a Crime or a Terrorist Event?

Over the last two decades, criminal enforcement of energy and environmental laws has increased substantially as a result of public interest, increased enforcement staffing and additional enforcement laws. In the past few years, for example, the federal government has initiated a number of criminal investigations following spills or releases. The

government has also manifested interest in pursuing criminal sanctions where there has been a pattern of spills, even if none of them are particularly large and the Company responds to the spills quickly and appropriately. Increased criminal enforcement comes under the environmental laws rather than safety laws and regulations.

The government's policy with regard to environmental and criminal enforcement is to prosecute individuals' as well as corporations in an appropriate case. Moreover, the government will prosecute individuals to the highest level in the organization where a case can be made. It is important to note that this approach of enforcement can divide an otherwise unified front and place extreme pressures on the Company and its employees.

Some environmental offenses verge on strict liability – effectively eliminating "intent" as an element of the crime. Other environmental crimes require only negligence on the part of the Company or its employees. The government maintains that low intense standards are acceptable because it will only prosecute extreme cases. This is a little comfort to employees who are asked to testify in a civil lawsuit, when there is a pending or potential criminal investigation where they may be a target.

Moreover, agencies such as the Federal Occupational Safety and Health Administration or the State Department of Labor or even a local district attorney may become involved if Company employees or contractors were injured or killed in the accident. These entities may evaluate criminal filings under either occupational safety statutes or negligent or reckless homicide charges. Likewise, accidents involving over-the-road vehicles may subject a driver to charges of negligent or reckless homicide.

Finally, as mentioned above, it is essential that defense counsel advise employees accused of crimes of a need to retain separate counsel. The prospect of a conflict arising between a company and its employees where a threat of criminal prosecution involved is extremely heightened. A prosecution, governmental investigation or even a potential government investigation can dramatically change the dynamics of a civil suit and impose significant pressure to settle the tort suit. Ultimately, failure to anticipate a potential prosecution can have serious consequences for a company and its employees.

Since 2001, the prospect of terrorism has brought a new dimension to the investigatory facet of any incident. Oftentimes a significant explosion or event which does significant property damage or loss of life raises the specter of terrorism. Where that occurs, Homeland Security may employ

an interdisciplinary approach drawing on the expertise of federal, state and local agencies to investigate pieces of evidence.

## III. CONCLUSION

Preparation is the key to preventing catastrophic industrial/construction disasters and mitigating their consequences should such an event occur. Effective disaster management begins with assessing a company's risks and then having in place a comprehensive crisis management plan which outlines principles of preparedness, response and recovery. Bearing in mind that litigation is likely to ensue following a disaster, having an effective and efficient plan of action will ensure that the company can respond positively to crisis situations and handle events with confidence and authority, both during the disaster and in its aftermath.

## Table of Known Statutes Concerning Anti-Indemnity Provisions in Contracts

| | |
|---|---|
| Alabama | |
| Alaska | - Alaska Stat. § 45.45.900 |
| Arizona | - A.R.S. § 32-1159 |
| Arkansas | |
| California | - Cal Civ Code § 2782 |
| Colorado | - C.R.S. 13-50.5-102 |
| Connecticut | - Conn. Gen. Stat. § 52-572k |
| Delaware | - 6 Del. C. § 2704 |
| Florida | - Fla. Stat. § 725.06 |
| Georgia | - O.C.G.A. § 13-8-2 |
| Hawaii | |
| Idaho | |
| Illinois | - 740 ILCS 35/1 |
| Indiana | - Ind. Code Ann. § 26-2-5-1 |
| Iowa | |
| Kansas | - K.S.A. § 16-121 |
| Kentucky | |
| Louisiana | - La. R.S. 38:2216 |
| Maine | |
| Maryland | - Md. Code Ann. § 5-401 |
| Massachusetts | - ALM GL ch. 149, § 29C |
| Michigan | - MCL 691.991; MSA 26.1146 |
| Minnesota | - Minn. Stat. § 337.02 |
| Mississippi | - Miss. Code Ann. § 31-5-41 |
| Missouri | - _434.100 R.S. Mo. |
| Montana | - Mont. Code Ann. § 18-2-124 |
| Nebraska | - R.R.S. Neb. § 25-21, 187 |
| Nevada | |
| New Hampshire | - RSA 338-A:2 |
| New Jersey | - N.J. Stat. § 2A:40A-1 |
| New Mexico | - N.M. Stat. Ann. § 56-7-1 |
| New York | |
| North Carolina | - N.C. Gen. Stat. § 22B-1 |
| North Dakota | |
| Ohio | - ORC Ann. § 2305.31 |
| Oklahoma | - 15 Okl. St. § 221 |
| Oregon | - ORS § 30.140 |
| Pennsylvania | |
| Rhode Island | - R.I. Gen. Laws § 6-34-1 |
| South Carolina | |
| South Dakota | - S.D. Codified Laws § 56-3-18 |
| Tennessee | - Tenn. Code Ann. § 62-6-123 |
| Texas | - Tex. Civ. Prac. & Rem. Code § 127.001 |
| Utah | - Utah Code Ann. § 13-8-2 |
| Vermont | |
| Virginia | |
| Washington | |
| West Virginia | |
| Wisconsin | - Wis. Stat. § 895.447 |
| Wyoming | |

# REINSURANCE MARKETS

# IN A

# GLOBAL ECONOMY

FDCC Annual Meeting
Westin Grand Arabellapark Hotel
Munich, Germany

July 24 – 31, 2010

Presented by:


Thomas Leidell
Tokio Millennium Re Ltd
Hamilton, Bermuda

Stephen Carter
Carter Perry Bailey LLP
London, England

Dr. Thomas Fausten
Swiss Re Germany AG
Munich, Germany

Michael T. Glascott
Goldberg Segalla LLP
Buffalo, New York

# REINSURANCE MARKETS IN A GLOBAL ECONOMY

By Michael T. Glascott
Jeffrey L. Kingsley
Thomas F. Segalla

On a clear day, can reinsurers foresee forever? Pandemics, financial meltdowns and Icelandic volcanoes have made us acutely aware that natural and man-made events can cascade across international boundaries, continents and oceans. The world grows smaller every day in our global economy and the need for reinsurers to maintain capital and risk transfer capability is challenging. As reinsurance markets struggle to foresee that which is to come, will every market react in the same way to the pressures exerted by the changes in our global economy? A recent decision in one market has cedants and reinsurers wondering what is next.[1]

## A. A Primer

Reinsurance is best conceptualized as "insurance of insurance companies."[1] Restated, "the insurance of one insurer (the 'reinsured') by another (the 'reinsurer') by means of which the reinsured is indemnified for loss under insurance policies issued by the reinsured to the public."[2] Consider the following:

- **primary insurer** - the company that writes the insurance for and has the relationship with the policyholder/insured.
- **reinsurer** - provides protection for the reinsured/cedant.
- **retrocessionaire** - provides a second layer of reinsurance (i.e. reinsurer buys insurance). In this situation the reinsurer can be referred to as a "cedant."
- **retention** - the portion of the risk that the ceding insurer retains or assumes.

Reinsurance involves various plans and underwriting methods.

### 1. Reinsurance Plans[3]

Each of the following plans impact how the premiums are treated.

*Proportional Plans*

Quota share/co-insurance. Under this type of plan the loss or risk is shared proportionately. In the life insurance/reinsurance field these are two specific types of plans. Usually a fixed percentage.

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[1] We have analyzed the recent ruling by the House of Lords in Lexington v. Wasa, but we have also attached a paper by Bill Perry and Stephen Carter entitled "'BACK TO BACK' AS A CONCEPT IN REINSURANCE IN ENGLISH LAW FOLLOWING LEXINGTON V. AGF (AND LEXINGTON V. WASA").

- yearly renewable term

- modified coinsurance

Surplus share. The face amount of the policy or the policy limit depending on the type of insurance is shared on a quota basis.

*Non-Proportional Plans*

Stop Loss/Excess Loss. The reinsurer on a particular loss pays an amount above the attachment point.

Stop Loss Aggregate. An aggregate attachment point is defined and the reinsurer pays the claims over that amount.

Loss Trigger/Franchise. If losses exceed the trigger point which is set, the insurer pays all claims down to a particular amount.

Horizontal Excess of Loss. This plan contemplates the adding of additional reinsurers.

*Fronting Arrangements*

Licensed/Unlicensed. This is a reinsurance device used by a company not qualified or licensed to do business in a particular state. The licensed insurer issues a policy with the understanding that another party will pay under the policy.[4]

2. Reinsurance Contracts[5]

Two types of reinsurance contracts:

a. *Treaty Reinsurance*
Under the pure treaty contract, the reinsured cedes a block of business on an ongoing basis to the reinsurer. In such situations there could be more than one reinsurer each taking a specific amount or percentage of the total liability. Such a sharing could be open and automatic or secretive and blind.[6]

b. *Facultative Reinsurance*
This type of reinsurance deals with a specified risk insured by a particular policy or group of policies. The reinsurer individually underwrites the specific risk.[7] There is a semi-automatic or automatic variation that allows the reinsurer to cancel whole or part of the risk.[8]

## B. Interpretation Of The Arrangement

*Rules Of Construction*

Generally, ambiguous provisions contained in an insurance policy are interpreted in favor of the insured and against the insurer, but when interpreting a reinsurance arrangement, such traditional principles are not applied when two insurers negotiate the certificates and treaties.[9] However some courts, even in the reinsurance context, have held that "where an ambiguity exists in a standard-form contract supplied by one of the parties, the well established *contra proferentum* principle requires that the ambiguity be construed against that party."[10]

Unique to the interpretation of reinsurance arrangements is the notion that courts will consider industry usage and practices as well as communications and documentation utilized by the cedant and reinsurer.[11] Specifically, courts will consider the course of dealing between the parties. As one court noted: "[f]acultative reinsurance agreements are not integrated agreements. Courts recognize, generally, that the insurance agreement consists of the communications exchanged between the parties, as well as the facultative reinsurance certificates."[12]

Consequently, all correspondence and communications between a cedant and reinsurers are important to the determination of the terms of a reinsurance arrangement. The exchange of correspondence by the parties can create a binding agreement and the issuance of a certificate of assurance is unnecessary.[13] The communications and documents generated between the parties, and all submissions, requests, binders, facultative notes and certificates, will be reviewed in order to clarify the arrangement.[14] Even the "exchange of telephone calls or telefax" can constitute an agreement.[15] Notably, courts will use applicable evidence for the purpose of "clarifying, but not contradicting or changing the terms."[16]

*Enforcement of Terms*

Once the terms of the arrangement have been defined, the interpretation of such terms usually follows two concepts for the determination of how the agreement will be enforced.

*a. Follow the Fortunes Doctrine*

The follow the fortunes doctrine is generally referred to as the loss settlement clause; however, most jurisdictions refer to clauses of this nature as the follow the fortune doctrine and define it as follows:

> A loss settlement clause, in the absence of a provision to the contrary, binds the reinsurer to pay its share of the reinsured's settlement of losses under an original insurance unless:
>
> 1. The loss is beyond the scope of the insurance as a matter of law; or

2. The loss, in the case of a reinsurance coextensive with underlying insurance, is beyond the scope of the underlying insurance as a matter of law; or
3. The settlement was fraudulent, collusive, in bad faith or otherwise dishonest; or
4. The reinsured failed to take all businesslike steps reasonably necessary to properly and carefully investigate and ascertain the amount of the loss.[17]

A follow the fortune clause obligates reinsurers to pay their share of a loss settlement made by the insured if the loss settled was, with respect to liability and damages, reasonably within the scope of the reinsurance arrangement. Payments must be made if the loss is covered by the original policy and the reinsurance contract, subject to the foregoing defense. A loss would be without reinsurance if it was not contemplated by the original insurance policy or if it was expressly excluded by the term of the certificate of reinsurance.[18]

In order to avoid its obligation under a follow the fortune clause, a reinsurer must prove that "the reinsured's gross negligence or bad faith, or that the settlement was not arguably within the scope of the reinsurance coverage."[19] A majority of courts have held that the follow the fortunes clause does not rewrite the terms of the arrangement.[20]

Courts have also held that a follow the fortune clause will not be implied into the insurance contract and there must be an express provision[21] that is similar to the following:

> The liability of the reinsurer . . . shall follow that of the company, subjected in all respects to all the terms, conditions and limits of the company's policy(ies), except when otherwise specifically provided herein or designated as non-concurrent reinsurance in the declarations[22]

Closely related to a follow the fortune clause is a follow the form clause, which generally provides: "concurrency between the policy of reinsurance and the reinsured policy is presumed, such that a policy of reinsurance will be construed as offering the same terms, conditions and scope of coverage as exists in the reinsured policy. That is, it exists in the absence of explicit language in the policy of reinsurance to the contrary."[23]

b. *"Uberrimae fidei"*

This duty, of utmost good faith, has been described as "a mutual duty each party owes the other. The duty exists with respect to any action necessary or desirable in order to place and maintain both parties within a fair and equitable bargain."[24] It is recognized that "... a reinsurer's obligation to indemnify its cedant pursuant to the follow the fortunes doctrine is conditioned on the good faith exercised by the cedant in its dealing with the reinsurers."[25] While there are a varying number of standards applied by the courts, one commentator provides an interesting spectrum and defines three potential standards:[26]

(1) Highest - - cedant subordinates its interests to that of the other party.
(2) Middle - - treat your interests as you would treat others.
(3) Lowest - - watch out for yourself first, do not conceal and act unfairly.

The type of underwriting, that is the retention amount, could affect the standard to be applied. The doctrine has been raised in the context of the cedant's failure to disclose critical information or the making of various misrepresentations about the risk or its own insolvency.[27]

A reinsurer owes the cedant a duty of good faith and fair dealing. In *Commercial Union Insurance v. Seven Province Insurance Co.,*[28] the First Circuit Court of Appeals held that the reinsurer's conduct, consisting of raising multiple, shifting defenses (many unsubstantiated) in a lengthy pattern of foot-dragging and stringing Commercial Union along, with the intent of pressuring Commercial Union to compromise its claims,[29] constituted a violation of the Unfair Trade Practices Act.

c. *Other Obligations*

A typical reinsurance arrangement involves the underlying insured, the reinsured and reinsurer. In order to understand the reinsurance relationship, an understanding of the obligation among and between these parties is necessary.

1. Obligations of Reinsured to Reinsurer

a. Notice of Claim

Most reinsurance arrangements require that the reinsured provide the reinsurer with prompt notice.[30] Prompt notice has not been defined precisely by the courts that have considered it, but the timeliness of the notice is judged by an objective standard[31] and custom and usage in the reinsurance industry judge the nature and reasonableness of the notice.[32] The traditional view was that the reinsurer was not required to show prejudice in order to prevail on a late notice claim.[33] However, recent decisional authority suggests that the reinsurer show prejudice.[34] Courts have held there must be some "tangible economic injury" to the reinsurer.[35] Similarly, courts have decided that a cedant's bad faith can be a substitute for the prejudice requirement - - simple negligence is not enough.

b. Underwriting and Claims Handling

The cedant must exhibit competent underwriting and claims handling and specifically that it must act "honestly and [has] taken all proper and businesslike steps" in investigating and resolving the claim.[36] It appears most courts require more than the mere negligence in the handling of a claim in order for the reinsurer to rescind the agreement. For example, the Third Circuit Court of Appeals requires that the "misadjustment" be as a result of gross negligence or reckless conduct.[37]

The reinsurer under the follow the fortunes doctrine "cannot second guess the good faith liability determinations made by its reinsured, or the reinsured's good faith decision to waive defenses to which it may be entitled."[38] However, what happens if the reinsurer becomes involved in defending the loss or in the claims handling process? In *Venetsanos v. Zucker, Facher & Zucker*[39] the court held:

> We recognize and endorse the general rule that an original insured does not enjoy a right of direct action against a true reinsurer [citation omitted]. It is settled that an ordinary treaty of reinsurance merely indemnifies the primary insurer against loss rather than against liability.[40]

The general rule changes when:

> . . . the conduct of the reinsurer demonstrates that it takes charge of and manages the defense of suits against the original insured, the reinsurer may be held to be a 'privy' to the action. In such case, . . . the insured [has] been allowed to proceed directly against the reinsurer.[41]

> The extent of the reinsurer's involvement that will trigger the change of the general rule is difficult to predict and one commentator has noted that "[a]t some level of involvement, reinsurers share the cedant's obligation to the insured to handle claims in a fair and efficient fashion. The point at which this takes place, however, is not yet clear."[42]

2. Obligations of Reinsurer to Reinsured

Generally, obligations of reinsurer are defined and governed by the reinsurance arrangement. The reinsurer arrangement is one of indemnity and the reinsurer owes nothing to the reinsured until the claim has been paid.[43] In *International Surplus Lines Insurance Co. v. Fireman's Fund Insurance Co.,*[44] the court held that the burden of proof is on the reinsured to establish that the reinsurer is liable under the reinsurance contract. Once the reinsured has met its burden of proof, the burden shifts to the reinsurer to show there is an exception or defense to coverage.[45]

Traditionally under an indemnity agreement, the reinsurer is required to pay, in addition to the amount of loss, a proportional share of expenses incurred by the reinsured and related to the defense and claim handling of the underlying claim.[46] Recently, in *TIG Premier Insurance Co. v. Hartford Accident & Indemnity Co.*[47] the court considered this issue of whether a reinsured under a facultative reinsurance agreement was entitled to recover expenses in addition to the limits. The court, in distinguishing two New York cases and deciding the issue under California law, held there were questions of fact as to whether the meaning of the certificate could be used to include the reimbursement of expenses.[48]

3. Liability of Reinsurer to Policyholder

Courts have traditionally held that "an insured does not have a direct right of action against a reinsurer, since the reinsurance contract is only one of underwriting to the original insurer."[49] The basis for such holdings is that privity of contract exists only between the reinsurer and the reinsured.

There is no privity between the reinsurer and the original insured/policyholder. Specifically, it has been stated:

> [A] contract of reinsurance being one between the reinsurer and the insurer/reinsured, absent language in the policy indicating the reinsurer's intent to be directly liable to the insured, the reinsurer has no obligation to the original insured which cannot claim the status of third party beneficiary of the reinsurance contract.[50]

The contract can be drafted to operate in favor of the insured and provide by a "cut through" clause that the original insured has a direct action.[51] Notably, the course of dealing or custom and practice can alter the general rule. This is especially true where the reinsurer becomes involved in the claims process.[52]

d. *Discovery Issues*

Several courts have recently treated the issue of whether the communications between the reinsured and reinsurer are protected as extrinsic evidence, privilege or work product. Further, the courts have been filled with discovery challenges between reinsureds and reinsurers.[53] Most jurisdictions subscribe to the "common interest doctrine" that permits parties who possess common legal interests to share and exchange attorney-client privilege information without that information losing its protected stakes.[54] The doctrine also applies to the reinsurance arrangement.[55]

A claimant in a bad faith action against its insurer will seek disclosure of communications between the reinsured and reinsurer. Two recent cases supply some guidance in this area. In *Young v. Liberty Mutual Insurance Co.*,[56] a bad faith claimant sought communication between the reinsured and reinsurer pertaining to reserve information. In noting that the information requested was extrinsic evidence, the court allowed discovery because it might aid in interpreting the meaning of the terms in the CGL policies.[57] The reinsured sought to protect communications with its reinsurer in the case of *Front Royal Insurance Co. v. Gold Players, Inc.*[58] In holding that the documents were created in the ordinary course of business under the contractual obligation between the insurer and reinsurer and not prepared in anticipation of litigation, they were not protected under the work product doctrine.[59]

E. *Allocation*

The disputes that arise between the reinsured and reinsurer over the allocation payments have generally been in environmental and mass tort litigation. The case of *Commercial Union Insurance Co. v. Seven Provinces Insurance Co.*[60] raises the key issues that must be addressed when seeking to determine whether the allocation method selected is proper. In the typical case the reinsured will settle the past and future claims and in arriving at a settlement figure will choose to settle for commercial reasons. That figure will not necessarily be based on actual liability and may not involve each policy period. As one commentator noted:

> Reinsurers may object . . . that the reinsured has singled out policy years in which the reinsurance retention was lowest, or that the reinsured's settlement artificially minimized the number of occurrences, all in order to reduce retained loss and maximize the indemnity payment from reinsurers.[61]

In determining whether the allocation is enforceable, the courts will look at "whether the allocation of the settlement to reinsurers was rational, reasonable, fair and transparent with regard to liability and calculation of damages, as well as, to whether the particular portion of the losses allocated are reasonably shown to be within the scope of reinsurance."[62]

## C. Will *Wasa International v Lexington Insurance* Cause A Shift In The Traditional Reinsurance Arrangement?

*What happened?*

On July 30, 2009, the House of Lords issued a ruling in *Wasa v. Lexington*[63] in which it determined that the reinsurers, though agreeing to provide back-to-back cover through a facultative reinsurance agreement, were only responsible for a portion of the entire claim. While the House of Lords acknowledged that the reinsurance agreement contained the standard "follow the settlements" doctrine, it nevertheless limited its exposure to the three-year time of cover. Although reinsurers rejoiced in the ruling, cedents around the world examined their own policies to discern if they could be saddled with a sizable under reinsured claim.

*Wasa* adds tension between cedents and reinsurers in all reinsurance markets, but particularly the London market, as to the scope and purpose of reinsurance, especially proportionate facultative reinsurance. While the impact of the decision is not yet known, the reinsurance industry will likely make modifications in future agreements to restore predictability to the market and to avoid cedents from questioning the value of reinsurance.

*Wasa* raises questions regarding the scope and purpose of principles such as the "follow-the-fortunes"/"follow-the-settlement" doctrines that are common in most reinsurance agreements. Is the *Wasa* decision "unique" based on an unfortunate set of circumstances that the reinsurance market can use to essentially sidestep long-lasting implications? Or do reinsurers, particularly London reinsurers, need to ensure that cedents continue to view reinsurance as an effective method of risk allocation?

The reinsurance industry has long thrived on the notion of a gentleman's agreement in which reinsurers assisted the reinsured in their business by sharing the risk in exchange for a set dollar amount or portion of the premiums; however, *Wasa* may well confirm the deficienies of such a system when the parties cannot agree on the scope and purpose of the reinsurance.

In the United Kingdom, the fundamental aspect of the "follow-the-settlement" doctrine mirrors the above United States' cases. In order to recover under a facultative proportional reinsurance policy, the cedent must: (1) establish its own liability to assured by reason of a judgment in a component jurisdiction; and (2) show that the loss falls within the terms of the reinsurance. [64]

The *Scor* test challenges the cedent to demonstrate that the settlement was conducted in good faith and within the scope of cover. For example, if a cedent makes a gratuitous payment, the reinsurer would not be obliged to honor that payment. In essence, the "follow-the-settlements" doctrine was not met. While courts in the United Kingdom have been reluctant to force reinsurers to automatically indemnify cedents on a settlement made in a good-faith manner, the standard, similar to the United States law, is relatively low.[65]

In both the United States and the United Kingdom, when a cedent settles a claim in good-faith and submits its claim to the reinsurers subject to a "back-to" facultative proportionate reinsurance policy, the reinsurers are traditionally limited as to their inquiry concerning a cedent's claim. By consenting to the "follow the settlements" doctrine, reinsurers have typically agreed to indemnify the cedent where the cedent settles the claim in a business-like manner and it falls within the scope of the reinsurance contract.

Before the *Wasa* decision, the cedent typically had little trouble demonstrating what its own liability under the reinsurance agreement was by reason of the "follow-the-settlements" clause. The *Wasa* decision analyzed several important aspects of the reinsurance agreement that potentially changed the business-like notions of reinsurance forever. The significance of the *Wasa* decision was not an "overnight" development but rather one which took nearly a half century and several separate decisions to create.

*Significant Facts*

For years, Alcoa, which was the world's leading producer of primary and fabricated aluminum, generated waste products that were stored in on-site disposal facilities, landfills and lagoons. Occasionally, during the course of those operations, Alcoa discharged waste to the property of others. In the early 1990's, governmental agencies required Alcoa to clean up pollution and contamination of ground water, surface water and soil at more than 58 of its manufacturing sites in the United States and beyond. The waste had been disposed during more than 40 years of operation. Alcoa paid for investigation and remediation of the environmental harm.

Lexington Insurance Company was one of many carriers that provided coverage to Alcoa over the 40+ years. The policy period for the Lexington policy was July 1, 1977 - July 1, 1980. The policy did not contain a choice of law provision, but contained a standard service of suit clause, which read:

> In the event of the failure of this Company to pay any amount claimed to be due hereunder, the Company, at the request of the Insured, will submit to the jurisdiction of any Court of Competent

> jurisdiction within the United States and will comply with all requirements necessary to give such Court jurisdiction and all matters arising hereunder shall be determined in accordance with the law and practice of such Court.

The Lexington policy contained limits of $20 million per occurrence, and defined the term "occurrence" as "any one loss, disaster, or casualty arising out of one event or common cause." The policy contained a property damage deductible of $250,000 per occurrence.

The insuring clause of the policy stated:

> We will pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of bodily injury ... to which this insurance applies, caused by an occurrence, and we shall have the right and the duty to defend any suit against the Insured seeking damages on account of such bodily injury.

It further provided as follows:

> Perils Insured: This policy insures against all physical loss of, damage to, the insured property as well as the interruption of business, except as hereinafter excluded or amended.

On 1 June 1977, Sentry Underwriting Agencies, Ltd. subscribed to a 2.5% line of the reinsurance contract. (Note: Wasa is the successor in title to 1% and AGF was, for all intents and purposes, successor in respect of 1.5%.) These dates were intended to coincide with the period of the underlying insurance. The subject matter of both the reinsurance and the insurance was the risk of physical loss and damage occurring to property at Alcoa's worldwide sites.

The period of reinsurance cover was from 1 July 1977 until 1 July 1980 and was subject to a limit of $20 million per occurrence. The terms were set out in a slip:

| | |
|---|---|
| | FACULTATIVE REINSURANCE |
| FORM: | J1. or NMA 1779 covering<br>All Risks of Physical<br>Loss or Damage excluding<br>Fire and Allied<br>Perils &/or as original. |
| REASSURED: | LEXINGTON<br>INSURANCE COMPANY |
| ASSURED: | ALCOA<br>ALUMINUM |

| | |
|---|---|
| PERIOD: | 36 months 1.7.77<br>L/U &/or pro rata<br>to expiry of original |
| INTEREST: | All Property<br>of every kind and<br>Description and/or<br>Business Interruption<br>and O.P.P. &/or<br>as original |
| SUM INSURED: | Policy to pay<br>up to $20,000,000 each<br>occurrence and in<br>the aggregate annually<br>in respect of<br>Flood and Earthquake |
| SITUATED: | Worldwide &/<br>or as original |
| CONDITIONS: | Retention $1,675,000<br>subject to excess<br>of Loss &/or<br><br>Treaty<br>R/I_<br>Full R/I Clause<br>No. 1 amended<br><br>C.C. as original<br>plus 30 days |
| PREMIUM: | Calculated<br>at GOR |
| BROKERAGE: | 25% and<br>tax. |

The 25% brokerage was divided, with 10 percent payable to Lexington and 15 percent payable to C.E. Heath as brokerage.

*The Washington Litigation*

In 1992, Alcoa sued 167 insurers in the state of Washington that had provided insurance to it during a period from 1956 to 1985. In the first of two actions, Alcoa sought a declaration of coverage with respect to the clean up costs at 35 manufacturing sites scattered throughout the United States. Lexington was one of those defendants. A second action against first-party property carriers, which also included Lexington, was brought in 1996 in relation to 23 other sites. The two actions were subsequently consolidated.

The Washington Superior Court selected three of the 58 manufacturing sites - - one in Mesina, New York, one in Vancouver, Washington, and one in Point Comfort, Texas (referred to as the "Phase 1" test sites) to be the subject of an initial trial, with trials on the other sites to follow. In March 1996, the Phase 1 trial commenced before a jury and most of the insurers were found not liable, either because the claim was time barred under suit limitation provisions in the policies, or because the losses were excluded by pollution exclusions. In the second stage of the trial, evidence was heard as to the existence, extent, and time of occurrence of damage at each of the Phase 1 test sites.

At the conclusion of the evidence, the jury was provided with a verdict form which contained 13 questions, and was given written instructions with respect to each question. The first question required the jury to answer yes or no to whether there was property damage at each of the three Phase 1 test sites. The second question required that the jury identify each year in which the property damage occurred at each site between 1977 and 1984. Question 11 required the jury to state the cost of repair of fortuitous property damage at each area of each site without allocating repair costs to specific years. Question 12 asked the jury to indicate whether or not there was a reasonable basis to allocate to each separate policy year the costs related to the property damage that occurred during that year. Question 13 asked, in relation to any damages and repair costs which the jury concluded could be allocated on a year-by-year basis, what portion of the total repair cost was attributable to the various policy years, with answers to be given either in percentage terms or dollar figures.

In relation to Questions 12 and 13, the jury instructions included the following:

> The DIC policies issued by the Defendants cover only damage that occurred during the policy period. Therefore, if you find there are covered damages, once you have calculated the total costs incurred by Alcoa to repair, build, or replace its damaged property, you must determine whether the costs can be allocated to fairly and reasonably assign to each policy year the cost to repair the property damage which occurred during that year. Your determination must be based on the evidence and not on speculation or conjecture. If you find that it would be possible to allocate the costs of repairing the property damage, but the evidence does not provide you with an appropriate and reasonable method to do so, you should so indicate in response to Question No 13 on the Special Verdict Form. If you find that the total repair costs are divisible over time, you will be

> asked to determine what amount of damages should be charged to each of the policy years as well as lump sum allocations for periods before and after the policy years. In allocating damage between years, you are not required to allocate 100% or the total to the insurers. If you find from the evidence that some or all of the damage occurred prior to or after the policy period, you may so allocated it [*sic*]. If you do allocate a part or all of the damage to time periods other than July 1, 1977 – July 1, 1984, you need not allocate those damages by specific years.

The jury's verdict form was returned, only partially completed, in October of 1996, following 60 days of deliberations. The jury had determined that there had been property damage at most of the three Phase 1 test sites, and that the damage had occurred in each of the policy years, which contributed to the cost of repair. The jury returned a verdict for just less than $20 million for repair costs for some, but not all, of the sites, but the jury did not answer Questions 12 and 13.

Following the jury's inability to reach a verdict on Questions 12 and 13, Lexington invited the trial judge to decide as a matter of law whether there was a "reasonable basis or bases on which to allocate to each policy year the costs related to the property damage that occurred during that policy year." In March of 1997, the trial court concluded there was such basis. The court held that there were two occurrences, one from the manufacturing units and another independent occurrence, that the property damage at the three sites could be measured and quantified, and that the remedial costs were generally estimated, planned, and priced according to the size of the contaminated area.

The court held that damage that had accrued during each policy year could reasonably and appropriately be equated with cubic yards of contamination that occurred during that year. The court also held that, although the contamination was not entirely linear, it was the result of a continuous and progressive process - - which was something on which the experts largely agreed.

The court decided that a fair and appropriate estimation of the damage that occurred in each year could be attained by dividing the total damage by the number of years it took to reach "its present border," and that the damage therefore was divisible. The court contrasted the pollution damage in Alcoa's case to cases of asbestosis where the development of the disease is unrelated to the length of exposure or number of asbestos fibers taken into the body.

The court further held that the total repair cost for a particular area should be divided by the number of years in which the damage occurred. The damage occurring during any particular year would then be covered by the insurance that was on the risk that year, with liabilities divided according to policy limits or "other insurance" provisions in the policies. Alternatively, if the property damage could properly be characterized as indivisible, the court ruled that a pro rata allocation of damages, rather than a joint and several liability, would still be appropriate. The court also determined that at each site damage had occurred many years before the inception of Lexington's policy.

The court determined that the appropriate method of allocation was to divide the total repair costs by the years in which the damage occurred. Under this calculation, Lexington had no liability with respect to Point Comfort and Vancouver because the repair costs were within Alcoa's deductible, but Lexington's liability with respect to two occurrences at the Mesina site was $366,327.86. However, Lexington's liability for the three Phase 1 test sites was reduced to zero by the end of the trial as a result of other rulings in Lexington's favor.

At the conclusion of the trial, Alcoa filed a motion asking the trial court to hold as a matter of law that the pollution damages were indivisible because there was no way to distinguish between pollution damage occurring prior to a policy inception and pollution damage occurring after the policy incepted. Judge Learned denied the motion, holding as a matter of law that the pollution could be allocated on a pro rata yearly basis. Alcoa appealed the court's rulings on fortuity, suit limitation, and allocation. In May of 2000, the Supreme Court of Washington reversed, holding that Lexington was not entitled to rely on the suit limitation provisions in its insurance contract and that the insurers were jointly and severally liable to Alcoa for all property damage, including damage which had occurred before the policies had incepted. The Washington Supreme Court determined that the trial court failed to closely examine the applicable policy language from the Lexington policy. It noted that the insuring agreement of the Lexington policy stated:

> Perils Insured: This policy insures against all physical loss of, damage to, the insured property as well as the interruption of business, except as hereinafter excluded or amended.

The Washington Supreme Court determined that the language was very broad and contained no limitation as to the time of the physical loss or the damage to the property itself. It also determined that there was no exclusion in the policy for physical loss or damage that might have begun spreading before the policy had incepted. The Washington Supreme Court also found that the policy's definition of occurrence also compelled a broad reading of the policy. The definition stated that the term "occurrence" meant:

> Any one loss(es), disaster(s), or casualty(ies) arising out of one event or common cause(s).

The Supreme Court noted that the definition did not contain any words of limitation and found clear from the policy language that any physical loss or damage which manifested itself during the time that the policy was in effect would have been covered by the policy including damage that had started before it had incepted. In so doing, the Washington Supreme Court referred to *J.H. France Refractories Co. v. Allstate Ins. Co.*[66] in which the Pennsylvania Supreme Court had rejected the pro rata approach in a case of asbestos disease. In *J.H. France*, the Pennsylvania Supreme Court had considered the issue of multiple insurance coverage over time in a case of asbestos disease. France was an asbestos manufacturer and seller from 1956 to 1972. The wife of a person who had died from asbestos exposure to France's products that occurred between 1948 and 1978 sued France. France sought a defense and indemnification from its insurers for those years, but the insurers denied any duty to defend or indemnify. France then filed a declaratory judgment

action to force the insurers to defend and indemnify. The six insurers at trial had provided policies at varying times and all the policies contained the same general liability language:

> We will pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of bodily injury ... to which this insurance applies, caused by an occurrence, and we shall have the right and the duty to defend any suit against the Insured seeking damages on account of such bodily injury.

An issue the trial court in *France* considered was whether, and how, to allocate coverage among six insurers. The trial court prorated the obligations of the insurers based on the time their respective policies were in effect but on appeal, the Pennsylvania Supreme Court rejected that approach:

> First, and most compelling, is the language of the policies themselves. Each insurer obligated itself to 'pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of bodily injury to which this insurance applies.' We have already ascertained that any stage of the development of a claimant's disease constitutes an injury 'to which this insurance applies' under each policy in effect during any part of the development of the disease. Under any given policy, the insurer contracted to pay all sums which the Insured becomes legally obligated to pay, not merely some pro rata portion thereof.

The Washington Supreme Court acknowledged the distinction between asbestos disease and environmental contamination, and also acknowledged that progression of pollution damage could be measured and apportioned more certainly year to year than the progress of asbestos disease, but still determined that the Lexington policy's policy language simply did not compel proration. It determined that given the fact the policy language did not limit the scope of coverage to that portion that had occurred after the policy's inception, coverage applied to damage that occurred even before the policy's inception date.

In the end, Lexington was faced with a claim of about $180 million, which it settled for an amount in excess of $103 million.

*The UK Bench Division's Decision – April 2007*

On January 30, 2004, Lexington notified Heath Lambert Group (successors to the placing brokers for the reinsurance contract) that they had settled with Alcoa for $103,140,500 and had incurred and paid more than $28 million in legal costs in defending the claims. It thus claimed, as against Wasa, $1,031,405 (1% of the settlement figure) and as against AGF $1,547,107.50 (1.5% of the settlement figure), as well as corresponding percentages of the defense costs. Wasa International Insurance Co. Ltd. ("Wasa") and AGF Insurance Ltd. ("AGF") issued proceedings seeking declarations that they were not liable to indemnify Lexington under a contributing facultative reinsurance contract in respect of Lexington's settlement of a claim made under the underlying policy of insurance Lexington

issued to Alcoa. Lexington counterclaimed for an indemnity or damages in respect of the settlement which it had reached with Alcoa, as well as legal costs incurred by it in defending Alcoa's claim. The reinsurance contract was placed in London with London Reinsurers by London Insurance Brokers in 1977 - - in other words, prior to the Rome Convention on the Law Applicable to Contractual Obligations of 1980.

Judge Simon noted as common ground that the governing law is to be determined in accordance with English common law principles and that by proper application of those principles, the reinsurance contract is to be governed by English law, since the contract was brokered in the London market on one of two alternative London forms. Judge Simon also determined that since no contract was ever drawn up, the terms of the reinsurance contract were contained in the slip, which referred to a choice of forms (J1 or NMA 1779). The court acknowledged that was reflective of an administrative practice in the London market for the issue of formal policy documentation, noting that J1 is, in fact, a "policy jacket" containing the policy, which is then put to various underwriters for subscription, and that the NMA 1779 form was generally used as an attachment to a slip, which obviated the need to issue a formal policy.

Judge Simon also noted that the J1 form contains the words: "being a reinsurance of and warranted same gross rate, terms and conditions as and to follow the settlements of the [reassured]." The court noted that the NMA 1779 form does not have a follow settlements clause but does contain an obligation to "pay or to make good to the Reinsured all such Loss as aforesaid as may happen to the subject matter of this Reinsurance, or any part thereof during the continuance of this Policy." The court also noted that the "full R/I Clause No 1" was a standard clause used in the London market, with the following terms:

> Being a Reinsurance of and warranted same conditions as and to follow the settlements of the . . . Company and that said Company retains during the currency of this Policy at least . . . on the identical subject matter and risk and in identically the same proportion on each separate part thereof, but in the event of the [67]retained line being less than as above, Underwriters' lines to be proportionately reduced.

The court also noted that since the J1 form contained a similar provision, it could reasonably be inferred that the full reinsurance clause was specifically referred to in the slip in the event that the NMA 1779 form was used.

The principal issue was whether the reinsurance contract requires Wasa and AGF to indemnify Lexington in respect of the settlement with Alcoa and, in particular, whether the reinsurance contract provides for indemnity in respect of the remedial costs sustained in cleaning up the damages which occurred during the three year period specified in the reinsurance, or whether it also requires the reinsurers to indemnify Lexington in respect of the remedial costs sustained in cleaning up the damage which occurred prior to and subsequent to that three year period.

a. Wasa's argument

Wasa insured Lexington for the risk and loss of damage for a three year period, not a 50 year period. Moreover, the period of cover was fundamental to the scope of the bargain between the cedent and the reinsurer and, notwithstanding the existence of a "follow the settlement" provision and the decision of the Washington Supreme Court as to the effect of Lexington's insurance contract under Pennsylvania law, Wasa did not contract to indemnify Lexington against any liability that might be incurred under the insurance contract.

Essentially, in order to be recovered under the reinsurance contract, the relevant loss must be within the scope of that contract. Thus, Wasa would not be bound to follow the settlement agreement since the settlement did not fall within the risks covered by the reinsurance contract as a matter of law, and Lexington's claim for indemnity would fail since Lexington did not advance its claim against Wasa on the basis that if the reinsurance only responded to the cost of remedying damage caused during the three year period of cover, the cost of remedying that damage would give rise to a claim under the reinsurance contract.

b. Lexington's argument

It was necessary to look at the reinsurance contract (and its factual background) in order to identify the presumed intention of the parties. On that basis, the parties would have acknowledged the likelihood that disputes between Alcoa and Lexington, both of which were incorporated in the United States, would have been litigated in the United States, and might reasonably assume that a dispute would be decided under Pennsylvania law since Alcoa was based in Pennsylvania. The parties also would have acknowledged the possibility that disputes might be decided in any United States forum under any system of United States state law and that the period clause in the reinsurance contract was one of a number of provisions which reflected the back-to-back nature of the reinsurance. The reinsurance and insurance contracts were intended to be, and were in fact, back-to-back.

Lexington also contended that, although the reinsurance contract was governed by English law and the insurance contract was not, that fact alone was not sufficient to disturb the back-to-back nature of the coverage.

Lexington asserted that it is necessary to look at the reinsurance contract and its factual background in order to identify the presumed intention of the parties. On this basis the parties would have acknowledged:

1. the likelihood that disputes between Alcoa and Lexington (two companies incorporated in the United States) would have been litigated in the United States and might reasonably assume that a dispute would be decided in Pennsylvania under Pennsylvania law; and

2. the possibility that disputes might be decided in any United States state forum and under any system of United States state law.

The period clause in the reinsurance contract was one of a number of provisions which reflected the back-to-back nature of the reinsurance and there is no reason to read a limitation into the provision.

Lexington also claimed that it was possible to formulate a declaration as to the extent of recovery under the reinsurance contract which could have been sought in 1977 and which would have been wide enough to embrace the sums which were claimed in this action. In addition, the reinsurance contract did not indicate with precision what was covered. It was the construction of the underlying insurance contract which provided the definition of what constituted an occurrence and the financial consequences thereof, and it could have been anticipated that the scope of that policy would be determined by the law of any state within the United States.

Finally, Lexington argued that, where the meaning and effect of the terms of an insurance contract have been determined as between the insured and the insurer by a court of competent jurisdiction, the presumed intent of the parties to the reinsurance contract must have been that in relation to the same claim, the same meaning and effect would bind the reinsurer, absent a provision to the contrary in the reinsurance contract.

c. The UK Bench Decision

Judge Simon acknowledged a number of reinsurance principles:

- The effect of the full reinsurance clause is that the subject matter of the original risk is effectively incorporated into the reinsurance contract (*i.e.*, "back-to-back").

- Just as it is common ground that the reinsurance contract is governed by English law, so is it common ground that the underlying insurance contract was governed by a system of law other than English law. (So, at least in this respect, they differ.)

- The subject matter of the reinsurance was Alcoa's property, not Lexington's liability to Alcoa.

- Under English law, a reinsurer is not obligated to indemnify the cedent unless the loss follows within:

    - the scope of the cover of the insurance contract; and

    - the scope of the cover created by the reinsurance contract.

- In the absence of any express clause in the reinsurance contract, it is for the cedent to prove both matters (although a follow the settlements clause is one way in which the parties can agree on how the cedent proves those matters).

- In reaching their bargain potentially conflicting situations may have to be weighed: the undesirability of litigating the same issues twice versus the importance of assuring that the reinsurer's bargain is not eroded by an agreement over which it has no control.

- A follow the settlements clause is intended to give proper weight to both of the foregoing considerations and under such a clause the cedent does not have to prove that the loss actually fell within the scope of insurance, only that it acted honestly in making the settlement and took all proper and businesslike steps in settling the claim.

Ultimately, Judge Simon observed that the issue was whether the claim recognized by the settlement agreement was excluded by the defining terms of the period clause in the reinsurance contract. Judge Simon then cited to the following quote from a prior case:

> [T]he reinsurer is always entitled to raise issues as to the scope of the reinsurance, and where the risks are co-extensive with those of the underlying insurance he is not precluded from raising such issues, even when there is a 'follow the settlement' term of the reinsurance contract. Ultimately, this is the only sure protection which the insurer has against being called upon to indemnify the reinsured against payments which were not legally due from him to the original insured, however reasonable and businesslike the payments may have been.

Judge Simon also noted that in 1977 when the reinsurance contract was entered into, no case in the United States had applied a joint and several approach to allocation such as that adopted by the Washington State Supreme Court in the Alcoa case. Judge Simon found significant the fact that the parties agreed to the NMA 1779 wording, which provided that the reinsurer's obligation was "to pay or make good to the reassured all such loss as aforesaid as may happen to the subject matter of this Reinsurance, or any part thereof during the continuance of this Policy." He felt that the fact that the parties had envisioned that such a term would be incorporated into the reinsurance contract militates against the construction favored by Lexington, even though he accepted, as Lexington argued, that there were a number of features of the reinsurance contract indicating that the parties intended the contracts to be back-to-back, including the fact that the premium was calculated at gross original rates.

In support of its argument, Lexington relied primarily upon two cases - - *Forsikringsaktieselskapet Vesta v. Butcher*, [68]and *Groupama Navigation et Transports v. Catatumbo CA Seguros.*[69] Lexington submitted that those cases demonstrated that in the absence of clear words to the contrary, there is a presumption that the scope and nature of the cover afforded by reinsurance would be the same as the cover afforded by the insurance itself and, as such, they are put together as a package and could not have intended that the same period wording in the two contracts would have a different meaning in each.

In *Vesta*, the original insurance policy on the fish farm was governed by Norwegian law, while the reinsurance policy was subject to English law. The reinsurance policy had been issued before the original policy had been taken out. The reinsurance policy stated that it was "as original" and the underlying insurance contained a warranty that a 24 hour watch would be maintained over the fish farm. A storm caused severe losses at a time when a watch was not being maintained. Under Norwegian law, the breach of warranty did not discharge the insurers from liability because that law required a causal link between the breach and the loss. Accordingly, the insurer accepted liability. The reinsurer nevertheless refused to indemnify the reinsured for the reason that under English law there is no requirement for a causal link between breach of warranty and loss, and that breach has an automatic discharging effect. The House of Lords held that, in order to provide back-to-back cover, the reinsurance warranty had to be construed in the same way as the insurance contract.

In *Groupama*, the original insurance was governed by Venezuelan law, but again the reinsurance contract was governed by English law. As in *Vesta*, the underlying contract did not require proof of a causal link between the breach of warranty and the loss. The direct policy contained a classification warranty which had been broken but the breach had no connection with the loss. In contrast with *Vesta*, in the *Groupama* case, the reinsurance contract not only incorporated the terms of the direct policy but contained its own class warranty. The Court of Appeal nevertheless thought that *Vesta* remained applicable given that the contracts provided identical cover, the interpretation of the warranties should be identical and accordingly, the express reinsurance warranty was either to be regarded as a provision displaced by the incorporated warranty, or to be construed in accordance with the direct warranty.

The reinsurers pointed out that neither *Vesta* nor *Groupama* materially assists Lexington in its position because both cases involved inferring a contractual intention that terms incorporated in a reinsurance contract by reference to the underlying insurance were to have the meaning understood under the local law or language. Therefore, in each case it would have been possible with the assistance of a legal encyclopedia or dictionary to establish the meaning of the disputed words in the relevant reinsurance contract. The position in the Lexington case, however, was different because there was no identifiable United States law interpretation that could be placed on the period clause. Judge Simon determined that applying Lexington's construction would provide not so much a back-to-back cover as back-to-front. Judge Simon noted that the follow the settlements clause and the back-to-back nature of insurance and reinsurance contracts are both important features of the reinsurance but are not sufficient to displace the importance of the prescribed period of cover:

> The reinsurers in this case agreed to reinsure Lexington in relation to Alcoa's property damage occurring between noon on 1 July 1977 and noon on 1 July 1980, or to use the words of the NMA 1779 form, 'during the continuance of the policy.' The reinsurers did not agree to reinsure Lexington in relation to an earlier or later period, nor in relation to its liability to Alcoa, nor in relation to a period of cover

> which might be determined by whatever United States law interpretation might be placed on the period clause in the insurance contract.

Judge Simon noted that this was not a case where there was a dispute as to when the damage occurred so that the reinsured might argue that a settlement was made on the basis the damage might have occurred during the policy period. Rather, this was a case in which Lexington settled the underlying case on the basis it was liable for costs of remedying damage outside of the period of cover. He determined that a reinsurance contract cannot be construed as if it provided cover in respect of the cost of remedying damage whenever the damage occurred solely on the basis that some of it occurred during the policy period.

*The Court of Appeal Decision – February 2008*

In February of 2008, the Court of Appeal rendered its decision reversing Judge Simon's April 2007 decision in favor of the reinsurers and the reinsurance community has analyzed the significance of that reversal since the date of the decision. Although the Court of Appeal acknowledged that the "presumed intention" of the parties is the starting point of the inquiry, the Court also noted that one has to identify the question to which the presumed intention is to supply the answer:

> Rather than asking whether the reinsurance was intended to be back-to-back or whether the reinsurance was intended only to apply to the loss and damage occurring within the policy period . . . it is probably better to ask whether the parties intended that, to the extent that they used the same or equivalent wording in the reinsurance as in the underlying insurance they intended that wording to have the same meaning in both contracts. This is not quite the same as asking merely whether the intention is a back-to-back contract[.]

Lord Justice Longmore cited *Vesta* and *Groupama* for the proposition that the language in the reinsurance policy must conform to the interpretation of the same language in the underlying policy so as to indemnify the reinsured, and he took issue with Judge Simon's reliance on the period clause. He noted that such reliance was based both on the fact that there was no way in which it could be ascertained how an American court would interpret the period clause as well as the fact that even if there was a way of ascertaining it in 1977 it would not have been the way chosen by the Supreme Court of Washington in 2000. Lord Justice Longmore found neither of those distinctions convincing. Interestingly, Lord Justice Longmore found it of no moment that in 1977 joint and several liability was not the law of Pennsylvania: "[T]he fact is that we now know that it is the law since it has been so stated by the Supreme Court of Washington after an analysis of the Pennsylvanian authorities."

Ultimately, however, he determined that the prevailing factor is the fact that, as a matter of construction, the parties to the reinsurance contract intend the period clause to have the same meaning, "whatever that meaning may be." He also found notable the fact that Lexington ceded to the reinsurers the entirety of the premium.

Lord Justice Longmore also found inconsequential the reinsurers' argument that the reinsurers were reinsuring property, not an obligation. While he found the premise no doubt true, he also found it irrelevant because the real issue was whether the parties intended to afford cover only for damage occurring during the policy period or for all damage provided that some of it occurred during the policy period: "whatever the answer is, it should be the same and it cannot differ according to whether the reinsurance is reinsurance of the original subject-matter insured or of the reinsured's liability in respect of it." Citing to an outside source (Professor Robert Merken in an October 2007 article which appeared in Insurance Law Monthly, Lord Justice Longmore acknowledged that the U.S. judgment against Lexington was not one which either Lexington or the reinsurers had expected, but determined that it "was nevertheless a possibility." Given that the reinsurers had accepted premium on the same basis as the reinsured, and by using words which were more or less indistinguishable from those in the direct policy, Lord Justice Longmore agreed with Professor Merken that "the arguments put forward by Lexington appear to have great cogency."

*The "Controversial" House of Lords Decision*

On 30 July 2009, on its last day sitting as such, the House of Lords rendered its opinion reversing the Court of Appeal and reaffirming the decision of Judge Simon - - thus bringing the dispute full circle. Lord Mance's 23 page, 37 paragraph opinion provided an articulate and detailed analysis of the issues, but seven factors were determinative:

1. Reinsurance is a separate contract, which may contain its own independent terms required to be satisfied before the reinsured can claim indemnity under it. The conclusion that the reinsurance insures the reinsured's own liability, in and of itself, is not enough to entitle the reinsured to indemnity against whatever liability it might be found to have in any court in which it is sued under whatever law is applied because reinsurance, like any other insurance, is subject to specific terms which have to be satisfied before any indemnity can be sought.

2. An insurer seeking indemnity under a reinsurance contract must, in the absence of special terms, establish both its liability under the terms of the insurance and its entitlement to indemnity under the terms of the reinsurance. This has been developed into what is known as the "follow the settlements" doctrine.

3. The reinsurers were and are bound by the follow the settlements provision to accept that Lexington's settlement of Alcoa's claims fairly reflect Lexington's liability under the original insurance contract and, if and so far as the loss was insured and reinsured on the same basis, the reinsurer would be obligated to indemnify the insurer.

4. If the present reinsurance slip, including such terms of the original insurance as it incorporates, is to be construed according to purely English law principles, it does not have a meaning or effect similar to that which the Washington Supreme Court gave to the insurance. In other words, according to purely English law principles, the only property damage which the reinsurance covers is property damage occurring during the three year reinsurance period.

5. Given that the reinsurance was placed expressly to cover the original insurance contract and that the relevant language of both the insurance and reinsurance was identical, as well as the fact that Lexington's intention in reinsuring was to cover itself in respect of the whole risk after the exhaustion of the intention, the two contracts must be treated as back-to-back and the mere difference in the governing law should not lead to any other result.

6. A contract has a meaning which is to be ascertained at the time when it is concluded, having regard to its background and the surrounding circumstances within the parties' knowledge at that time. As a result, the parties must have contemplated that any claim under the insurance issued to Alcoa would, if contentious, be litigated and determined before the courts of the United States under the service of suit clause. Alcoa exercised its right to bring suit in Washington, and Judge Learned did no more and no less than what an English court would have done - - under conflict of laws rules of the State of Washington, she determined that the laws of Pennsylvania applied, and she interpreted and applied those laws. Lord Justice Mance saw this as a foreseeable and conventional exercise. Interestingly, however, Lord Justice Mance determined that if under conflict of law principles determined by English law, the underlying case would have been decided under Massachusetts, not Pennsylvania, law given that Lexington is a Massachusetts company, is headquartered in Massachusetts, and that the broker who placed the policy was located in Boston, as well as the fact that the policy insured property around the United States and, in fact, in various countries outside of the United States.

7. Much like Judge Learned determined that the dispute involving the Lexington policy should be interpreted under Pennsylvania law, the reinsurance policy is a separate contract with its own terms, which should be construed under English law.

Ultimately, what drove the House of Lords to its determination was the fact that an aspect of reinsurance as fundamental as its definition of the risks and period insured must be determined under English law, irrespective of all other issues.

*Repercussions Of The Wasa Decision*

The House of Lords' decision made clear that reinsurance should not be considered as merely an extension of the original insurance. Establishing liability under the original insurance does not automatically satisfy obligations under the reinsurance agreement. Rather, the terms and conditions of a reinsurance policy, despite similarities with primary insurance, are separate and distinct and must be analyzed independently. The House of Lords affirmatively held that the terms of a reinsurance contract is governed by English law, not the original insurance.

Significantly, the House of Lords distinguished this decision from the prevailing authority in the *Vesta* and *Groupama* and ruled in favor of the reinsurer. As Lord Justice Collins stated:

> "[i]n complete contrast to *Vesta v Butcher* and *Groupama v Catatumbo*, in the present case there was in 1977, when the insurance contract and the reinsurance contract were concluded, no identifiable system of law applicable to the insurance contract which could have provided a basis for construing the contract of reinsurance in a manner different from its ordinary meaning in the London market."

In an attempt to characterize this decision as exceptional, the House of Lords relied heavily on the fact that there was no identifiable system of law at the time the parties entered into the agreement. Due to this factual difference between the *Wasa* case and the *Vesta and Groupama* cases, Lord Justice Mance stated it was "impossible to adopt [the Court of Appeal's views] in circumstances where Lexington's liability has been held to arise under a system of law which was applied to the insurance not by reason of the terms of the insurance or their operation but in the context of a choice of law on a blanket basis to cover a large number of other independent insurances and claims."

Further guiding the House of Lords' decision were the obvious practical implications of compelling reinsurers, with only a three year period of cover, to be responsible for the entire amount of the settlement claim which spanned more than forty years. As Lord Justice Collins emphasized "... there is no principled basis for treating the scope of the 3 year reinsurance as the same as the insurance, which has been interpreted ... not to contain any 'limitation as to time of the physical loss or damage to property' ... [Lexington's argument] ... seems ... to be wholly uncommercial and outside any reasonable commercial expectation of either party."

The House of Lords attempted to avoid the stigma that this decision was a simple "technical" argument in which the reinsurers would escape liability. As Lord Justice Collins commented:

> "This is not a case where the reinsurers are relying on a technicality to avoid payment. At the beginning and end of these appeals remains the question of whether the provision for the policy period in the reinsurance is to be given the effect it has under English law, or whether the parties must be taken to have meant that the reinsurance was to respond to all claims irrespective of when the damage occurred and irrespective of the period to which the losses related. There is, in my judgment, no principled basis for a conclusion in the latter sense."

The main concern for the House of Lords was that if the two policies were interpreted in the same way, the reinsurers would have been liable for the entire period of contamination even if the reinsurers covered less than a tenth of that time frame. In conclusion, the House of Lords stated that the *Wasa* decision was "exceptional" and traditional reinsurance principles such as the "follow-the-settlements"/"follow-the-fortunes" doctrines are still enforceable. That said, what is implied in this decision is the notion that cedents, not reinsurers, are responsible for unexpected, unforeseen changes in governing law(s) the same as the United States court decision which applies "joint and several" liability to insurance carriers.

*Criticisms From Cedents*

1. *Wasa* is not factually different than *Vesta and Groupama*

Initially, critics pointed out that the facts in the *Wasa* decision were not unique. Specifically, they argue that the *Vesta* and *Groupama* cases also involved situations where there were differences in the governing law between the original and reinsurance agreements. As such, cedents argue that the "distinction" made by the House of Lords claiming that Wasa was exceptional in that there was no governing law section is trivial at best. According to the cedents, both courts in *Vesta* and *Groupama* found that the intent of the agreement was to provide "back-to-back" cover and, despite differences in governing law, the reinsurer assumed the risk.

The High Court attempted to distinguish itself from *Vesta* and *Groupama* because "joint and several" liability was not an established legal theory at the time the reinsurance agreement was executed. According to the High Court, it would not be economically or practically feasible for the reinsurer to follow the cedent where it was not clear which law would ultimately govern their risk. Specifically, the High Court placed great emphasis on what would happen if, instead of a single reinsurance agreement, there were multiple reinsurance agreements for the three year period. As a result of that potential unfair outcome, the High Court highlighted the period of cover section.

Despite their rationale, critics continue to believe that there are now two distinct legal theories relating to the scope of cover. The first theory, following the *Vesta* and *Groupama* holdings, states that despite the reinsurance agreement is governed by English law, the reinsurance agreement is viewed in accordance with the foreign law of the original insurance to ensure "back-to-back" cover. The second theory, following *Wasa*, places an

emphasis on applying English law to a reinsurance agreement leaving "back-to-back" cover in doubt. As a result, cedents believe the *Wasa* decision has created uncertainty as to the implications of "back-to-back" cover in facultative reinsurance agreements.

2. Cedents, not Reinsurers, Should Not Bear the Risk for Unexpected, Unforeseen Changes in the Law Alone.

Despite statements by several Lords to the contrary, cedents are nevertheless left to wonder if they, as opposed to the reinsurers, bear the risk when unexpected, unforeseen changes in the law occur. The practical holding of the *Wasa* decision could be that absent a governing law section, a reinsurer will not be responsible for any risk that could not be contemplated at the time the reinsurance agreement was executed. As a result, cedents question the usefulness of such agreements if unexpected changes in the law cannot be shared jointly between reinsurer and cedent equally.

Furthermore cedents argue that in 1977, what more could Lexington have done to protect itself from this unfortunate outcome. The original insurance and reinsurance policies had nearly identical language regarding the scope of cover. As a result, cedents argue that the *Wasa* decision is a marked shift from traditional reinsurance principles in that cedents, not reinsurers, are responsible for unexpected, unforeseen changes in the governing law such as the United States court decision to apply "joint and several" liability to insurance carriers.

3. English Courts Do Not Respect Foreign Judgments Against UK Reinsurers

As mentioned above, in order for the reinsured to submit a good faith claim against the reinsurer, it must establish the reinsurer's obligation to accept the claim under the specific terms of the reinsurance. That said, cedents argue that according to *Commercial Union Assurance Co Plc v NRG Victory Reinsurance Ltd* , [1998] Lloyd's Rep IR 439, that if a foreign court established the cedent's liability, it will be binding on the reinsurer to the extent the English court determines: (1) the court was of competent jurisdiction; (2) the proceedings had not been brought in breach of a clause excluding proceedings in that court; (3) the insurer had advanced all proper defenses and (4) the ruling was not manifestly perverse. *Id.* In *Wasa,* the High Court did not challenge the competency of Washington Supreme Court's ruling. In fact, it specifically stated that its ruling was not perverse. As a result, cedents, especially those who reside in the United States, began to question the ability of English Courts to enforce foreign judgments against an English reinsurer.

Reinsurers, in turn, argue that *Commercial Union*'s standard is still applicable but in *Wasa,* the cedent failed to establish its own liability under the terms of the reinsurance agreement – a necessary requirement. Simply stated, reinsurers argue that the *Wasa* holding had little to do with challenging the enforceability of a foreign judgment but rather the deficiency in the cedent's claim under the terms of the reinsurance agreement.

4. The Follow-the-Settlements Clause is Fundamentally Changed

Cedents also point to the purposely "low" standard of "follow-the-settlements" doctrine which has dictated reinsurer's obligations but was fundamentally changed under *Wasa.* Until *Wasa,* the "follow-the-settlements" clause provided a cedent with minimal obstacles in establishing its liability and claim under the reinsurance agreement. Now, with the High Court determining that the period of cover clause has equal weight with the "follow-the-settlements" clause, the standard by which cedents are judged has changed.

Reinsurers, argue that the "follow-the-settlements" clause was not limitless and the cedent still needed to establish that the claim was within the scope of the reinsurance agreement. In *Wasa,* the "follow-the-settlements" clause was applied but given the unique factual circumstances in this action, the cedent could not establish that the entire claim was covered under the reinsurance agreement.

5. Does "Back-to-Back" Cover Still Exist?

Finally, critics of the *Wasa* decision indicate that "back-to-back" cover may not exist in a multi-jurisdictional reinsurance agreement. The critics point to the fact that the High Court indicated that, despite identical governing law, sections in the original and reinsurance agreements might not necessary create "back-to-back" coverage. Specifically, the High Court pointed out the construction of the reinsurance agreement should rest on relevant background information and surrounding circumstances. For the High Court in *Wasa,* it meant that there was no "back-to-back" cover because the legal theory on which the U.S. court rested its decision was not developed until after the reinsurance agreement was entered into by the parties. By relying on such subjective standards to determine whether "back-to-back" cover exists, critics argue that this has created uncertainty as to when, if ever, a cedent can conclude that their respective reinsurance agreements are considered "back-to-back."

*Conclusions, Recommendations and Practice Pointers*

One of the most interesting inquiries is whether the House of Lords would have made the same decision if "joint and several" liability had been established at the time the reinsurance agreement was formed. While that query will never be answered, reinsurers nevertheless rejoiced in having limited the scope of the "back-to-back" cover on facultative proportionate reinsurance contracts. As demonstrated above, lingering questions still remain regarding the presumptions involved in the "back-to-back" cover. Therefore in order to reaffirm the confidence in the reinsurance market, the issue remains: how do reinsurers and cedents attempt to restore the presumption of proportionate facultative reinsurance?

Lord Justice Mance suggested perhaps contract drafting might be the best option. One possibility would be for the contract to contain language that in the event of a formal dispute over the coverage in the underlying insurance, the underlying insurance shall apply equally to the reinsurance. Another possibility would be to contain a clause in the policy "that the reinsurer provide indemnity no matter what the local laws provide at the time of loss." While these suggestions might avoid the issue, reinsurers would be hard pressed to

accept such board terms in the policy without significant modifications to the premiums. Perhaps the best alternative is for the London Market to incorporate the Bermuda Form regarding governing law. Specifically, the Bermuda Form declares that "any dispute, controversy, or claim arising out of or relating to this policy shall be governed and construed in accordance with the internal laws of the State of New York." The contract could possibly contain a provision that procedural laws remain under the internal laws of England and Wales. Applying a specific jurisdiction would provide comfort for cedents in that unexpected changes in New York law would be shared by the reinsurer under the facultative policy. From the reinsurers' perspective, having a specific jurisdiction may assist them in setting premium rates.

Practically speaking, the ramifications of the *Wasa* decision might lead cedents to secure their reinsurance agreements in markets other than London. As a result, the Bermuda and Dublin markets may see an unexpected "bump" from this decision as cedents attempt to insulate them from the impact of the *Wasa* decision. Furthermore, the fact that James Wrynn, New York State Superintendent of Insurance, recently indicated his willingness to reconstitute the New York Insurance Exchange might be seen as an alternative to the London Market.

In the end, the above suggestions that attempt to minimize the impact of this decision on cedents might help them when entering into new agreements or renewals. However, the entire market will continue to cautiously observe how existing reinsurance agreements are analyzed in light of *Wasa*.

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[1] HENRY T. KRAMER, *The Nature of Reinsurance*, in REINSURANCE 1, 5 (R. Strain, ed. 1980) at 5; BARRY R. OSTRAGER & THOMAS R. NEWMAN, HANDBOOK ON INSURANCE COVERAGE DISPUTES §15.01 (10th ed. 2000).

[2] *Id.*

[3] *Id.* This article provides and excellent technical discussion of basic definitions, plans and underwriting concepts; *see also* OSTRAGER & NEWMAN, *supra* note 7, at §§15.02[a],[b] & [c].

[4] OSTRAGER & NEWMAN, *supra* note 7, at §15.03[c]; *see also* Robert M. Hall, *Enforcing Net Retention Clauses In Reinsurance Contracts*, MEALEY'S LITIG. REP.: REINSURANCE, Vol 11, No 15, December 14, 2000.

[5] *Id.* at §15.03; Kabele, *supra* note 9.

[6] In re Midland Ins. Co., 590 N.E.2d 1186, 1188 (N.Y. 1992); Old Reliable Fire Ins. Co. v. Castle Reins. Co., 665 F.2d 239, 241 (8th Cir. 1981).

[7] Unigard Sec. Ins. Co. v. North River Ins. Co., 4 F.3d 1049, 1054 (2d Cir. 1993).

[8] Compagnie de Reassurance d'ile de France v. New England Reins. Corp., 57 F.3d 56, 64-65, 74-76 (1st Cir. 1995).

[9] William C. Hoffman, *"Custom and Usage" in Reinsurance Contracts 1997-1999 Recent Developments and Outlook*, MEALEY'S LITIG. REP.: REINSURANCE, Vol 10, No 19, February 10, 2000; Loblaw, Inc. v. Employer's Liab. Assur. Corp., 446 N.Y.S. 2d 743, 745 (App. Div. 1981), *aff'd*, 442 N.E.2d 438, (N.Y. 1982); Great Am. Ins. Co. v. Fireman's Fund Ins. Co., 481 F.2d 948, 954 (2d Cir. 1973).

[10] Westchester Resco Co. v. New England Reins. Corp., 818 F.2d 2, 4 (2d Cir. 1987); *see also*, Travelers Ins. Co. v. Central Nat'l Ins. Co., 733 F. Supp. 522, 528 (D.Conn. 1990) (where the court held against the reinsurer because it drafted the agreement); OSTRAGER & NEWMAN, supra note 7, at §15.03[b].

[11] United Fire & Casualty Co. v. Arkwright Mut. Ins. Co., 53 F. Supp. 2d 632 (S.D.N.Y. 1999).

[12] *Id.* at 28; *see also* Donaldson v. United Community Ins. Co., 741 So.2d 676 (La. Ct. App. 1999); *see generally*, COUCH ON INSURANCE 3d §13:17; *see also* Hoffman, *supra* note 16.

[13] *Donaldson*, 741 So.2d 676.

[14] *Id.*

[15] Sumitomo Marine & Fire Ins. Co. v. Cologne Reinsurance Co., 552 N.E.2d 139, 142 (N.Y. 1990).

[16] United Fire & Casualty Co. v. Arkwright Mut. Ins. Co., 53 F. Supp. 2d 632 (S.D.N.Y. 1999); *see also*, Ozog et al., *supra* note 6.

[17] Ozog et al., *supra* note 6 (citing William C. Hoffman, *Common Law of Reinsurance Law Settlement Clauses*, 28 TORT & INS. L.J. 659, 677 (1993)).

[18] North River Ins. Co. v. CIGNA Reins. Co. 52 F.3d 1194 (3d Cir. 1995); *see also*, Bellefonte Reins. Co. v. Aetna Cas. & Sur. Co., 903 F.2d 910 (2d Cir. 1990).

[19] Hartford Accid. & Indemn. Co. v. Columbia Cas. Co., 98 F. Supp. 2d 251 (D. Conn. 2000).

[20] *See* Am. Ins. Co. v. N. Am. Co. for Prop. & Cas. Ins., 697 F.2d 79 (2d Cir. 1982) (holding that despite a follow the fortune clause, the reinsurer is only liable for a loss of the kind reinsured).

[21] Michigan Twp. Participating Plan v. Federal Ins. Co., 592 N.W.2d 760 (Mich. Ct. App. 1999); Int'l Surplus Lines Ins. Co. v. Certain Underwriters at Lloyd's of London, 868 F. Supp. 917 (S.D. Ohio 1994); *see generally*, Hoffman, *supra* note 16.

[22] OSTRAGER & NEWMAN, *supra* note 7, at §16.01[d].

[23] *Id.*

[24] Kramer, *supra* note 7, at 9; *see generally*, M. Patricia Casey, *The Relationship Between Alternative Markets and Reinsurers: The Reinsurance Perspective*, 28 THE BRIEF 26 (Summer 1999).

[25] Ozog et al., *supra* note 6; *see also*, Kabele, *supra* note 9.

[26] Kabele, *supra* note 9.

[27] Compagnie de Reassurance d'ile de France v. New England Reins. Corp., 57 F.3d 56, 64-65, 74-76 (1st Cir. 1995); Michigan Nat'l Bank – Oakland v. Am. Centennial Ins. Co., 674 N.E.2d 313 (N.Y. 1996); *see* Allendale Mut. Ins. Co. v. Excess Ins. Co., 992 F. Supp. 278, 283 (S.D.N.Y. 1998) (for the general statement of the law; however, note that the complaint was dismissed on jurisdictional grounds at 62 F. Supp.2d 116 (S.D.N.Y. 1999)); see also Commercial Union Ins. Co. v. Seven Provinces Ins. Co., 9 F. Supp. 2d 49 (D. Mass. 1998).

[28] 217 F.3d 33 (1st Cir. 2000), *cert. denied*, 121 S.Ct. 1084 (2001).

[29] *Id.*

[30] Zenith Ins. Co., v. Employers Ins. Co., 141 F.3d 300 (7th Cir. 1998); Christiania Gen. Ins. Corp. v. Great Am. Ins. Co., 979 F.2d 268 (2d Cir. 1992).

[31] For a general discussion of late notice, see OSTRAGER & NEWMAN, *supra* note 7, at §16.02.

[32] *Id.* at §16.02[a].

[33] *Id.* at §16.02[b]; Unigard Sec. Ins. Co. v. N. River Ins. Co., 762 F. Supp. 566, 592 (S.D.N.Y. 1991), *certified questioned answered*, 594 N.E.2d 571 (N.Y. 1992); *aff'd. in part, rev'd in part*, 4 F.3d 1049 (2d Cir. 1993).

[34] *Unigard*, 4 F.3d at 1069.

[35] *Id.*

[36] OSTRAGER & NEWMAN, *supra* note 7, at §15.04[a]; *see generally*, Ins. Co. of Africa v. Scor (U.K.) Reins. Co., [1985], 1 Lloyd's Rep. 312 (Ct. App. 1984); Am. Marine Ins. Group v. Neptunia Ins. Co., 775 F. Supp. 703, 708 (S.D.N.Y. 1991), *aff'd*, 961 F.2d 372 (2d Cir. 1992).

[37] N. River Ins. Co. v. CIGNA Reins. Co., 52 F.3d 1194 (3d Cir. 1995).

[38] Christiania Gen. Ins. Corp. v. Great Am. Ins. Co., 979 F.2d 268, 280 (2d Cir. 1992).

[39] 638 A.2d 1333 (N.J. Super. Ct. App. Div. 1994).

[40] *Id.* at 1339.

[41] *Id.*; *see also*, Keightley v. Republic Ins. Co., 946 S.W.2d 124 (Tex. Ct. App. 1997) (opinion was subsequently withdrawn by stipulation of the parties at a rehearing).

[42] Robert M. Hall, *Reinsurance Coverage of Excess of Policy Limits and Extra Contractual Obligations*, MEALEY'S LITIG. REP.: REINSURANCE, Vol 11, No 16, December 28, 2000.

[43] *See generally*, OSTRAGER & NEWMAN, *supra* note 7, at §15.04[b].

[44] No. 88C320, 1992 U.S. Dist. LEXIS 1022 (N.D. Ill. 1992), *aff'd*, 998 F.2d 504 (7th Cir. 1993).

[45] *Id.*; *see also*, Charman v. Guardian Royal Exchange Assurance [1992], 2 Lloyd's Rep. 607.

[46] OSTRAGER & NEWMAN, *supra* note 7, at §15.04[b].

[47] 35 F. Supp. 2d 348 (S.D.N.Y. 1999).

[48] *Id.* at 351. *Compare*, Unigard Sec. Ins. Co. v. North River Ins. Co., 4 F.3d 1049, 1071 (2d Cir. 1993) and Bellefonte Reins. Co. v. Aetna Cas. & Sur. Co., 903 F.2d 910, 911 (2d Cir. 1990).

[49] Klockner Stadler Hurter v. Ins. Co. of Pa.., 785 F. Supp. 1130, 1133 (S.D.N.Y. 1990).

[50] Michigan Nat'l Bank – Oakland v. Am. Centennial Ins. Co., 611 N.Y.S.2d 506, 511-12 (App. Div. 1994), *aff'd*, 674 N.E.2d 313 (N.Y. 1996); *see also*, Litho Color, Inc. v. Pacific Employers Ins. Co., 991 P.2d 638 (Wash. 1999); Gannon Trucking v. Aon Corp. No. BC199481 (Cal. Super. April 4, 2000).

[51] Bruckner-Mitchell, Inc. v. Sun Indem. Co., 82 F.2d 434, 444 (D.C. Cir. 1936).

[52] Klockner Stadler Hurter v. Ins. Co. of Pa., 785 F. Supp. 1130, 1134 (S.D.N.Y. 1990); *see also*, OSTRAGER & NEWMAN, *supra* note 7, at 15.04[d].

[53] For an excellent discussion of these discovery issues, see Ellen K. Burrows & John H. O'Leary, *Discovery and Privilege: Protecting Reinsurance Communication in an Uncertain Legal Landscape*, MEALEY'S LITIG. REP.: REINSURANCE, Vol 10, No 12, October 28, 1999.

[54] *Id.*; *see also* James M. Fischer, *The Attorney-Client Privilege Meets the Common Interest Arrangement: Protecting Confidences While Exchanging Information for Mutual Gain*, 16 REV. LITIG. 631, 646 (1997).

[55] Minn. School Boards Ass'n Ins. Trust v. Employers Ins. Co., 183 F.R.D. 627 (N.D. Ill. 1999); Nat'l Union Fire Ins. Co. v. Stauffer Chem. Co., 558 A.2d 1091 (Del. Super. Ct. 1989); Durham Indus., Inc. v. N. River Ins. Co., No. 79 Civ. 1705 (RWS), 1980 U.S. Dist. LEXIS 15154 (S.D.N.Y. Nov. 21, 1980).

[56] No. 3:96-CV-1189 (EBB), 1999 U.S. Dist. LEXIS 6987 (D. Conn. Feb. 16, 1999).

[57] *Id.*

[58] 187 F.R.D. 252 (W.D. Va. 1999).

[59] *Id.*

[60] 9 F.Supp.2d 49, 64 (D. Mass. 1998), *aff'd*, 217 F.3d 33 (1st Cir. 2000), *cert. denied*, 121 S.Ct. 1084 (2001).

[61] Hoffman, *supra* note 16.

[62] *Id.*

[63] [2009] UKHL 40

[64] *Insurance Co. of Africa v. Scor Reinsurance Co. Ltd* [1985] 1 Lloyd's Rep. 312.

[65] *See Charman v. Guardian Royal Exchange Assurance [1992]* 2 Lloyd's Rep. 607; *SpA v. CGU International PLC* [2003] 2 CLC 852.

[66] 534 Pa. 29 (1993)

[67] There were two other issues as well: (1) whether there is only one retention or a per occurrence retention: and (2) whether the reinsurers had an obligation to indemnify Lexington for the underlying defense costs.

[68] (No 1) [1989] 1 All ER 402

[69] [2000] 2 All ER (Comm) 193

# "BACK TO BACK" AS A CONCEPT IN REINSURANCE IN ENGLISH LAW FOLLOWING LEXINGTON V AGF (AND LEXINGTON V. WASA)

Bill Perry
Stephen Carter

Writing towards the end of the 18th Century, at a time when reinsurance contracts were prohibited in England by statute,[1] Park J. said "Re-assurance, as understood by the law of England,[2] may be said to be a contract which the first insurer enters into, in order to relieve himself from those risks which he has incautiously undertaken, by throwing them upon other underwriters, who are called re-assurers."[3] Historically there has been some discussion on whether reinsurance actually constitutes a form of liability insurance contract whereby the re-insurance insures the liability of the cedant or is indeed a different specific type of contract that is properly called "reinsurance", the distinguishing feature of which is that the subject matter of the reinsurance is treated as being the same as that of the original insurance.

In England, Lord Mansfield answered that question 200 years ago: ". . . a reinsurance, . . . consists of a new assurance, effected by a new policy, on the same risk which was before insured, in order to indemnify the underwriters from their previous subscription and both policies are in existence at the same time."[4] Lord Hoffman affirmed this recently in *Charter Reinsurance Co Ltd v. Fagan*:[5] ". . . Contracts of reinsurance were unlawful until 1864. Such contract [of reinsurance] is not an insurance of the primary insurer's potential liability or disbursement. It is an independent contract between reinsured and reinsurer in which the subject matter of the insurance is the same as that of the primary insurance, that is to say, the risk to the ship or goods or whatever might be insured. The difference lies in the nature of the insurable interest, which in the case of the primary insurer arises from his liability under the original policy . . . ."

In other words, even a perfectly proportional facultative reinsurance is not an insurance against liability, and ipso facto not one against any liability which the reinsured may incur under his own insurance. Accordingly, one of the perennially vexed questions which arises in reinsurance is the extent to which a reinsurer is liable to pay the losses suffered by the reinsured.

"In proportional reinsurance the reinsurer or reinsurers accept a specified percentage of the risk and receive the same percentage of the gross premium or 'gross/net premium' as it is quaintly called – the premium to the reinsured net of commission paid by him. The fortunes of the reinsured and the reinsurer, on the business written should, proportionately, be the same."[6]

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[1] The Marine Insurance Act, 1745; and thus apparently also in the overseas territories of His then Majesty (George II) including those which later founded the United States of America following the War of Independence. Reinsurance was legalised in England in 1864.

[2] There is no such thing as "UK law" or "British law". Scotland and Northern Ireland are separate jurisdictions (though they share the same highest appellate Court – see below). Wales is part of "England and Wales", conventionally contracted (by the English anyway) to "England"/"English". Jersey, Guernsey and the Isle of Man are part of Her Majesty's territories but not technically part of the United Kingdom and like all such territories their highest appellate Court is (the Judicial Committee of) Her Majesty's Privy Council.

[3] SIR JAMES ALLAN PARK, A SYSTEM OF THE LAW OF MARINE INSURANCES, 595 (8th ed., Professional Books, 1842 (1987)).

[4] Delver, Assignee of Bunn v Barnes, (1807) 1 Taunt 48.

[5] (1997) AC 313, at 392.

[6] TERRY O'NEILL AND JAN WOLONIECKI, THE LAW OF REINSURANCE, para. 1-11 (2nd ed., Sweet and Maxwell, 2006).

In order to ensure that their fortunes are indeed the same, in other words that reinsurances do respond properly to losses properly paid by reinsureds, English law has developed a substantial body of case law.

## I. Follow the Settlements

In 1985 the Court of Appeal in *Insurance Company of Africa v. Scor (UK) Reinsurance Co. Limited*,[7] laid down that the "follow the settlements" wording required reinsurers to pay their proportion of the claim to the reinsured provided (1) the claim falls as a matter of law within the risks covered by the reinsurance policy;[8] (2) they have acted in good faith and without fraud or collusion; and (3) they have acted "in a proper and businesslike manner", reinsurers must pay their proportion of the claim.

Such a clause is frequently, indeed usually, to be found in London market facultative reinsurance contracts. It is often incorporated within what is called a "full reinsurance clause" (or "full R/I clause").[9] Such a clause tends to be regarded as "an essential part of the facultative reinsurance policy."[10]

The use of such shorthand is part and parcel of normal London market practice. Although as time has gone by the law has developed, brokers have become more cautious. Lloyd's and the company market have also become more demanding, so although the length of placement slips in the London market has expanded, they remain succinct, using such market shorthand. Certainly in the 1970s, even the largest reinsurance contracts might be written on slips of 100 or 200 words.

The intention is often that such slips be expanded into full policy wordings (and English law provides that if and when that happens, the full policy wording normally displaces the slip ab initio).[11] However, in facultative risks in particular, there is often no wording so slip is, and remains, a binding contract once signed/subscribed.[12] Hence it is important that such "shorthand" is well understood in the market, and it has frequently had to be interpreted by the Courts.[13]

## II. Foreign law and "back to back"

The general idea of facultative reinsurance contracts is usually that they should be "back to back". In other words that they should exactly parallel the underlying insurance so that the cedant may be relaxed

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[7] (1985) 1 Lloyd's Rep. 312; (1983) 1 Lloyd's Rep. 541 at first instance.

[8] Or arguably so – Assicurazioni Generali SpA v. CGU International Insurance Plc (2004) Lloyd's Rep. I.R. 457.

[9] "being a reinsurance of and warranted same gross rate terms and conditions as and to follow the settlements of ..."

[10] ROBERT KILN, REINSURANCE IN PRACTICE, 12 (4th ed., Witherby 2001).

[11] Youell v. Bland Welch (1990) 2 Lloyd's Rep. 423, affirmed at (1992) 2 Lloyd's Rep. 127. (In such a case, the slip is not even admissible as an aid to construction of the policy.) However, this is not an absolute rule and whether the policy supersedes the slip depends upon the facts of the case and whether that is the agreed intent – see HIH Casualty and General Insurance v. New Hampshire Insurance and Independent Insurance (2001) Lloyd's Rep. IR 596.

[12] General Reinsurance Corporation v. Forsakringsaktiebolagtet Fennia Patria (1983) 2 Lloyd's Rep. 287.

[13] English law regards subjective intent of either party as basically irrelevant, not least because not reliably ascertainable. Although the general commercial nexus can sometimes be invoked to assist in contractual interpretation – *see* Prenn v. Simmonds [1971] 1 W.L.R. 1381 (HL), *and more recently* Chartbrook v Persimmon Homes [2009] U.K.H.L. 38 - the normal rule is that the intention of the parties is expressed by the words they chose. However the courts will endeavour not to give a contract a meaning that does not make commercial sense. Most London (re-)insurance slips and wordings are now familiar to the English Courts and especially to the Commercial Court which normally hears these cases. England has a substantial body of insurance and re-insurance case law. Lord Mance (see *infra*) was a Commercial Court judge before his elevation to the House of Lords. He is an expert in the field both as a judge and previously as a barrister specialising in this field.

in the knowledge that provided he meets the tests laid down in *ICA v. Scor*, any payments he makes will be recoverable under his reinsurances. Questions inevitably arise, however, when the English market has reinsured a foreign insurance contract. Experience has shown that the same words and phrases used in contracts governed by different law can have different effects, with the result that the contracts are not "back to back" and the cedant/reinsured may not be paid.
Thus for example, in *Forsikringsaktieselskapet Vesta v. Butcher*[14], the reinsurance was on the Lloyd's J1 form. This form provides: "being reinsurance of and warranted at the same gross rate, terms and conditions as and to follow the settlements of the company" - the classic words of a full reinsurance clause and containing a "follow the settlements" clause. In that case the cedant Norwegian Insurance Company had insured a fish farm in Norway. The fish farm subsequently suffered serious storm damage. It was a condition of the insurance contract that "A 24 hour watch be kept over the site." No such 24 hour watch was kept, but the existence of such twenty-four hour watch would not have affected the damage inflicted by the storm.

The insurance contract was governed by Norwegian law. Under Norwegian law, the fact that the twenty-four hour watch had not been kept, and that there was accordingly a breach of condition, was not a defence for insurers because the breach had nothing to do with the loss. Accordingly, the insured was able to succeed in a claim against the insurer.

The J1 form, as stated, incorporated the same terms and conditions into the reinsurance policy. The reinsurance was almost entirely with Lloyd's underwriters. A reinsurance policy placed in London with Lloyd's underwriters or London companies is governed by English law as a result of the implied choice of the parties.[15] Under English law, a breach of warranty entitles an insurer (in this case reinsurer) to repudiate liability even if the breach is irrelevant to the loss suffered. Accordingly, although (in fact, because) the wording of the policies was the same, the insurers were compelled to pay the insured but prima facie were not entitled to recover from their reinsurers.

The Judge in the Commercial Court, Hobhouse J., held that "As a matter of English law . . . the proper law of the reinsurance contact is English law subject to the construction and effect of the clauses of the [brokers'] wording being determined in accordance with Norwegian law in the same manner as they are as part of the contract of original insurance."[16] In other words, as a matter of English law, the English law reinsurance must be interpreted to match properly the effect of Norwegian insurance, despite any normal English law to the contrary. So reinsurers had to pay.

This decision was unanimously upheld in the Court of Appeal.[17] It was also upheld in the House of Lords.[18] Although the speeches in the House of Lords were in differing terms, for present purposes the important quotation is probably from Lord Lowry, who said that "Like every Judge who has

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[14] (1986) 2 Lloyd's Rep. 179 QBD (Comm Court); (1988) 1 Lloyd's Rep. 19 (Court of Appeal); (1989) A.C. 852 (House of Lords).

[15] That a Lloyd's insurance policy is governed by English law as the result of the implied choice of the parties (in fact, this applies to any London market policy, *see* Amin Rasheed Shipping Corp v. Kuwait Insurance Co (1984) A.C. 50) has long been the law in England and is accepted internationally. For example, it is an example of such implied choice quoted in the Giuliano-Lagarde *Report on the Rome Convention of 1980* governing the applicable law of contracts (1980) O.J. C282/1. (The Rome Convention was incorporated into English law by the Contracts (Applicable Law) Act, 1990. This applies only to contracts entered into after it came into effect and therefore did not apply to the 1977 contracts in Lexington v. AGF.) The English Courts have repeatedly held this also to be the case in reinsurance contracts, *see* Royal Exchange Assurance Corp v. Sjoforsakrings AB Vega (1902) 2 K.B. 384 (pre-Rome Convention) and Gan Insurance Co. Ltd. V. Tai Ping Insurance Co. Ltd. (1999) I.L.P. 729 (post-Rome Convention).

[16] (1986) 2 Lloyd's Rep. 179 at 194.

[17] (1988) 1 Lloyd's Rep. 19.

[18] (1989) A.C. 852; (1989) 1 Lloyd's Rep. 331 (HL).

considered the case ... [he considered that] . . . the real intention . . . [of the parties was that the policy should be] . . . "back to back" . . . [and that] . . . effect should, if legally possible, be given to it."[19]

A similar dispute was resolved by the Court of Appeal in *Groupama Navigation v. Catatumbo CA Seguros.*[20] The insurance policy covered two vessels which were damaged. They had never been in class. There was a warranty of class in both the insurance and, separately, in the reinsurance. Further, the reinsurance, like the J1 slip, said that "All term clauses, conditions, warranties . . . as original". Venezuelan law, like Norwegian law, provides that a breach of warranty does not give insurers a defence unless it is material to the loss. English law, as explained above, does. Once again, therefore, the Court held that under English law the reinsurance was to be construed in line with the (Venezuelan law) effect of the underlying contract, so as to deprive reinsurers of their defence and ensure that the reinsurance responded.

The effect of *Vesta* and *Catatumbo* has been that London underwriters have understood for the last 20 years (but probably did not before about 1986) that where they write "back to back" facultative reinsurance, itself governed by English law but of a foreign law underlying insurance, the English Courts will interpret their reinsurance to match the effect of the underlying insurance.

That has not, however, derogated from the fact that the reinsurance contract is not a contract of liability insurance of the cedant but, as held by Lords Mansfield and Hoffman nearly 200 years apart, a separate contract on the same risk that the cedant insured.

### III. The facts in *Lexington v. AGF*

In this particular case, the original insured was Alcoa. Alcoa had been forced by the United States Environmental Protection Agency to pay to clean up a large number of sites which had been polluted by its aluminium smelting activities between 1942 and 1986. The costs were considerable: Alcoa looked to its insurers to pay them. In the end, it had to sue some 98 insurers on hundreds of policies in respect of a total of 58 sites, most within the United States but some outside it. Lexington was one of the insurers sued.

Lexington had insured Alcoa under an "all risks difference in conditions" property damage insurance policy. The policy was issued for the period from July 1, 1977 to July 1, 1980. There was no specific governing law in the policy. There was, however, a standard service of suit clause by which Lexington agreed to submit to proceedings in any State. Accordingly, Lexington, like all the other insurance companies, was joined into legal proceedings in the courts of the State of Washington.

The case came before Judge Learned. On June 10, 1994, in a preliminary ruling, she held that the law of Pennsylvania should be applied to all the policies in issue in the proceedings, consistent with the approach of the American Law Institute's Restatement (2d) on Conflict of Laws in respect of the choice of law in contracts.

At trial, the jury were unable to agree whether there was "a reasonable basis or bases on which to allocate to each separate policy year the costs relating to the property damage that occurred during that policy year." Accordingly Judge Learned had to rule on that issue. She ruled that there existed in law a reasonable basis for allocating to each separate policy year on a pro-rata straight line basis the costs relating to the property damage on each site.

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[19] (1989) 1 Lloyd's Rep. 331, 346.
[20] (2002) Lloyd's Rep. IR 141.

On appeal, that ruling was emphatically disapproved by the Washington Supreme Court. The Washington Supreme Court applied the rule *in J.H. France Refractories Company v. Allstate Insurance Company*,[21] a decision of the Pennsylvania Supreme Court relating to asbestos disease.[22] The Washington Supreme Court ruled that: "[i]t seems clear from the policy language that any physical loss or damage manifesting itself during the time a . . . policy was in effect was covered by the policy, including pollution damage starting before the policy inception."

In other words, the Washington Supreme Court, applying Pennsylvania law, ruled that each and every insurer which had issued a policy which provided cover for a period in which any pollution damage manifested itself, no matter when that damage actually occurred including prior to and after the period of cover, was liable for the whole of the damage that manifested itself during that period. That ruling seems to have been a reasonable and proper understanding of Pennsylvania law. Pennsylvania is a State which has adopted a "joint and several" liability approach to such cases, as opposed to other States such as New York, California and Illinois, which have adopted "pro rata" allocation. The application of Pennsylvania law was thus crucial to the decision.

Faced with the ruling by the Washington Supreme Court, various insurance companies, including Lexington, negotiated with Alcoa. Lexington in particular (the claims against which could have totalled $180 million) negotiated a settlement of $103 million.

### IV. Lexington's reinsurance

Lexington's reinsurance policy in the London market (placed with a large number of companies) provided for cover for "36 months at date 1.7.77 [that is, in English notation, 1 July 1977] ... and/or pro rata to expiry of original." It was described as a "Contributing Facultative Reinsurance" and under "form" it was stated that it was "covering all risks of physical loss or damage excluding fire and allied perils &/or as original." Lexington's interest was in "all property of every kind and description and/or business interruption and OPP &/or as original." It included a "full R/I [reinsurance] clause."

As is often the case in large placements, it seems that the reinsurance was placed to enable the insurance to be placed; at any rate, the reinsurance slip was subscribed before the cedant's formal policy document was signed and issued. This has no bearing on contractual interpretation, of course. If the underlying insurance were never placed the reinsurance would be void; if it were placed on terms different from those disclosed to reinsurers as what was intended then they could, and no doubt would, avoid ab initio if they wished to do so.

The reinsurance policy did not contain an express choice of law clause. It was, however, placed in London, through a London broker, with English reinsurance companies (neither AGF nor Wasa were amongst the companies with whom reinsurance was placed: they are successors in title to such companies). Accordingly, there was no doubt that there was an implied choice of English law to govern the reinsurance contract.[23] Lexington never challenged this. (Nor did Lexington ever challenge the traditional understanding of what a re-insurance contract is.)

Lexington took the view that this reinsurance policy was "back to back" with its own insurance policy. In other words, if its own insurance policy had to respond, so should this reinsurance policy. It was for the same period (albeit slightly differently expressed) and indeed the expression "to expiry of original" expressly appeared in the period clause. It was expressed to be "&/or as original" in respect

[21] 534 Pa 29, 626 A.2d 502 (Pa. 1993).

[22] The English Courts are, of course, also familiar with the causation and hence allocation problems inherent in asbestos/mesothelioma cases.

[23] *See supra* note 15.

of the form, the interest, and where the risk was situated. It also had a full R/I clause, which meant that it should follow the settlements of the insurance policy.[24]

Lexington invoked the rule in *Vesta v Butcher* and *Groupama v Catatumbo.* Hence, Lexington said, even if Pennsylvania law interpreted Lexington's policy differently from English law, the English Court should force reinsurers to pay by interpreting, as a matter of English law, the English law reinsurance policy in the same way.

AGF and Wasa argued that these rules only apply where there is an underlying choice of law (which under English rules must be ascertainable at the time the contract is entered into) by reference to which reinsurers could at the time they underwrote the reinsurance have worked out what they were letting themselves in for. In this case (said AGF and Wasa), the law of Lexington's policy was not ascertainable at the time the reinsurance was agreed. They further said that the choice of Pennsylvania law was in any event not an obvious one. Accordingly, reinsurers should not be held to the effects of a system of law they could not have foreseen.

Additionally they said that the *Vesta* and *Catatumbo* principle only applies if the claim is within the reinsurance, as in the first test in *ICA v. Scor.* In this particular case, they were being asked to cover loss and damage which had occurred outside, in particular before, their own policy period of 36 months from July 1, 1977. That they had intended to cover only loss and damage occurring within that period was clear on the face of the reinsurance policy; the period of cover is a fundamental matter not to be overridden by application of the *Vesta* principle.

## V. The English litigation

At first instance in the Commercial Court, Mr. Justice Simon agreed with AGF and Wasa.[25] He did so, broadly speaking, on both the main grounds advanced by AGF and Wasa. The Court of Appeal allowed Lexington's appeal.[26] The Court of Appeals (consisting of three Lord Justices) held unanimously that what the Washington Supreme Court had done was to interpret the Lexington policy, and that this therefore fell squarely within the principle in *Vesta* and *Catatumbo.* Remarks were also ventured to the effect that the old distinction between reinsurance and liability insurance was outdated and artificial, and that reinsurance contracts should be treated as if they were liability insurance contracts, thus rendering this sort of argument unnecessary.

[24] *See supra* note 9.

[25] (2007) Lloyd's Rep. IR 604.

[26] (2008) Lloyd's Rep. IR 510. An interesting feature of this case is that each lower tribunal refused permission to appeal, so in each case the appellant had to obtain that from the appellate tribunal – which in each case then went on to allow the actual appeal unanimously.

## VI. The decision of the House of Lords

The Appellate Committees of the House of Lords used to consist of five "Law Lords" chosen by the Senior Law Lord as those best to hear the relevant case from a total number of twelve. [27] (It could be seven or nine in unusual cases.) July 30, 2009 was the last date upon which the Appellate Committee of the House of Lords ever reported cases to the House of Lords and the House of Lords adjudicated cases. The House chose that day to rule on *Lexington v. AGF*.[28]

As a result of the Constitutional Reform Act 2005, the judicial functions of the House of Lords have now been taken over by a new United Kingdom Supreme Court, sitting for the first time on October 1, 2009. Under the transitional provisions of the Act, the Supreme Court (whose initial membership was the Law Lords at the time of the changeover) adjudicated those cases which were heard by an Appellate Committee but on which the members of the Appellate Committee had not by July 30, 2009 delivered their opinions to the House.[29]

The Appellate Committee which considered *Lexington v. AGF* was strong one. It consisted of Lord Phillips of Worth Matravers (the Senior Law Lord, now President of the Supreme Court), Lord Walker of Gestingthorpe, Lord Brown of Eaton under Heywood, Lord Mance and Lord Collins of Mapesbury.[30]

The Opinions (Judgments) were strong and unanimous. Lord Phillips agreed with both Lords Mance and Collins, delivering a short opinion of his own. Lord Walker agreed with Lord Collins. Lord Brown agreed with Lord Collins but delivered a short opinion of his own. Lord Mance agreed with Lord Collins but delivered a lengthy opinion of his own and Lord Collins agreed with Lord Mance but delivered an opinion as long as Lord Mance's.

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[27] "Law Lords" (technically "Lords of Appeal in Ordinary") were Judges promoted from the Court of Appeal who were ennobled as Peers and sat in the House of Lords, which as "The Lords Spiritual and Temporal in the Court of Parliament of Her Majesty the Queen Assembled" was England's (indeed, the United Kingdom's) highest Court from 1399, when the House of Commons ceased its role in hearing petitions to reverse the decisions of the King's lower Courts. (The Lords Spiritual are Bishops of the Church of England, of whom twenty-six sit in the House of Lords.) By convention no other members of the House of Lords either attended the hearings of the Appellate Committee or spoke or voted at the sittings of the House of Lords to which the opinions of the members of the Appellate Committee were reported and at which the House then resolved to adopt them, thus adjudicating the case. (The membership of the Judicial Committee of Her Majesty's Privy Council, which is the final Appellate Court for those Commonwealth Countries and Dependent Territories which have not established their own such court, was virtually, but not entirely, the same as the Law Lords and will no doubt continue in the same relationship to the Supreme Court.).

[28] (2009) U.K.H.L. 40. For historic reasons – this was technically not an appeal but a petition to change a decision – the case remains as designated in the Court of Appeal; nevertheless Lexington was now the respondent and AGF the appellant (with Wasa).

[29] Judges elevated to the Supreme Court after its creation will not receive Peerages automatically, since they do not need to be members of the House of Lords. They hold the title of Lord Justice of the Supreme Court.

[30] Lord Collins was the first and only solicitor, as distinct from barrister, member of the Appellate Committee of the House of Lords (and so now is the first and so far only such Lord Justice of the Supreme Court).

Broadly, their Lordships proceeded upon three foundations:

1. Lord Hoffman was correct in *Charter Re v. Fagan*,[31] as to the nature of a contract of reinsurance. Both Lord Mance[32] and Lord Collins[33] expressly disapproved the comments in the Court of Appeal that the distinction between liability insurance and reinsurance should be abolished.
2. A reinsurer cannot be held liable unless the loss falls within the risk assumed under the underlying insurance contract and the relevant risk has been properly assumed under the reinsurance contract.[34]
3. It is a fundamental concept of English property insurance law that: "the insurer is liable for a loss actually sustained from a period insured against during the continuance of the risk."[35]

There was precedent in England on the question of the allocation of losses from insurance to reinsurance contracts. *Inter alia*, in *Municipal Mutual Insurance Limited v. Sea Insurance Company Limited*,[36] Municipal Mutual as insurer had paid as a single claim arising out of a single event damage arising from lack of supervision (which gave rise to pilfering, "the huge bulk of which must in all probability have occurred between March 1987 and September 1988"[37]). However the event covered three separate years of reinsurance contracts, each with different excess layers. Waller J, the Judge at first instance, conceded that these policies "are different policies for different years [so] there is no room for ... applying some form of equitable apportioning as between years before establishing whether under and individual policy some liability arises,"[38] but he then reached the pragmatic conclusion that all loss should be taken as arising in the single year in which the bulk of the pilfering occurred.

The Court of Appeal[39] did not agree. It allocated the loss pro-rata, in which Hobhouse LJ, giving the leading Judgment of the Court, said that:

> In my judgment the Judge's approach to the question of construction was radically flawed . . . . The Judge came to the surprising conclusion that each reinsurance contract covered liability in respect of physical loss or damage whether or not it occurred during the period covered by the reinsurance contract and he went on expressly to contemplate that the same liability for the same physical loss or damage might be covered under a number of separate contracts of reinsurance, covering different periods. This is a startling result and I am aware of no justification for it. When the relevant cover is placed on a time basis, the stated period of time is fundamental and must be given effect to. It is for that period of risk that the premium payable is assessed. This is so whether the cover is defined as in the present case by reference to when the physical loss or damage occurred, or by reference to when a liability was incurred or a claim made. Contracts of insurance (including reinsurance) are or can be sophisticated instruments containing a wide variety of provisions, but the

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[31] *See supra* note 5.
[32] (2009) U.K.H.L. 40, paragraph 33.
[33] *Id.* paragraphs 113-115.
[34] Hill v. Mercantile & General Reinsurance Co Plc (1996) 1 W.L.R. 1239 (HL).
[35] Knight v. Faith (1850) 15 Q.B. 649, 667 (per Lord Campbell C.J.).
[36] (1998) Lloyd's Rep. IR 421 (CA).
[37] (1996) L.R. L.R. 265, 268 (per Waller J.).
[38] *Id.* at 272.
[39] (1998) Lloyd's Rep. IR 421 (CA).

> definition of the period of cover is basic and clear. It provides a temporal limit to the cover and does not provide cover outside that period; the insurer is not then 'on risk'.[40]

Lexington's reinsurance was on a "losses occurring during" basis.[41] It followed in *Lexington v. AGF* that:

> Viewing the reinsurance through purely English law eyes, it cannot therefore be construed as a contract to indemnify Alcoa in respect of all contamination of Alcoa sites, whenever caused or occurring, provided that part of such contamination manifested itself or was in being during the reinsurance period. That would involve reinsurers in an unpredictable exposure, to which their own protections would not necessarily respond. It would mean that the same exposure would arise, even if they had granted the reinsurance for a shorter period than the three year period matching the original, since the original itself would, even if in force for only one year, have had effectively the same exposure as that for which the Washington Supreme Court held it answerable. Under the approach taken by the Washington Supreme Court, reinsurers must have incurred liability (in practice probably up to the reinsurance limits), as soon as they wrote the reinsurance. The retention must likewise have been exhausted before the reinsurance period began, and cannot have fulfilled any object of introducing an element of discipline into insurers' handling of the insurance. These represent as fundamental and surprising changes in the ordinary understanding of reinsurance and of a reinsurance period as those to which Hobhouse LJ was referring in the Municipal Mutual case.[42]

Lord Collins arrived at a similar view:

> In the present case, however, there is no principled basis for treating the scope of the three year reinsurance as the same as the insurance, which has been interpreted under the law of Pennsylvania not to contain 'any limitation as to time of the physical loss or damage to property' . . . . If Lexington were right some very uncommercial consequences would flow if the reinsurers had agreed to accept only two years of the risk, rather than the three years of the underlying risk accepted by Lexington, leaving Lexington to reinsurer the third year of cover elsewhere; or if the London market had elected to reinsure Lexington by way of three separate one year policies (as in Municipal Mutual Insurance Limited v Sea Insurance Co Limited . . .). The periods of cover under the insurance and reinsurances would not be back to back. But Lexington would still be maintaining that, in the light of the decision of the Washington Supreme Court, if any damage occurred within any relevant policy period, of any duration, the relevant reinsurer would be liable for all of the damage, including damage occurring before inception or after expiry. That seems to me to be wholly uncommercial and outside any reasonable commercial expectation of either party.[43]

Lord Brown was, if anything, even firmer on the subject. He said that:

> 'Physical loss or damage' under a policy providing cover for three years simply cannot be construed under English law to include pre-existing damage. The respective contracts are not, of course, back to back as to their governing laws. However powerful and far reaching the presumption that reinsurance is intended to respond to

[40] *Id.* at 435-436.
[41] (2009) U.K.H.L. 40, paragraph 58(5).
[42] *Id.* Paragraph 40 (per Lord Mance).
[43] *Id.* paragraph 111.

> claims payable under the primary policy, it could not avail Lexington here unless English law were to regard it in effect as tantamount to a rule of law – unless, in short, English law were to dictate that reinsurance must always respond. English law does not, in my opinion, go so far. Vesta . . . and Catamumbo . . . , clearly the decisions closest in point, are authority for the presumption. They do not warrant its application in all the circumstances, certainly not so as to override so clear a temporal limitation as the reinsurance contracts stipulated here with regard to the risks covered.[44]

The House of Lords approached the application of the *Vesta* and *Catatumbo* principle in this case carefully. As Lord Collins said: "I would . . . accept that it would almost invariably be the case that losses for which the insurer has indemnified the original insured would be within the reinsurance even if the losses are payable under a foreign law or a foreign judicial decision which takes a view different from English law of what losses are recoverable. The presumption that the liability under a proportional facultative reinsurance is co-extensive with the insurance should be a strong one because (as I have said) the essence of the bargain is that the reinsurer takes a proportion of the premium in return for a share of the risk."[45]

Lord Mance too remained of the view, like the other Law Lords, that *Vesta* and *Catatumbo* remain good law. He referred to the principle set out in them expressly as "a sensible principle of construction."[46]

However, there were two reasons why the *Vesta* and *Catatumbo* principle was not applicable in this case. Both were succinctly set out by Lord Phillips in his Judgment:

[1] "I agree with Lord Mance, for the reasons that he gives, that the 'full reinsurance' clause in this case, and 'follow the settlements' clauses in general, did not and do not have the effect of bringing within the cover of a policy of reinsurance risks that, on the true interpretation of the policy, would not otherwise be covered by it." [and]

[2] "Longmore LJ [who had delivered the leading Judgment in the Court of Appeal] concluded that at the time that the reinsurance was written those parties to it would have anticipated that the interpretation of the primary insurance would be determined according to the law of Pennsylvania and implicitly agreed that the same law would apply to the interpretation of the reinsurance. For the reasons given by Lord Mance and Lord Collins, I do not consider that this finding was justified."[47]

Taking those two findings in turn, the first is fundamental to the understanding of the English law of "back to back". It appears that the *Vesta/Catatumbo* principle will only be applied to terms and conditions within the cover, rather than to the terms which define the cover. In other words, fundamental matters such as time periods, nature of the cover written, the property covered and no doubt its location, will continue to be governed by the English law wording in the (independent) reinsurance contract, not by any foreign law of the underlying contract. So the first test in *ICA v. Scor* must in principle be considered on the basis of the law of the reinsurance contract – English law, if required by English law - excluding the *Vesta* principle.

This is not exclusively so. Lord Mance expressed the view that "In relation to the present contract . . . the reinsurance period (expressed as a unitary period of 36 months at 1 July 1977) would be understood to run back to back with the insurance term of 36 months 'beginning and ending at noon standard time at location of property involved' . . . similarly any doubt about the meaning of the sum

[44] *Id.* paragraph 16.
[45] *Id.* paragraph 116.
[46] *Id.* paragraph 51.
[47] *Id.* paragraphs 6-7.

reinsured of $20m in the aggregate in respect of Flood and Earthquake would be clarified by reference to the original, which makes clear that such aggregate applies to each of these perils separately. In each case, there is no doubt about the terms or effect of the original insurance wording and there would be no problem about making the necessary minor assimilation".[48] So minor "assimilations" under the *Vesta* principle to exclude "unmeritorious"[49] defences will still be made.

However, he went on to say that:

> It may not, perhaps, always be so easy to assimilate an original insurance and reinsurance, when one is concerned with as fundamental an aspect of a reinsurance as its definition of the risks and period insured and the period for which they are insured. . . . [Counsel for Lexington] asked rhetorically : what more could Lexington have done to reinsure themselves on a fully back to back basis? . . . Absent a common governing law, reinsurers may still sometimes be entitled to respond, with reference to the clear meaning that their contract has under the law governing it: what more could we as reinsurers have done to make clear the basis of reinsurance? A sensible principle of construction, established in Vesta and Catatumbo, cannot be made into an inflexible rule of law which would impose upon reinsurers a liability for which under the law applicable to the reinsurance, they did not bargain. The consideration that Lexington probably did not reckon on the liability which it was held to have in America is not by itself a conclusive reason for passing that liability to reinsurers who were, on the face of it, also entitled to be confident that no such liability could arise under the clear and basic terms of English law contract into which they entered.[50]

Lord Collins felt that the issues in *Lexington v. AGF* "are more difficult and fundamental questions than those in Vesta v Butcher."[51] He considered that: "This is not a case about the interpretation of the policy period . . . ."[52] "The express (and entirely usual) terms of the reinsurance are clear. This is not a case where the reinsurers are relying on a technicality to avoid payment. At the beginning and end of these appeals remains the question whether the provision for the policy period in the reinsurance is to be given the effect it has under English law, or whether the parties must be taken to have meant that the reinsurance was to respond to all claims irrespective of when the damage occurred and irrespective of the period to which the losses related. There is, in my Judgment, no principled basis for a conclusion in the latter sense."[53]

The *ratio decidendi* of the case in this respect is quite clear. Where there is an English law reinsurance with clear terms applicable to the scope of the risk, these will be enforced despite the *Vesta* principle. The *Vesta* principle may be used for "smoothing" small and unmeritorious points such as precise hour of the day to and from which a contract may take effect, or the interpretation of sub-limits within it, but not the major and fundamental parts in any significant way. The choice of English law (whether expressly or by implication) is enough to make clear what the English policy means and is to be taken as deliberate, and hence to prevent the reinsurance being "back to back" with the underlying policy if it is different. The parties could, after all, contractually have agreed the same law for both if they had wished.

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[48] *Id.* paragraph 50.
[49] *Id.* paragraph 66 .
[50] *Id.* paragraph 51.
[51] *Id.* paragraph 56.
[52] *Id.* paragraph 109.
[53] *Id.* paragraph 116.

The second point summarised by Lord Phillips relates to the floating law nature of the *Lexington* contract: "At English common law, the applicable law must exist and be identifiable at the time when the contract is made . . . it is said to follow that it is not possible to specify a 'floating' applicable law (that is, a proper law chosen at a time later than the commencement of the contract)".[54] This seems also to be true under the Rome Convention.[55]

The suggestion made by the Court of Appeal was that it was foreseeable by the parties, at the time when reinsurance contract was agreed, that Pennsylvania law applied/would apply to the underlying insurance, despite the fact that no law was chosen in that contract. The House of Lords disagreed. Its view was that applying normal conflict of law principles, it was likely that if they had been able in 1977 to forecast what law would apply to the underlying insurance contract at all, the parties to the reinsurance contract would have expected it to be Massachusetts law. Further, the choice of Pennsylvania law made by Judge Learned (and endorsed in the Washington Supreme Court) was not made solely in respect of the Lexington insurance – it was made in respect of all the policies she had to construe.

No criticism was made by the House of Lords (or the parties) of Judge Learned's choice of such law. On the contrary, it was well understood that in doing so she had applied the principles laid down in the Restatement, and made a choice to be applied to many policies. Further, Judge Learned had made it clear not only that she regarded herself as determining that Pennsylvania law applied as a general rule, but had also said that if specific or unique issues arose regarding one or more defendants or one or more sites, which raise significant considerations which overrode the general rule, they could be brought to the Court's attention. In other words, she at no time asserted that Pennsylvania law was necessarily the proper law she would have found to apply to the Lexington insurance had that been considered as a freestanding contract.

Accordingly, standing in the way of the application of the *Vesta* principle in *Lexington v. AGF* was the fact that there was in fact no law governing Lexington's insurance at the time it incepted and/or when the reinsurance was agreed (and if there had been it would probably, according to the House of Lords in contrast to the Court of Appeal, have been Massachusetts law; interestingly Massachusetts law was indeed applied to the Lexington policy in the Washington proceedings to strike down a limitation clause which would have precluded Alcoa's claim).

> Lexington's case depends upon the application of a Pennsylvania legal dictionary. Lexington has not advanced its case on the basis that a Massachusetts legal dictionary could be relevant to or assist Lexington's position. In my view, the present case is materially different from both Vesta and Catatumbo. The reinsurance has a clear English law meaning. There was here no identifiable legal dictionary (formal or informal), still less a Pennsylvania legal dictionary, which can be derived from the interaction or operation of the terms of the insurance and reinsurance and which could lead to any different interpretation of the reinsurance wording. For reasons I have already given, the reinsurance is an independent contract, with its own terms which fall to be construed under English law, and I see no basis for interpreting it as covering any liability which might subsequently be held to arise under the insurance in any State whose law might ... be applied by reference to factors extraneous to the particular

[54] RAYMOND FOX AND LOUISE MERRETT, PRIVATE INTERNATIONAL LAW OF REINSURANCE AND INSURANCE, paragraph 10.60 (2006); *see, e.g.,* Star Shipping AS v. China National Foreign Trade Transportation Corp., "The Star Texas" (1993) 2 Lloyd's Rep. 445.

[55] See Article 3(2), by necessary implication.

> insurance to which alone the reinsurance related. It follows that there is no basis for construing the two contracts as back to back in the present situation.[56]

Lord Collins agreed: "In my judgment, in complete contrast to Vesta v Butcher and Groupama v Catatumbo, in the present case there was in 1977, when the insurance contract and the reinsurance contract were concluded, no identifiable system of law applicable to the insurance contract which could have provided a basis for construing the contract of reinsurance in a manner different from its ordinary meaning in the London insurance market."[57]

In summary, the existence of a "legal dictionary" for the underlying insurance from which reinsurers could have worked out the meaning of relevant parts of their contract is fundamental to the application of the *Vesta* principle, and since by definition there was none in the circumstances, the *Vesta* principle could not apply. Even once Pennsylvania law was selected as applying to the Lexington policy, that selection was not made on the merits of the Lexington insurance policy itself, but only as part of an overall case management decision. As a result, the English Court was not prepared to say that the *Vesta* principle attached to the finding that Pennsylvania law applied.

It must be remembered, of course, that the fact that the law of the "legal dictionary" turns out after the reinsurance is written to be different from what it was believed at the time to be does not enable reinsurers to avoid its application. That is just one of the risks they take (like the reinsured). The decision of the House of Lords was based upon both of these considerations. Accordingly both will apply to future cases.

## VII. Whither?

*Lexington v. AGF* has had a mixed press. Unsurprisingly, English lawyers are perhaps happier with it than others; likewise reinsurers, particularly those in run-off. One well respected English reinsurance commentator (in a then-shortly-to-be joint English/USA law firm) said:

> In a ruling of strict orthodoxy and traditional insistence on the primacy of the contract terms . . . the House of Lords has revived the belief of non-US reinsurers that the reinsurance contract is still a stand-alone, enforceable contract, and not merely a blank cheque on some form of global syndication of a primary insurance policy. . . . Reinsurers are not bound to take every bit of rough that the inventiveness of the US tort system can produce along with the smooth. . . . Suitable wording and clear language in the reinsurance contract can ensure that the terms of the contract are indeed writ in stone and proof against foreign deviations from the natural and ordinary meaning of English words as read and understood by English people. . . . And in the end, it is all a ***matter of construction.***"[58]

The "back-to-back" presumption was strongly reaffirmed by the House of Lords as a rule of construction. The departure from "back-to-back" cover is where a claim made in respect of a loss of type reinsured falls outside the fundamental coverage provisions of the reinsurance contract. Any uncertainty is restricted to the parameters of those fundamental coverage provisions.

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[56] (2009) U.K.H.L. 40, at paragraph 49 (per Lord Mance).

[57] *Id.* paragraph 108.

[58] Available at http://www.lovells.com/NR/rdonlyres/7EADC715-AA24-47BA-AE0C-CBACD82EEE3E/0/Wasa_decision_client_note.pdf.

If cedant insurers want to be certain that in such circumstances their reinsurance will provide cover for whatever the Courts before which they may be taken rule to be the meaning of their policies, words such as "as original" and "follow the fortunes" and the existence of a full reinsurance clause will not alone always be sufficient to achieve this. It is now clear that they apply only once the risk re-insured has been defined, as to time, risks and property covered. To avoid doubt, cedants should seek to include a clause in the reinsurance which specifies it is governed by the same law as the underlying insurance; jurisdiction can still be English if that is what they want.

However, as indicated above, American law may permit a "floating" law, that is to say one which is not ascertained until after the contract has incepted, but English law does not permit that. It requires the system of law governing a contract to be ascertained at inception of the contract.[59] The "Star Texas" case is one where the contract provided for one party to be able to choose the applicable law, which was disapproved. So where an insurance contract has a floating choice of law it might not help to insert in the reinsurance a clause which simply applies that floating law to the reinsurance – it may be contrary to English law/public policy. A choice may need to be made at inception.

An alternative approach which might be successful is to agree English law for the reinsurance and to specify that all the clauses in it shall be interpreted so they are back to back with whatever the underlying insurance may be held to mean under whatever system of law a Court of competent jurisdiction may choose to apply to it. Lawyers will no doubt take some pleasure in working out appropriate wordings to achieve this effect. Even on this method, however, there may also be public policy implications since again the purpose of such wordings would be to negate a rule of English law bolstered by the Rome Convention.

Another way round the problem might be to use such wordings but to specify arbitration as the method of resolving disputes. Arbitrators have more latitude in how they may decide cases and the law which they may apply to do so. Arbitration agreements should specify the seat of the arbitration and the applicable law. They do not have to be the same – see, for example, the Bermuda Form which provides for arbitration in London applying New York law. Arbitration clauses also have a long history of invoking market practice.

There is also in theory no reason why underwriters should not (be asked to) write, if they wish, liability insurance covering cedants' insurance risks. In other words the market could adopt by contract the suggestion made in the Court of Appeal. The market already writes "stop-loss" cover which is de facto liability cover for members of Lloyd's syndicates design to put a limit on their exposure. There is no conceptual difficulty. The regulatory ramifications are considerable, however (as Lord Collins pointed out). Authorisation to write liability insurance will be necessary, and capital requirements are not the same as for reinsurance. Further, since many contracts involve underwriters from many jurisdictions, despite the vaunted European "passport" (whereby an insurer authorised in one State in the European Union can underwrite in all the States) many checks on authorisation will be needed and the market may be small. New contract types would need to be developed in this age of "contract certainty", with all the litigation risks involved, so while this is a possible route, it may be practically difficult.

On the other hand, if reinsurers want to be sure that they get the fundamental period (and other things) that they intend, they would do well to specify English law (and probably jurisdiction) expressly. Although English courts will continue to treat London market contracts as subject to English law absent any provision to the contrary, it does not necessarily follow that the same question asked of an overseas court (with jurisdiction under its conflicts rules) about the same contract will reach the same

[59] *See supra* notes 50 and 51.

conclusion. The widespread practice of not specifying the law and jurisdiction applicable to international reinsurance contracts is of itself the source of uncertainty and potential dispute.

It has been suggested that the House of Lord's decision may result in cedants looking to markets other than London for their reinsurance. However, there are many market forces that affect the placement of reinsurance. It must be remembered that what the cedant regards as certainty, constitutes uncertainty when viewed from the reinsurer's standpoint. It is open to the parties to agree the terms that they require, which may of course have premium rating implications as well. Reinsurances are negotiated contracts between commercial parties all in the business of carrying and delineating risk. Commercial forces will dictate the breadth of cover required, that which reinsurers are prepared to provide and the premium which they will accept and cedants will pay to achieve it.

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Bill Perry and Stephen Carter are partners in Carter Perry Bailey LLP, solicitors that acted for the successful appellant AGF Insurance, in Lexington v AGF & WASA.
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# OLD WORLD SOLUTIONS TO NEW WORLD LITIGATION PROBLEMS: INTERNATIONAL PERSPECTIVES ON MANAGING, MEASURING AND ENHANCING THE REPRESENTATION OF CLIENTS IN A GLOBAL ECONOMY.

**By:** **Jorge Angell**
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# CURRICULUM VITAE FOR JORGE ANGELL

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Deborah Kuchler is a founding partner of Kuchler Polk Schell Weiner & Richeson, LLC. Ms. Kuchler graduated *cum laude* from the University of New Orleans with a B.A. degree in education in 1980. Her primary focus was upon the secondary school instruction of English and Biology. She attended Loyola Law School in New Orleans, Louisiana at night while working full time as a natural gas contract administrator and gas supply representative for an interstate natural gas pipeline company. She was a member of Loyola Law Review and graduated in 1985 in the top 10% of the combined day and night school class. She was privileged to serve from mid-1985 to 1987 as law clerk for the Honorable Patrick J. Carr in the United States District Court for the Eastern District of Louisiana.

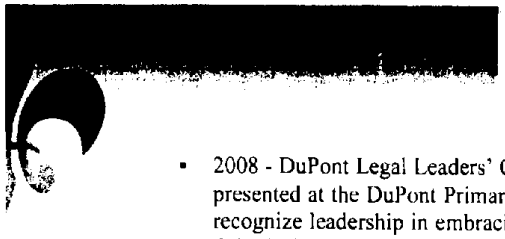
Ms. Kuchler is admitted to practice in Louisiana, Mississippi and Texas. She is a member of the Louisiana, Mississippi and Texas State Bar Associations, the Federation of Defense and Corporate Counsel (FDCC), Lawyers for Civil Justice (LCJ), and the Defense Research Institute (DRI). She is a certified Six Sigma Green Belt and puts the efficiency precepts of Six Sigma into practice in the administration of the Firm as well as the handling of client matters. She enjoys the science issues presented by her docket and typically handles the expert and Daubert issues associated with the Firm's interesting caseload.

Ms. Kuchler has managed dockets of complex civil litigation in Louisiana, Mississippi, Texas, Arkansas, Georgia, Alabama and Florida involving toxic tort and environmental litigation, class actions, product liability, personal injury and commercial litigation.

Ms. Kuchler's trial experience includes serving as lead or co-lead trial counsel in numerous state and federal actions, including multi-week trials in Louisiana, Mississippi and Texas involving alleged chemical releases and exposures; purported community asbestos and dioxin exposures; oil and gas operations involving alleged down-hole reserve losses; products liability actions; and admiralty.

**AWARDS**

- 2009 – Re-elected as a Vice President of the Federation of Defense and Corporate Counsel.
- 2009 – Dean of the Federation of Defense and Corporate Counsel's Trial Masters Program
- 2008 - Elected as a Vice President of the Federation of Defense and Corporate Counsel.
- 2008 - The John Alan Appleman Award presented by the Federation of Defense and Corporate Counsel for Outstanding Substantive Law Section Chair of the Toxic Tort and Environmental Law Section.
- 2008 – Selected as one of Louisiana's Super Lawyers.



- 2008 - DuPont Legal Leaders' Circle Award. The DuPont Legal Leaders' Circle Award is presented at the DuPont Primary Law Firm/Primary Service Provider Annual Meeting to recognize leadership in embracing and promoting the ideals of the DuPont Legal Model. Criteria for selection include:
  - Excellence in the delivery of legal services and results for DuPont;
  - Selfless dedication to serving the needs of the DuPont Company;
  - Ongoing support of the DuPont Legal Model;
  - Valuing diverse legal teams and promoting the growth and development of individual members;
  - Collaboration with other members of the DuPont PLF and Service Provider Network; and
  - Active commitment to growing DuPont's business.
- 2007 - Themis Award presented by the DuPont Women Lawyers Network. The Themis Award is presented annually to recognize a woman in the Network who embodies the mission of the DWLN, which is to positively impact the business of DuPont by promoting legal excellence through the success, development and professional advancement of the women lawyers representing DuPont.

**PUBLICATIONS**

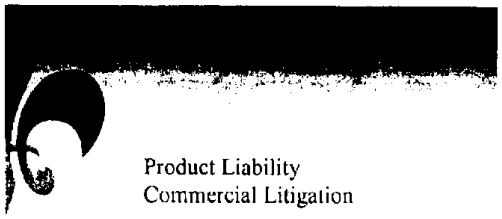
- "Considerations in Formulating a Mutually Advantageous Alternative Fee Agreement: Putting 'Skin in the Game,'" FDCC Quarterly, Vol. 59, No. 3, Spring, 2009.
- Co-author with Leslie O'Toole, "How Technological Advances in the Courtroom are Changing the Way We Litigate," FDCC Quarterly, Vol. 58, No. 2, Winter, 2008.
- Co-author with Paul J. Schumacher, "Preventing and Managing Chemical Catastrophes: A Practical Guide for In-House and Outside Counsel," FDCC Quarterly, Vol. 58, No. 3, Spring, 2008.
- "Overcoming Small and Mid-Size Firm Diversity Challenges," Tort Source, A Publication of the ABA's Tort & Insurance Practice Section, Vol. 9, No. 3, Spring, 2007.
- Co-author with Don G. Rushing, James Shomper and Chris Barbee, "Building the Virtual Law Firm Through Collaborative Work Teams," ACCA Docket, Vol. 19, No. 9, October 2001.

**FEATURED IN**

- "LCJ: How Strong Advocacy Makes Good Things Happen," The Metropolitan Corporate Counsel Magazine, November 2008.
- "Cajun Country's Toughest Litigators," Litigation Management Magazine, Fall, 2003.

**AREAS OF PRACTICE**

Toxic Tort Litigation
Environmental Litigation
Class Actions
Personal Injury



Product Liability
Commercial Litigation

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# CURRICULUM VITAE FOR WILLIAM VITA

William Vita is a partner in the New York law firm of Westerman Ball Ederer Miller & Sharfstein, LLP. He earned his Bachelor's Degree at the University of Notre Dame and the degree of Juris Doctor from Boston College. He engages in a wide range of complex civil litigation, including frequent representation of clients involved in product liability and toxic tort litigation, as well as commercial, contractual and employment disputes.

He is a Past Chair of the Federation of Defense and Corporate Counsel's Management, Economics and Technology of Practice Section and is a current Vice Chair of the Employment Practices and Workplace Litigation Section as well as the Corporate Counsel Symposium. He is a member of the Commercial Litigation Section. He is also served as the Chair of the Hand and Power Tools Specialized Litigation Group of the Defense Research Institute's Product Liability Committee.

Mr. Vita practices regularly in the Federal and State courts throughout New York State.

## I. Introduction

This paper is intended to accompany a panel discussion at the Federation of Defense and Corporate Counsel 2010 Summer Meeting which will examine European management of and solutions to, litigation. We will consider whether some of the European procedures may be used and incorporated by American litigators and companies.

## II. Overview of European Litigation Systems

We will begin with an overview of the differences between the American and European litigation systems, with a special emphasis on contrasting European legal systems with those in America. Obviously, the systems are quite different, with the European legal systems dating as far back as the Roman Empire. The American legal system, by contrast, evolved more recently and differently, from its roots in English Common Law. A thorough understanding of both systems must precede any discussion of what can be learned from the European model, because European "solutions" have evolved as responses to the challenges posed by European systems and such responses may not always fit the challenges presented in the United States.

The Western European countries have a largely socialist outlook. Recent events in Greece illustrate some of the fiscal tensions created by such policies. These types of political and social distinctions have a pronounced effect on the judicial systems in Europe and the U.S.

Forms of litigations which are major concerns for American businesses and litigators, such as mass torts, class actions, and product liability, are much less prominent in Europe. Europe has "collective actions" which are different from American-style class actions. The lack of class actions, coupled with a general lack of punitive damages (save in the special circumstances of late payments of insurance claims), leads to a system in which many small claims, which together might add up to a significant amount, are abandoned or dropped because of the costs and time involved in litigation. David Green of the London Solicitors Litigation Association, commenting on EU proposals to allow European consumers to mount multi-nation "pan-European" class action litigation, indicated that "the adoption of an almost complete American system" of class actions would be resisted by UK judges. (The Guardian, March 19, 2007). Many European businesses argue that such American style class action cases are not necessary in Europe, but the reality is that the introduction of such litigation has been discussed by the EU Commission and judges will implement such laws if they are passed.

The panel will explore how prevalent each type of litigation is. The panel will also explore whether any litigation categories have begun to grow more popular in recent years and, if so, how this affects the management of litigation by European businesses. The panel will also explore what type of litigation forms the bulk of European litigation.

## III. Comparison of European and American Systems

The panel will discuss the efficiency of European litigation, as compared to American litigation. Is it faster? Is it less expensive? Are depositions common? Is there less paper discovery? Is electronically stored information an issue? Are European businesses receiving sanctions for failure to preserve electronically stored information? (*See* e.g. *Zubulake v. UBS Warburg*, 217 F.R.D. 309 (S.D.N.Y.2003); *Pension Committee v. Bank of America*, 2010 U.S. Dist. LEXIS 4546 (S.D.N.Y. Jan. 15, 2010); 2010 WL 184312.

What sort of pre-trial discovery are parties to European litigation permitted to engage in and how does it compare to the thorough, yet frequently highly expensive, pre-trial discovery practice in American courts?

## IV. Comparisons of National Systems Within Europe

The panel will explore the differences within Europe between the common law system prevalent in the U.K. and the civil law system prevalent on the Continent. For example, what types of cases are tried before a jury, in the common law system? Why are defamation cases tried before a jury but not other civil cases? How long do jury trials usually take? Do courts in Ireland hear and decide motions for summary judgment or otherwise summarily dismiss cases? We will also discuss the different tasks performed by solicitors and barristers in preparing and trying a case.

The practices in countries such as Ireland will be contrasted with other European countries such as Spain. We will discuss how Spanish judges are trained, how quickly trials are conducted, how demonstrative evidence is received and how receptive judges are to summary dismissal.

## V. Europe Concerns With American Litigation

The panel will discuss the attitudes of European corporations and companies toward litigation in the United States, with particular emphasis on concerns that European countries have about the American system. Do European businesses understand the American system? Is there any concern that "American style litigation" will spread to Europe? If this were to happen, what would the likely costs be in terms of money and lost productivity?

## VI. Managing Litigation On Both Sides Of The Atlantic

What do attorneys on both sides of the Atlantic need to know in order to manage relationships with European clients when they are sued in the United States or to intelligently counsel American clients when they are sued in Europe?

The panel will discuss how legal costs are controlled and managed in Europe and contrast this management with the American system.

We will explore whether European law firms regularly use hourly fees, or alternative fee-arrangements and, if so, which type of arrangements are preferred. Contingency fees are discouraged, if not outlawed, in many European countries, thus discouraging many tort and "consumer oriented" lawsuits. (*See*, Besiner, John and Borden, Charles, *On the Road to Litigation Abuse: The Continuing Export of U.S. Class Action and Antitrust Law Law*, U.S. Chamber Institute For Legal Reform, October 2006, pgs. 14-18.) "Loser pays" rules also tend to discourage litigation, yet some European policymakers are suggesting that loser pays policies as well as bars on contingency fees and punitive damages should all be abolished. *Id.* It remains to be seen how Europe's style of litigation and payment of its attorneys will evolve, however, it is certain that Europeans will grapple with these issues in the years to come.

The panel will discuss how European clients measure the performance of their attorneys and whether such clients regularly use "metrics" to measure performance, as American companies do with increasing frequency.

## VII. Alternate Billing

The panel will close with a discussion of how American law firms have learned to "put skin in the game" by creative use of alternative billing arrangements.

The alternative billing arrangements include, in addition to contingency fees, blended hourly rates, fixed fee or flat fee, pricing, fee cap pricing, discounted hourly pricing, cash-based pricing, blends of hourly and contingent pricing, budget ceilings and performance bonuses.

The panel will pay particular attention to the need for both clients and attorneys to consider ethical considerations and share information before entering into alternative fee arrangements and to think outside the box in order to increase the efficiency of such arrangements and maximize the benefits to both the law firms and the corporate clients.

## VIII. Conclusion

It is hoped that the discussion will lead the audience to a better understanding of how to most effectively and efficiently represent clients on both sides of the Atlantic.

# THE GREAT HEALTHCARE DEBATE AT HOME AND ABROAD

## HEALTHCARE REFORM IN THE UNITED STATES: A Brief Comparison with Healthcare Systems in Canada and Germany

*Amy E. Kempfert*
*Benjamin D. Reed*

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**FDCC Summer Convention**
**The Westin Grand Munich Arabellapark**
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**Dr. Michael Lauterbach, Heuking, Kühn, Lüer, Wojtek, Munich, Germany**

# HEALTHCARE REFORM IN THE UNITED STATES:
## A Brief Comparison with Healthcare Systems in Canada and Germany

### UNITED STATES

The new health care reform is essentially health insurance reform. It borrows principles of shared responsibility from systems such as Canada's and Germany's, to provide health insurance to all citizens. In fact, except for certain exempted individuals, citizens and legal residents are required to purchase health insurance. The reform bill also seeks to eliminate discriminatory practices of insurance companies such as pre-existing conditions exclusions and elimination of lifetime benefits limitations.

Those citizens or legal aliens that cannot afford a health insurance policy will have the premium paid to the private insurer through subsidy, primarily by re-allocating funds raised for Medicare, taxation on medical device sales and tanning services, and by revenue raised by the higher education student loan program and penalty provisions. Insurance can be obtained through an individual's employer, through the individual insurance market, or through new state-based American Health Benefit Exchanges and exchanges through which small businesses can purchase coverage. Premium and cost-sharing credits are available to individuals and families with income between 133% to 400% of the federal poverty level ("FPL").

New regulations will require employers to offer coverage to employees and penalties will be imposed for any employee who receives a health insurance tax credit through an Exchange, and with certain exceptions for small employers. Likewise, individuals will be required to purchase health insurance or pay an annual penalty, based on the greater of a fixed amount or percentage of income,

with caps on maximum amounts. New regulations will be imposed on health plans in the Exchanges and in the individual and small group markets. Medicaid will expand to cover income up to 133% of the federal poverty level.

Another feature of the legislation is that preventative services and immunizations are required to be covered, a feature that exists in both Canada and Germany's system and which is believed will help reduce costs through preventative, rather than reactionary healthcare treatment. Employers will be offered an incentive for workplace wellness practices. Funds will also be allocated to providing a bonus for primary care doctors. Also, insurers will be prohibited from denying coverage or setting rates based on gender, health status, medical condition, claims experience, genetic information, domestic violence evidence, or other health-related factors, which is similar to Germany's regulations governing sickness funds. Premiums will vary based on some factors such as geographic location, family structure, and tobacco use, which is somewhat similar to Canada's differing levels of coverage based on provincial location.

There will also be limits on out-of-pocket expenses, similar to Germany's annual maximum limit on co-payment amounts. Services through medicaid and medicare will eventually be based on quality outcomes, and payment will be linked to quality outcomes in medicare. Also, Medicare part D prescription drug benefit will be enhanced and the donut hole will be reduced.

Similar to Germany's system that provides long-term care as part of the health-insurance payroll deduction, the legislation establishes a national voluntary insurance program for purchasing community living assistance services and support, called the CLASS program.

Funding will be provided by excise taxes on high cost employer-sponsored health coverage, reducing the maximum amount for health flexible spending accounts (and eliminates from coverage

over-the-counter medications that do not require a prescription), annual fees imposed on the pharmaceutical manufacturers health insurance providers, excise tax on medical devices, modifies the medical expense deduction by increasing it from 7.5% of AGI to 10.0% of AGI, limits health insurance company executive pay to $500K per year, additional hospital insurance tax for high-income taxpayers, excise tax on tanning services, and requires a medical loss ration of 85% or higher in order to take advantage of tax breaks for non-profits.

Thus, the US healthcare system will still be extremely fragmented, which means that administrative costs will still take up a much larger portion of healthcare costs than Canada's single-payer system, or Germany's standardized multi-payer system. The new health insurance exchanges will be similar to Canada's system where healthcare is largely administered by each province or territory individually with federal funding to supplement costs. Our healthcare industry will still be similar to Germany's, whereby the majority of insurance comes from employer-based insurance.

## CANADA

Canada's publicly-funded healthcare system, called Medicare, provides universal coverage for medically necessary health care services provided on the basis of need as opposed to ability to pay. Canada's healthcare system is a single-payer system, meaning that healthcare is provided by the private sector but paid for with public funds.[1] In the United States, Medicare is an example of a single-payer system for a specified, limited segment of the population.

Standard healthcare services are free to the patient. For services not covered by Medicare, such as dental and optometry services, supplemental insurance from the private sector supplements

[1]The Economist, *Healthcare Systems around the World: Canada*, (April 25, 2008) accessed at http://healthcare-economist.com/2008/04/25/health-care-around-the-world-canada/

their basic insurance. Employers typically offer additional health coverage as an employment benefit. Pharmaceutical costs are set at a global median by government price controls.[2]

Administration and the majority of responsibility falls on the provincial and territorial governments. Healthcare is funded by the provincial and territorial governments with federal funding to supplement the costs, similar to Medicaid in the United States.[3] In order to receive full federal funding, the provincial and territorial governments meet five established criteria: comprehensiveness, universality, portability, accessibility and public administration, pursuant to the Canada Health Act. Each province is permitted by law to opt out, but none currently do. Federal funding comes from general tax revenue and is allocated to each province or territory in the form of a block grant. The majority of the funding comes from provincial taxes, mostly individual and corporate taxes and represents around 1/3 to ½ of all provincial welfare spending.[4]

The healthcare services are provided by private sector healthcare professionals, who are paid on a fee per visit basis, at a rate that is negotiated annually with the provincial government and the that provinces medical association. Healthcare providers are prohibited from charging a fee greater than the negotiated rate, unless the provider opts out of the payment system.

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[2]See, Health Canada, accessed at http://www.hc-sc.gc.ca/hcs-sss/index-eng.php

[3]Tanner, Michael D. "*The Grass Is Not Always Greener: A Look at National Health Care Systems Around the World*" Cato Policy Analysis no. 613 (2008).

[4]Brett J. Skinner, "Paying More, Getting Less 2005: Measuring the Sustainability of Provincial Public Health Expenditure in Canada," Fraser Institute, October 2005

## GERMANY

Germany has an extensive and near-comprehensive statutory insurance system covering five branches (called insurance funds) of social insurance: (1) accident insurance, (2) long-term care insurance, (3) health insurance, (4) pension insurance, and (5) unemployment insurance.[5] Book V of the German Social Code requires German citizens with incomes under a specified amount (approximately $50,000 US dollars) to enroll in one of approximately 200 "sickness funds" as part of the statutory insurance system.[6] Those with incomes above the threshold are permitted to opt-out and purchase private insurance. Private insurance is also permitted for those individuals who don't qualify for employer-based insurance because they have no formal employer. For these individuals, the Artists' Social Fund serves as the "employer" for purposes of matching contributions for individuals broadly defined as "artists" under applicable law. The mandatory payroll tax is deducted monthly from these individuals' bank account, and the Artists' Social Fund matches that amount.[7]

Beginning January 1, 2009, all German residents are required to take out health insurance unless they are otherwise covered. Persons who had lost their insurance coverage are required to return to their most recent insurer, and this mandate applies both the statutory and the private

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[5]http://www.deutsche-sozialversicherung.de/en/guide/introduction.html

[6]The legal foundations for statutory health insurance are to be found in Book V of the German Social Code (SGB V), in the Farmers Health Insurance Act and in the Reich Insurance Code.

[7]Paul Hockenos, *Is Germany's health care a good model for the US?*, (October 8, 2009)

insurance systems.[8] Because of this, private health insurance companies will be required to accept insured persons at a base rate.[9]

Almost all citizens in Germany have health insurance, whether as a compulsory member of the statutory health insurance scheme (88 percent) or a private health insurance scheme (almost 12 percent). Non-employed family members of those in a compulsory health insurance scheme do not pay any contributions. The sickness funds are self-governing[10] non-profit corporations under public law that have joined together and are organized into the Central Association of Health Insurance Funds, who carries out legally mandated tasks. The Federal Ministry of Health regulates the statutory health insurance system.[11]

The sickness funds are financed through payroll deductions of around 15%, which is split approximately equally between the employer and employee.[12] The increasing proportion of elderly people in the population in conjunction with a relatively low birth rate and stagnant wages have pushed the system to its very limits. In 2007, a major reform of the healthcare system occurred with

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[8]http://www.bmg.bund.de/cln_160/nn_1169696/EN/Gesundheit/gesundheit__node.html?__nnn=true

[9]http://www.tatsachen-ueber-deutschland.de/en/society/main-content-08/reform-of-the-health-system.html

[10]This removes the burden on the State by delegating tasks and areas of responsibility to the funds (subsidiarity principle). This means that the social insurance funds, as corporations under public law, take responsibility for all control tasks under the legal supervision of the State. These funds are thus organisationally and financially independent. The special aspect of this principle is that employees and employers participate directly in this system of self-government. http://www.deutsche-sozialversicherung.de/en/guide/basic_principles.html

[11]http://www.deutsche-sozialversicherung.de/en/guide/introduction.html

[12]http://www.deutsche-sozialversicherung.de/en/guide/introduction.html

the introduction of a Health Fund. Beginning in 2009, insured persons' contributions to the sickness funds will be standardized. For each insured person, the sickness funds will receive a flat rate from the Health Fund. At the same time, tax financing of health insurance services began. Insured individuals are required to pay co-payments for almost all services up to an annual maximum, which is a percentage of income.

Healthcare provider compensation rates are negotiated between the sickness funds and physicians associations, with sickness funds possessing most of the bargaining power.[13] The sickness funds (health insurance companies) cover the cost of medical treatment, medication, hospitalization and preventive health care. All insured persons are guaranteed access to all medically necessary benefits and services, regardless of the size of the individual's contribution, age or state of health. The sickness funds are mandated to provide a wide range of coverages and cannot refuse membership or otherwise discriminate on an actuarial basis, very similar to the United States healthcare reform provisions regarding access to care, prohibition on discrimination, pre-existing conditions, etc.

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[13]The Economist, *Healthcare Systems around the World: Germany* (April 24, 2008) accessed at http://healthcare-economist.com/2008/04/24/health-care-around-the-world-germany/

# THE GREAT HEALTHCARE DEBATE AT HOME AND ABROAD

## HEALTHCARE REFORM IN THE UNITED STATES: HITECH Act and HIPAA Privacy, Security and Enforcement Issues

*Amy E. Kempfert*
*Benjamin D. Reed*

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# HEALTHCARE REFORM IN THE UNITED STATES: HITECH Act and HIPAA Privacy, Security and Enforcement Issues

## I. INTRODUCTION

The Health Insurance Portability and Accountability Act ("HIPAA") was enacted on August 21, 1996.[1] The Act encompasses five separate Titles. Title II of HIPAA, known as the Administrative Simplification provisions, required the Secretary of The U.S. Department of Health and Human Services ("HHS") to promulgate standards for the electronic exchange of healthcare transactions, as well as privacy and security standards for safeguarding and protecting the privacy of an individual's personal health information. The Administrative Simplification provisions have been codified at 45 C.F.R. §§ 160, 162, and 164. The standards are meant to improve the efficiency and effectiveness of the nation's health care system by encouraging the widespread use of electronic data interchange, while providing appropriate safeguards to protect the privacy of individuals' health information by placing limits on the access, use and disclosure of protected health information.[2]

Under HIPAA, the Administrative Simplification provisions generally apply to health plans, healthcare clearinghouses, and healthcare providers, otherwise known as 'covered entities.'[3] Most, if not all, healthcare providers and health plans do not carry out each healthcare function, service, or activity themselves; rather, they enlist the services of numerous other third party businesses and individuals, known as business associates. Business Associates have historically been covered only

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[1]Pub. L. 104-191.

[2]HIPAA, at § 263.

[3]45 C.F.R. § 160.102; 45 C.F.R. § 160.103.

indirectly by HIPAA by way of mandatory contractual agreements with the covered entity, called 'business associate agreements.' Covered entities are permitted to disclose individuals' protected health information to a business associate to carry out the covered entity's health care services, activities or functions only if the covered entity obtains the proper assurances that the business associate will safeguard and not misuse the information.

HIPAA's Privacy, Security, and Enforcement provisions have been widely criticized for providing inadequate protections against improper use and disclosure of PHI and providing inadequate individual rights governing access, use and disclosure of their PHI. Additionally, HIPAA has been lambasted because the scope of covered entities did not include third parties and other business associates who essentially used and disclosed PHI at their leisure with little to no consequences. Additionally, the enforcement under HIPAA was discretionary, rarely lead to any meaningful compliance regulations, and the low monetary penalties for non-compliance were said to be undeterring given the money to be made through PHI.

On February 17, 2009, Congress passed the Health Information Technology for Economic and Clinical Health ("HITECH") Act as part of the American Recovery and Reinvestment Act ("ARRA").[4] Among other provisions, one of the major purposes of the new law is to improve the nation's health care through Health Information Technology ("HIT")[5] by promoting the 'meaningful use' of electronic health records ("EHR") through various incentives. The Act provides financial

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[4]Pub. L. 111-5.

[5] The HIT provisions of the Recovery Act are found primarily in Title XIII, Division A, Health Information Technology, and in Title IV of Division B, Medicare and Medicaid Health Information Technology. These titles together are cited as the Health Information Technology for Economic and Clinical Health Act or the HITECH Act.

incentives to physicians and hospitals to adopt an EHR System prior to the end of 2015, and financial disincentives for failing to do so. The Act also provides funding for a national EHR infrastructure, state collaboration, effectiveness research, as well as HIT training and education for health care professionals.

Because this legislation anticipates a massive expansion in the exchange of electronic protected health information ("ePHI"), the HITECH Act broadens the scope of the HIPAA Security and Privacy Rules by making the Security Rule provisions and some of the Privacy Rule provisions directly applicable to business associates. The Act also provides for increased potential legal liability for non-compliance and greater enforcement of violations. The Act mandates prompt resolution of certain issues by government agencies via rulemaking, some of which have recently been promulgated into law, and some of which are still yet to come. While EHR implementation is voluntary under the Act, the enhanced applicability and enforcement of HIPAA Privacy and Security Rules are mandatory and will inevitably cause all covered entities and their business associates to substantially and dramatically alter current practices.

The HITECH Act provisions extending HIPAA Privacy and Security Rule provisions to business associates went into effect February 17, 2010. Unfortunately, HHS has yet promulgate regulations implementing the HITECH Act provisions on expanded HIPAA coverage to business associates or expanded Privacy and Security protections contained in the HITECH Act. On April 26, 2010, HHS released its semi-annual regulatory agenda in the Federal Register and stated that modifications to the HIPAA Privacy, Security and Enforcement rules would be coming in May.[6] HHS did not detail exactly which proposed rules would be released, but the Office of the Civil

[6]FR Doc. 2010-8934, accessed at http://edocket.access.gpo.gov/2010/2010-8934.htm.

Rights ("OCR")–the agency responsible for enforcing the HIPAA privacy and security rules–issued a statement on March 23, 2010, that forthcoming regulations would include "business associate liability; new limitations on the sale of protected health information, marketing, and fundraising communications; and stronger individual rights to access electronic medical records and restrict the disclosure of certain information."[7] The OCR statement also stated that:

> Although the effective date (February 17, 2010) for many of these HITECH Act provisions has passed, the NPRM and the final rule that follows will provide specific information regarding the expected date of compliance and enforcement of these new requirements.

Hopefully, these regulations will come sooner as opposed to later, but federal regulatory agencies will have their hands full with the recently-passed Healthcare Reform legislation.[8] Again, this new legislation will likely involve increased changes to HIPAA and to current legal and medical practices throughout the United States. This paper will attempt to provide a summary of how HIPAA has changed, as well as provide a concise summary of foreseeable forthcoming changes.

## II. PRIVACY RULE

### A. Introduction

The Standards for Privacy of Individually Identifiable Health Information ("Privacy Rule") establish national standards to protect individuals' health information privacy by requiring appropriate safeguards and restrictions on the access, use, and disclosure of an individuals' personal health information without the individuals' prior authorization. The Privacy Rule standards also establish rights and procedures for individuals to understand and control how their health

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[7]http://www.hhs.gov/ocr/privacy/hipaa/understanding/coveredentities/hitechblurb.html.

[8]The healthcare reform legislation includes the Patient Protection and Affordable Care Act, P.L. 111-148, along with the Health Care and Education Reconciliation Act of 2010, P.L. 111-152, which was passed by the reconciliation process in order to make amendments to the former.

information is utilized. The Privacy Rule represents a balance between protecting individuals' private health information while permitting the flow and exchange of health information essential for quality of care and other vital public purposes. Because of the diverse healthcare marketplace in the United States, the Privacy Rule is also designed to be flexible yet comprehensive in as much as it attempts to cover the gamut of potential uses and disclosures of PHI. The Privacy Rule is located at 45 C.F.R. Part 160 and Subparts A and E of Part 164.

## B. Who is Covered by the Rule

### 1. Covered Entities

The Privacy Rule (and Security Rule) applies to Health Plans, Health Care Providers, and Health Care Clearinghouses,[9] i.e., covered entities:

1. Health plans: includes health insurance companies, HMO's, company health plans, and government programs such as Medicare, Medicaid, and the military and veterans health care programs;
2. Health care clearinghouses: includes entities that process health information they receive from another entity into a standard (i.e., standard electronic format or data content), or vice versa; and
3. Health care providers: such as a physician or dentist who transmits any health information in electronic form in connection with a *transaction* [10]covered by HIPAA.

Because the exchange of health information is assumed by HIPAA, the Privacy Rule requires CE's to enter business associate agreements with any business associate who performs certain functions or activities on behalf of, or provides certain services to, a covered entity that involves the use or disclosure of individually identifiable health information.[11] These agreements expressly

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[9]45 C.F.R. § 164.104.

[10]'Transaction' is defined in 45 C.F.R. § 160.103, and includes eleven (11) types of transactions. These transactions are further defined in 45 C.F.R. section 162.

[11]45 C.F.R. § 160.103; 45 C.F.R. §§ 164.502(e), 164.504(e).

define the permitted uses and disclosures of PHI and mandate the use of specified procedures to adequately safeguard individuals' PHI .

### 2. Business Associates

A business associate is a third party (not an employee) that performs certain functions or activities involving the use or disclosure of protected health information on behalf of a covered entity, or who provides certain services to the covered entity. The Privacy Rule identifies the particular functions/activities/services that guide whether a third party is considered a business associate. The functions and activities include claims processing, data analysis, utilization review, and billing. The services are limited to legal, actuarial, accounting, consulting, data aggregation, management, administrative, accreditation, or financial services. Also, a covered entity can be the business associate of another covered entity.[12]

Some examples of business associates include:

- CPA firm that requires access to PHI in order to audit or otherwise provide accounting services to a covered entity;
- Attorney that needs access to PHI in order to provide legal services to a covered entity;
- Third party administrator that assists a covered entity with claims processing;
- Consultant that performs utilization reviews for hospitals;
- Patient billing service;
- Pharmacy benefits manager.

In addition, here are some examples of who is not considered to be a business associate:

- A person/entity whose function or service provided to the covered entity does not involve the use or disclosure of PHI and where any access to PHI is incidental.
- A healthcare provider who receives disclosures from other covered entities for treatment of the individual.
- Covered entities who participate in an organized health care arrangement (OHCA) to make disclosures that relate to the joint health care activities of the OHCA.

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[12]45 C.F.R. § 160.103. The definition of business associate can be found here.

The HITECH Act provides that the following additional organizations are now considered to be business associates for purposes of the provisions contained in the HITECH Act, and for purposes of the Privacy and Security Rules in effect as of the date of enactment of the HITECH Act.[13] This includes: organizations that provide data transmission of PHI to a covered entity (or it's business associate) *AND* that require access to such PHI on a routine basis, such as a Health Information Exchange Organization, Regional Health Information Organization, and E-prescribing Gateway must enter into a business associate agreement with the covered entity.[14] Also, any vendor that contracts with a covered entity to allow it to offer a Personal Health Record ("PHR") to patients as part of its EHR is also required to enter into a business associate agreement with the covered entity and will be considered to be a business associate for purposes of compliance with HIPAA Security and Privacy Rule provisions as described above and herein.[15]

The business associate agreement between the covered entity and business associate must contain certain specified elements and contractual language.[16] For instance, it must describe the permitted and required uses of PHI by the business associate; require the business associate not use or further disclose the PHI other than as permitted or required by the contract or as required by law;

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[13]HITECH Act, Section 13408, as codified in 42 U.S.C. § 17938.

[14] As described in the Privacy and Security Rules, 45 C.F.R. §§ 164.502(e) and 164.308(b), respectively.

[15] This provision is also likely to provide interpretation difficulties. For instance, does the provision apply to PHR vendors when the PHR being offered remains the PHR of the vendor, and is thus not "part of the electronic health record" of the covered entity. Or instead, does the provision apply and cover only circumstances where a PHR vendor is contracting with a CE so that the covered entity itself can offer *its own PHR* to its patients [*i.e.*, Z vendor contracts with X hospital so that an X hospital PHR can be offered to its patients, as opposed to Z vendor's PHR offered to X hospital's patients].

[16]45 CFR 164.504(e)

and require the business associate to use appropriate safeguards to prevent such unauthorized uses of disclosures of PHI. When a covered entity knows of a material breach or violation by the business associate, the covered entity is required to take reasonable steps to cure the breach or end the violation, and if such steps are unsuccessful, to terminate the contract. If termination is not feasible, a covered entity is required to report the problem to the OCR.

The HIPAA Privacy and Security rule provisions traditionally applied to business associates only via their business associate agreements. This meant that business associates were not directly liable for HIPAA violations and the only remedy for a business associates HIPAA violation was breach of contract by the covered entity. Effective February 17, 2010, the HITECH Act mandates that business associates comply with the Privacy Rule provisions made applicable to them via their business associate agreement.[17] Furthermore, any additional privacy provisions contained therein that apply to covered entities also directly apply to business associates. These new requirements must be incorporated into the business associate agreements between the covered entity and business associate. Finally, a violation of any applicable Privacy Rule provision by the business associate is now a HIPAA violation for which business associates are directly accountable (*see* Enforcement section).

Given the strengthened Enforcement provisions under the Act (discussed infra), it would appear that business associate agreement compliance will be a relatively simple audit issue: is there a business associate agreement where one is required, and if so, does it contain the required provisions.

### C. What is Protected

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[17]HITECH Act, Section 13404(a), as codified in 42 U.S.C. § 17934.

### 1. Protected Health Information

The Privacy Rule protects all "individually identifiable health information" transmitted or maintained by a covered entity or its business associate, in any form or media.[18] Individually identifiable health information represents information that is a subset of health information and that includes demographic data collected from the individual, and that:

(1) is created or received by a CE, and
(2) relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual; and
    (I) that identifies the individual; or
    (ii) with respect to which there is a reasonable basis to believe the information can be used to identify the individual.[19]

### 2. De-identified Health Information

There are no restrictions on the use or disclosure of de-identified health information.[20] Health information that does not identify an individual or provide a reasonable basis to identify an individual is considered de-identified health information. The Privacy Rule provisions provide two methods to de-identify information: (1) a formal determination by a qualified statistician; or (2) the removal of specified identifiers of the individual and of the individual's relatives, household members, and employers.[21]

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[18]45 C.F.R. § 160.103. Employment records that a CE maintains in its capacity as an employer and education and certain other records subject to, or defined in, the Family Educational Rights and Privacy Act, 20 U.S.C. §1232g, are excluded from the definition of PHI.

[19]45 C.F.R. § 160.103.

[20]45 C.F.R. §§ 164.502(d)(2), 164.514(a) and (b).

[21]45 C.F.R. § 164.514(b)(1) and (2). With respect to (2) above, in addition to removing the identifiers, the CE must not have actual knowledge that the remaining information could be used alone or in combination with any other information to identify an individual who is subject of the information. 45 C.F.R. § 164.514(b)(2)(iii).

## D. Rules for Use and Disclosure of Protected Health Information

### 1. General Principles

The Privacy Rule sets forth the general limitations regarding the use and disclosure of PHI by allowing for PHI to be used and disclosed (1) as permitted, (2) as required, and (3) as authorized by the individual (or his personal representative).[22] Also, a covered organization should use and disclose only the minimum amount of PHI necessary to achieve the desired the purpose.[23]

### 2. Required

A covered organization is required to disclose PHI in the following circumstances: (1) to individuals when they request access to their PHI, or when they request an accounting of disclosures of their PHI,[24] and (2) to the Secretary of HHS when it is undertaking an enforcement action or compliance investigation or review.[25]

### 3. Permitted without Authorization

The Privacy Rule permits covered organizations to use and disclose PHI as follows:

(1) to the individual (unless otherwise required);
(2) for treatment, payment, and healthcare operations;
(3) incident to an otherwise permitted or required use and disclosure;
(4) pursuant to an agreement where the individual has received the opportunity to agree or object;
(5) for specified important public interest and public benefit activities; and

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[22]45 C.F.R. § 164.502(a).

[23]45 C.F.R. § 164.502(b)(1).

[24]45 C.F.R. § 164.502(a)(2)(i). Requests for access to, and requests for accounting of disclosures are discussed *infra*.

[25]45 C.F.R. § 164.502(a)(2)(ii); *see also*, 45 C.F.R. § 160.300, *et seq*.

(6) pursuant to a limited data set for the purposes of research, public health or health care operations.[26]

To the Individual. A covered entity is permitted to disclose an individuals' PHI to that individual, unless of course they are required to disclose such information.

Treatment, Payment, Health Care Operations. [27] A covered entity is permitted to use and disclose PHI for its own treatment, payment, and health care operations activities.[28] A covered entity is also permitted to disclose PHI for: (a) treatment activities of any health care provider, (b) payment activities of another covered entity and of any healthcare provider, (c) health care operations of another covered entity that involves quality or competency assurance activities or fraud and abuse detection and compliance activities, provided both covered entities has or had a relationship with the individual and the PHI relates to such relationship.[29] Obtaining "consent" (written permission from individuals to use and disclose their PHI for treatment, payment, and health care operations) is optional for all covered entities.[30] The Privacy Rule does not contain provisions on how to obtain consent, or what information must be included in a consent form.

Incidental Use and Disclosure. The Privacy Rule does not require that every risk of an incidental use or disclosure of PHI be eliminated. A use or disclosure of this information that occurs as a result of, or as "incident to" an otherwise permitted use or disclosure is allowed so long as the covered entity

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[26]45 C.F.R. § 164.502(a)(1).

[27]Treatment, payment and healthcare operations are defined in 45 C.F.R. § 164.501.

[28]45 C.F.R. § 164.506(c)(1).

[29]45 C.F.R. § 164.506(c)(2)-(4).

[30]45 C.F.R. § 164.506(b).

has adopted reasonable safeguards as required by the Privacy Rule, and the information being shared is limited to the "minimum necessary."[31]

Uses and Disclosures with Opportunity to Agree or Object. Informal permission may be obtained by asking the individual outright, or by circumstances that clearly give the individual the opportunity to agree, acquiesce, or object. Where the individual is incapacitated, in an emergency situation, or not available, covered entities generally may make such uses and disclosures, if in the exercise of their professional judgment, the use or disclosure is determined to be in the best interests of the individual.[32] For instance, it is common in many healthcare facilities to maintain a directory of patient contact information. A covered entity may rely on an individual's informal permission to list in its facility directory the individual's name, general condition, religious affiliation, and location in the provider's facility, and the provider is permitted to disclose the individual's condition and location to anyone who asks for the individual by name. Likewise, a covered entity may rely on an individual's informal permission to disclose for notification purposes to an individual's family or relative identified by the individual, and to public or private entities authorized by law or charter to assist in disaster relief efforts.[33]

Public Interest and Benefit Activities. The Privacy Rule permits use and disclosure of PHI without an individual's authorization or permission, for specified important public purposes.[34] These disclosures are permitted, although not required, by the Rule in recognition of the important uses

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[31]45 C.F.R. §§ 164.502(a)(1)(iii).

[32]45 C.F.R. § 164.510(a).

[33]45 C.F.R. § 164.510.

[34]45 C.F.R. § 164.512.

made of health information outside of the healthcare context. Specific conditions or limitations apply to each public interest purpose, striking the balance between the individual privacy interest and the public interest need for this information.

1. Required by Law.[35]
2. Public Health Activities. This includes uses and disclosures for disease prevention, FDA regulated products related activities, employment-related disclosures necessary for compliance with specified labor laws.[36]
3. Victims of Abuse, Neglect or Domestic Violence.[37]
4. Health Oversight Activities. Such as audits and investigations for compliance with HIPAA or other government benefit programs.[38]
5. Judicial and Administrative Proceedings. If through a valid court order or subpoena if a protective order or other adequate safeguards are provided.[39]
6. Law Enforcement Purposes. Permitted under six circumstances, such as to identify or locate a suspect or to notify law enforcement of possible criminal activity, subject to specified conditions.[40]
7. Decedents. To funeral directors as necessary and to coroners or medical examiners to identify, determine cause of death, or perform other functions authorized by law.[41]
8. Cadaveric Organ, Eye, or Tissue Donation. To facilitate donation and transplantation of cadaveric organs, eyes, and tissue.[42]
9. Research. But only under specified conditions, and subject to appropriate assurances and safeguards.[43]

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[35]45 C.F.R. § 164.512(a).

[36]45 C.F.R. § 164.512(b).

[37]45 C.F.R. § 164.512(a) & (c).

[38]45 C.F.R. § 164.512(d).

[39]45 C.F.R. § 164.512(e).

[40]45 C.F.R. § 164.512(f).

[41]45 C.F.R. § 164.512(g).

[42]45 C.F.R. § 164.512(h).

[43]45 C.F.R. § 164.512(I). A covered entity also may use or disclose, without an individuals' authorization, a limited data set of protected health information for research purposes (see infra).

10. Serious Threat to Health or Safety. If believed necessary to prevent or lessen a serious and imminent threat to a person or the public, when made to someone they believe can prevent or lessen the threat.[44]
11. Essential Government Functions. Such functions include: assuring proper execution of a military mission, conducting intelligence and national security activities authorized by law, protecting the health and safety of inmates or employees in correctional institutions, and determining eligibility or enrollment decisions for certain government benefit programs.[45]
12. Workers' Compensation. As authorized by such laws, or in order to comply with workers' compensation laws.[46]

Limited Data Set. A limited data set is PHI from which certain specified direct identifiers of individuals and their relatives, household members, and employers, such as names, addresses, social security numbers, license or vehicle numbers, etc. have been removed.[47] A limited data set may be used and disclosed for research, health care operations, and public health purposes, provided the recipient enters into a data use agreement promising specified safeguards for the protected health information within the limited data set.

**4. Permitted with Authorization**

In general, the Privacy Rule requires a covered entity to obtain a valid written authorization for any use or disclosure of (1) psychotherapy notes, and (2) PHI for marketing.[48]

Psychotherapy Notes. A covered entity must obtain a written authorization for any use or disclosure of psychotherapy notes except as follows:

- the originator of the psychotherapy notes may use them for treatment;

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[44]45 C.F.R. § 164.512(j). A covered entity may also disclose PHI to law enforcement if the needed to identify or apprehend an escapee or violent criminal.

[45]45 C.F.R. § 164.512(k).

[46]45 C.F.R. § 164.512(l).

[47]45 C.F.R. § 164.514(e).

[48]45 C.F.R. § 164.508(a)(2) & (3).

- for the covered entity's own training program in counseling;
- to defend itself in legal proceedings brought by the individual;
- to HHS for compliance investigation or review;
- to avert a serious and imminent threat to public health or safety;
- to a health oversight agency for lawful oversight of the originator of the psychotherapy notes;
- for the lawful activities of a coroner or medical examiner; or
- as required by law.[49]

Marketing. Marketing is any communication about a product or service that encourages recipients to purchase or use the product or service.[50] The Privacy Rule carves out the following health-related activities from this definition of marketing:

- Communications to describe health-related products or services, or payment for them, provided by or included in a benefit plan of the covered entity making the communication;
- Communications about participating providers in a provider or health plan network, replacement of or enhancements to a health plan, and health-related products or services available only to a health plan's enrollees that add value to, but are not part of, the benefits plan;
- Communications for treatment of the individual; and
- Communications for case management or care coordination for the individual, or to direct or recommend alternative treatments, therapies, health care providers, or care settings to the individual.

Marketing also is an arrangement between a covered entity and any other individual or business whereby the covered entity discloses PHI in exchange for direct or indirect remuneration for the other entity to communicate about its own products or services encouraging the use or purchase of those products or services. A valid authorization must be obtained by the individual to use or disclose PHI for marketing, except for face-to-face marketing communications and for a covered entity's provision of promotional gifts of nominal value. No authorization is needed, however, to make a communication that falls within one of the exceptions to the marketing

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[49]45 C.F.R. § 164.508(a)(2)(I)-(ii).

[50]45 C.F.R. §§ 164.501 and 164.508(a)(3).

definition. An authorization for marketing that involves the covered entity's receipt of direct or indirect remuneration from a third party must reveal that fact.

**Changes pursuant to the HITECH Act.**

The HITECH Act alters the Privacy Rule provisions regarding marketing.[51] Unfortunately, the required Regulations mandated pursuant to the Act have yet to be promulgated, and the Privacy Rule regulations that have been substantially altered by the HITECH Act have yet to be amended to conform with the statutory provisions. Effective February 17, 2010, communications by a covered entity or business associate about a product or service that encourages recipients of the communication to purchase or use the product or service is no longer considered a "healthcare operation." Also, if a third party pays receives direct or indirect remuneration to send marketing communications to an individual, it is no longer considered to be a "healthcare operation" except where:

1. the communication describes ONLY a drug or biologic currently being prescribed for or administered to the patient, AND any payment received by the covered entity is "reasonable in amount";
2. the communication is from the covered entity AND the covered entity obtains a proper authorization from the individual; or
3. the communication is from a business associate on behalf of a covered entity AND the communication complies with the requirements of the business associate agreement.[52]

The term "reasonable in amount" is to be determined by the Secretary via Regulations (with no date within which such term is to be defined). Also, the term "direct or indirect remuneration" does NOT include payment for treatment of an individual.

### 5. Minimum Necessary Standard

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[51] *See*, HITECH Act, Section 13406(a), as codified in 42 U.S.C. § 17936(a).

[52] 42 U.S.C.A. § 17936(a).

Covered entities are required under the Privacy Rule to access, use, and disclose only the "minimum necessary" amount of PHI required to achieve the desired purpose.[53] The HITECH Act requires that in order to be effective, a covered entity must use a "limited data set"[54] to the extent it can do so practically, but a covered entity is permitted to use the old "minimum necessary" standard in lieu of the limited data set if necessary to accomplish the intended purpose.[55] The Secretary is required to issue Guidance no later than 18 months after the Act's enactment on what constitutes "minimum necessary" for purposes of the Privacy Rule provisions.[56] Effective February 17, 2010, a covered entity may no longer rely upon the entity requesting the data in determining what constitutes the "minimum necessary";[57] it must make that determination for itself.[58] Also, if a covered entity has agreed to a requested restriction by the individual,[59] it may not use or disclose that individual's PHI in a manner inconsistent with the agreement.[60]

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[53]45 C.F.R. § 164.502(b).

[54]As defined 45 C.F.R. § 164.514(e)(2). This is health information that excludes a number of categories of information identifying the patient (and relatives) and that can be used pursuant to a data use agreement for research, public health, or public health care operations purposes.

[55]HITECH Act, Section 13405(b)(1)(A), codified in 42 U.S.C. § 17935(b)(1)(A).

[56]HITECH Act, Section 13405(b)(2), codified in 42 U.S.C. § 17935(b)(2).

[57]45 C.F.R. § 164.514(d)(3)(iii). Unfortunately, HHS has yet to amend this provision to reflect the HITECH Act's statutory provision reflecting this prohibition.

[58]HITECH Act, Section 13405(b)(1)(B), codified in 42 U.S.C. § 17935(b)(1)(B). The Act contains a sunset provision providing that this section shall not apply on and after the effective date of the forthcoming Guidance on minimum necessary. Section 13405(b)(1)(c) 42 U.S.C. § 17935(b)(1)(B).

[59]Pursuant to 45 C.F.R. §164.522(a)(1).

[60]45 C.F.R. § 164.502(b)(3).

Exceptions. The Privacy Rule provides certain exceptions where a covered entity is not required to limit their use or disclosure to the minimum necessary requirement. These exceptions are expressly continued under the HITECH Act as well. The minimum necessary requirement is not imposed in any of the following circumstances:

(1) disclosure to or a request by a health care provider for treatment;
(2) disclosure to an individual who is the subject of the information, or the individual's personal representative;
(3) use or disclosure made pursuant to an authorization;
(4) disclosure to HHS for complaint investigation, compliance review or enforcement;
(5) use or disclosure that is required by law; or
(6) use or disclosure required for compliance with the HIPAA Transactions Rule or other HIPAA Administrative Simplification Rules.[61]

## E. Privacy Protections and Individual Rights

The Privacy Rule also provides certain protections and rights to individuals regarding the use and disclosure of their PHI. In addition, the HITECH Act expands the scope of some of these rights, and provides additional protections to the individual.

### 1. Privacy Practices Notice

The Privacy Rule provides, subject to certain exceptions, individuals with the right to adequate notice of a covered entity's potential uses and disclosures of their PHI, and of the individuals' rights and covered entity's legal duties with respect to PHI.[62]

Required Notice Content. Covered entities must develop, implement, and provide notice written in plain language regarding certain required elements.[63] The notice must provide:

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[61] 45 C.F.R. § 164.502(c).

[62] 45 C.F.R. § 164.520(a)(1).

[63] 45 C.F.R. § 164.520(b)(1). A covered entity is also permitted to limit the uses and disclosures it is legally permitted to make and include this in its notice. 45 C.F.R. § 164.520(b)(2).

(1) a general description of how the covered entity may use and disclose PHI;
(2) if the covered entity intends to engage in certain specified uses and disclosures, the covered entity must provide a separate description of these uses and disclosures;
(3) a description of the individual's rights with respect to PHI and how the individual may exercise these rights;
(4) a statement that the covered entity is required by law to protect the privacy of an individual's PHI, provide notice of its legal duties and privacy practices, that the covered entity must abide by the terms of the current notice, and how the covered entity will provide notice of any amendments or revisions to its privacy practices;
(5) a statement informing individuals of their right to complain to the covered entity and to HHS if they believe their privacy rights have been violated, a description of how to file a complaint, and a statement that the individual will not be retaliated against for filing a complaint;
(6) contact information for how to receive additional information; and
(7) the effective date.

Providing the Notice. The covered entity is required to promptly revise and re-distribute its notice in the event of a material change in any of the applicable notice provisions.[64] A covered entity must make its notice available to any person who requests it.[65] In addition, if a covered entity maintains a website that provides information about the covered entity's customer services or benefits, it is required to prominently post the notice on its website and make the notice available electronically on its website.[66] There are additional notice requirements applicable to health plans and healthcare providers with a direct treatment relationship with the individual.[67] A covered entity may also send notice via email if the individual agrees to electronic notice and such agreement has not been withdrawn.[68]

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[64]45 C.F.R. § 164.520(b)(3).

[65]45 C.F.R. § 164.520(c).

[66]45 C.F.R. § 164.520(c)(3)(i).

[67]See, 45 C.F.R. § 164.520(c)(1) (c)(2) respectively.

[68]45 C.F.R. § 164.520(c)(3)(ii).

Except in an emergency, healthcare providers with a direct treatment relationship with the individual must make a good faith effort to obtain a written acknowledgment of receipt of the notice provided, and if not obtained, document its good faith efforts to obtain such acknowledgment and the reason why the acknowledgment was not obtained.[69] Covered entities are permitted to develop more than one notice, in situations where it may perform separate covered functions and the privacy practices between the various functions differ. Covered entities that participate in an organized healthcare arrangement are permitted to produce a joint notice, so long as each covered entity agrees to adhere to the notice content provisions with respect to PHI created or received pursuant to their participation in the arrangement.[70]

Documentation of Notice. Covered entities must document their compliance with the notice requirements, as required by their general administrative requirements, by retaining copies of the notices provided.[71]

**2. Access**

In general, an individual has a right of access to inspect and obtain a copy of PHI about the individual in a "designated record set"[72] for as long as it is maintained in the designated record set,

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[69]45 C.F.R. § 164.520(c)(2)(ii).

[70]45 C.F.R. § 164.520(d). If one of the covered entities provides the notice, then all are in compliance. 45 C.F.R. § 164.520(d)(3).

[71]45 C.F.R. § 164.520(e). The general administrative requirements concerning documentation are found in section § 164.530(j). In the case of a healthcare provider with a direct treatment relationship with the individual, the covered entity must also retain copies of any written acknowledgment of receipt or documentation of good faith efforts to obtain such written acknowledgment.

[72]A designated record set is defined in 45 C.F.R. § 164.501. In general, it means a group of medical, billing, enrollment, payment, or claims records maintained by or for a covered entity and used, in whole or in part, by or for the covered entity in rendering decisions about individuals.

except for certain enumerated exclusions of PHI, such as: psychotherapy notes, information compiled for use in civil, criminal, or administrative proceedings, laboratory results to which the Clinical Laboratory Improvement Act (CLIA) prohibits access, or information held by certain research laboratories.[73] Once an individual requests access, the covered entity typically has 30 days to respond to the request (by either granting in whole or in part, or denying such request) if the requested PHI is located on site and 60 days if it is located off-site.[74]

Depending on whether the covered entity grants or denies the request, the rule provides for the covered entity to comply with additional requirements. If the request is denied in whole or in part, the rule allows the individual to obtain a review of the decision depending on whether the covered entity's grounds for denial is considered a "reviewable" or "non-reviewable" denial.[75] If the covered entity grants the request, it must provide a copy of the PHI in the form/format requested by the individual, if the designated record set is "readily producible" in that form/format. The Rule also permits the covered entity to charge certain fees in assembling or summarizing a copy of the PHI.[76]

Starting February 17, 2010, provisions in the HITECH Act supplement the rule as follows: if a covered entity has implemented an EHR system, individuals now have a right to obtain a copy of their PHI in an electronic format.[77] The Act does not appear to alter the time frame within which the covered entity must comply with the request. An individual can also designate that a third party

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[73] 45 C.F.R. § 164.524(a)(1).

[74] 45 C.F.R. § 164.524(b)(2).

[75] 45 C.F.R. § 164.524(d).

[76] 45 C.F.R. § 164.524(c)(4).

[77] HITECH Act, Section 13405(e), as codified in 42 U.S.C. § 13405(e).

be the recipient of the ePHI–so long as such designation is "clear, conspicuous, and specific." The Act provides that any fee charged for providing the individual with a copy of their PHI (or summary thereof) if such copy is in electronic form must not be greater than the labor costs of the covered entity in responding to the request.

Finally, consistent with a covered entity's general administrative requirements, it must document (and retain such documentation required by 164.530(j)) the designated record sets that are subject to access by individuals and the titles of the persons or offices responsible for receiving and processing requests for access by individuals.[78]

### 3. Accounting of Disclosures

Under the Privacy Rule, individuals have a right to receive an accounting of the disclosures of their PHI by a covered entity or it's BA's, for a maximum disclosure accounting period of six years immediately preceding the request.[79] However, there are numerous disclosures that are specifically excepted from accounting requirements:

(a) for treatment, payment, or health care operations;
(b) to the individual or the individual's personal representative;
(c) for notification of or to persons involved in an individual's health care or payment for health care, for disaster relief, or for facility directories;
(d) pursuant to an authorization;
(e) of a limited data set;
(f) for national security or intelligence purposes;
(g) to correctional institutions or law enforcement officials for certain purposes regarding inmates or individuals in lawful custody; or
(h) incident to otherwise permitted or required uses or disclosures.[80]

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[78]45 C.F.R. § 164.524(e).

[79]45 C.F.R. § 164.528.

[80]45 C.F.R. § 164.528(a)(1). The covered entity's accounting for disclosures to health oversight agencies and law enforcement officials must be temporarily suspended upon receipt of their written representation that an accounting would likely impede their activities. 45 C.F.R. §

Changes Pursuant to the HITECH Act. The HITECH Act changes the accounting for disclosures requirements of a covered entity that "uses or maintains an electronic health record" with respect to PHI.[81] Most significantly, there is no longer an exception for disclosures for "treatment, payment, and health care operations." Moreover, the accounting period is limited to the previous three years.

The Secretary is required to promulgate regulations to define what information needs to be collected about each disclosure, taking into account the (I) the interests of individuals in learning under what circumstances their PHI is being disclosed, and (ii) the administrative burden of accounting for such disclosures. These regulations must be promulgated within six months after the date the Secretary adopts Standards on accounting for disclosures.[82]

Covered Entities that use or maintain an EHR system now have the following options in responding to an individual's request for an accounting:

1. Covered entities can include the disclosures it made, as well as the disclosures made by its business associates, or
2. Covered entities can include the disclosures it made, and provide a list of all business associates acting on its behalf–which must include contact information for each (such as mailing address, phone number, email address).

Upon receiving a list of business associates from a covered entity, the individual must then request an accounting of disclosures DIRECTLY to the business associate, and the business associate must comply with said request.

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164.528(a)(2).

[81] HITECH Act, Section 13405(5)(c). The term "electronic health record" means an electronic record of health-related information on an individual that is created, gathered, managed, and consulted by authorized health care clinicians and staff. Section 13400(5).

[82]See, Section 13101, 42 U.S.C. § 300-jj *et seq.*

Effective Date. For covered entities that acquired an EHR as of January 01, 2009, the accounting disclosures provisions apply to disclosures of PHI from the EHR on and after January 1, 2014. For covered entities that acquired an EHR after January 01, 2009, the accounting disclosures provisions apply to disclosures of PHI from the EHR on and after the later of (I) January 1, 2011, or (ii) the date the covered entity acquires an EHR. The Secretary has the authority to change the applicable effective date, if it determines that a later date is necessary, but in no cases may be the date be:

(1). For pre-January 1, 2009, EHR acquisitions: **2016**, and
(2). For post-January 1, 2009, EHR acquisitions: **2013**.

**4. Request for Restrictions**

Individuals have the right to request that a covered entity restrict certain uses and disclosures of the individual's PHI for treatment, payment or health care operations, and restrict certain permitted disclosures to notify family and other specified individuals regarding the individual's condition, location, or death.[83] Covered entities are under no legal duty to agree to the restrictions, but if the covered entity does agree, it must comply with the restrictions except for purposes of medical treatment in the case of an emergency.[84]

Effective February 17, 2010, the HITECH Act now provides that there are certain circumstances when a covered entity is obligated to comply with an individual's request for restrictions. The Act now mandates that covered entities and their business associates comply with an individual's request to restrict their PHI if:

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[83]45 C.F.R. § 164.522(a).

[84]45 C.F.R. § 164.522(a). It should be noted that such an agreement is not effective to prevent uses or disclosures permitted or required under 45 C.F.R. §§164.502(a)(2)(ii), 164.510(a) or 164.512. *See*, 45 C.F.R. § 164.522(a)(1)(v).

1. except as otherwise required by law, the disclosure is to a health plan for purposes of carrying out:
   **(I)** payment, or
   **(ii)** healthcare operations, and
   **(iii)** not for purposes of carrying out treatment; **AND**
2. The PHI pertains *solely* to a health care item or service for which the health care provider involved has been paid out-of-pocket in full.[85]

### 5. Request for Amendment

The Privacy Rule provides individuals with the right to request that covered entities amend their PHI maintained in a DRS, typically when such information is inaccurate or incomplete.[86] The covered entity has 60 days to respond to the request. If the covered entity agrees to the amendment, it must make reasonable efforts to provide the amendment to those persons that the individual has identified as needing it, as well as to those persons that the covered entity knows may rely on the previous information to the individual's detriment. If the request is denied,[87] covered entities must provide the individual with a written denial and allow the individual to submit a statement of disagreement for inclusion in the record. There are specific processes provided for requesting and amendment and responding to such request. If the covered entity receives notice to amend from another covered entity, it must amend the PHI maintained in its designated record set.

### 6. Confidential Communications Requests

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[85]HITECH Act, Section 13405(a), as codified in 42 U.S.C. § 13405(a).

[86]45 C.F.R. § 164.526.

[87]Covered entities may deny an individual's request for amendment only under specified circumstances where the covered entity: (1) may exclude the information from access by the individual; (2) did not create the information (unless the individual provides a reasonable basis to believe the originator is no longer available); (3) determines that the information is accurate and complete; or (4) does not hold the information in its designated record set. 164.526(a)(2).

In general, covered entities must allow individuals to request and must accommodate reasonable requests to receive communications by alternate means or location than that typically utilized by the covered entity.[88] Any covered entity may condition its compliance with such a request on the individual specifying an alternative address or method of contact and explaining how any payment will be handled.

**F. Administrative Requirements**

Covered entities must develop and implement policies and procedures with respect to PHI that are designed to comply with the standards, implementation specifications, or other requirements and must make any changes to its policy and procedures necessary to comply with the law. Covered entities must designate a privacy official responsible for implementing the rules, and a contact person or office for receiving and handling complaints. Covered entities must provide training to all members of its workforce regarding PHI as it may apply to them and as necessary to appropriately perform their jobs, and such training must be conducted within a reasonable time and must be documented. Covered entities must have in place appropriate administrative, technical, and physical safeguards to protect the privacy of PHI.[89]

Covered entities must also provide a process for individuals to make complaints and complaints must be documented. Covered entities must apply appropriate sanctions against members of its workforce that do not comply with the rules and document such sanctions. Covered entities must mitigate, to the extent practicable, any harmful effects caused by the inappropriate disclosure of PHI.. Covered entities must refrain from intimidation or retaliation against an

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[88]45 C.F.R. § 164.522(b).

[89]This requirement in the Privacy Rule, while vague, is discussed in greater detail under the Security Rule requirements.

individual for the exercise of an established individual right. Covered entities may not require individuals to waive their rights under the rules as a condition of the provision of treatment, payment, enrollment in a health plan, or eligibility for benefits.

The most important aspect of the Privacy Rule's Administrative Safeguards provisions, given the HITECH Act's new provisions for mandatory auditing, would appear to be the documentation requirement. Covered entity must:

(I) Maintain the policies and procedures in written or electronic form;
(ii) If a communication is required by this subpart to be in writing, maintain such writing, or an electronic copy, as documentation; and
(iii) If an action, activity, or designation is required by this subpart to be documented, maintain a written or electronic record of such action, activity, or designation.

This requirement is likely going to be a target for auditing as it is relatively simple to ascertain whether a covered entity has the maintained the required documentation of its Administrative Requirements.

### G. Enforcement and Penalties

The new enforcement and penalty provisions are discussed in detail infra.

## III. SECURITY RULE

### A. Introduction

To address the data security threats associated with the electronic storage and transmission of private health information, HHS enacted the Security Rule under HIPAA. The Security Rule is part of the larger Privacy Rule established in the Privacy Rule administrative safeguards provision. The Security Rule delineates administrative, physical, and technical safeguards to protect the confidentiality, integrity, and availability of electronic protected health information (ePHI).

### B. Who is Covered by the Rule

HIPAA Security Rule provisions governing administrative safeguards,[90] physical safeguards,[91] technical safeguards,[92] and policies/procedures documentation requirements[93] now apply to business associates in the same manner these regulations apply to covered entities.[94] Moreover, all new Security provisions contained in the HITECH Act that are imposed upon covered entities are also imposed upon business associates. As discussed *supra* with regard to the new Privacy Rule provisions, all additional Security Rule requirements must be implemented into the business associate agreement between the covered entity and the business associate. Business associates are now directly accountable (*see* Enforcement and Penalty section) for applicable HIPAA Security Rule provision violations.

## C. What Information is Protected

Whereas the Privacy Rule protects health information contained in any form/media, the Security Rule focuses on the protection of individually identifiable health information created, received, maintained or transmitted in electronic form, called "electronic protected health information" (e-PHI).[95]

## D. How to Protect-Safeguards

### 1. General

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[90]45 C.F.R. § 164.308.

[91]45 C.F.R. § 164.310.

[92]45 C.F.R. § 164.316.

[93]45 C.F.R. § 164.316.

[94]HITECH Act, Section 13401(a), as codified in 42 U.S.C. § 17931.

[95]45 C.F.R. § 160.103.

The Security Rule establishes four general requirements: (1) ensure the "confidentiality, integrity, and availability"[96] of electronic health information created, received, maintained or transmitted; (2) protect against reasonably anticipated threats to its security or integrity; (3) safeguard against impermissible uses and disclosures; and (4) ensure workforce compliance with the Rule.[97] Because HIPAA covers such a broad spectrum of covered entities, the Rule provides a certain amount of flexibility in choosing how to "reasonably and appropriately" implement standards, so long as the following are taken into account: (a) the size, complexity, and capabilities of the covered entity, (b) the technical infrastructure, hardware, and software security capabilities of the covered entity, (c) the financial costs of implementing security measures, and (d) the probability and criticality of potential risks to ePHI security breaches.[98]

The Security Rule provides mandatory "standards" along with "implementation specifications" on how to satisfactorily comply with the outlined standards.[99] Implementation specifications are either "required" or "addressable". Required implementation specifications must be implemented. Addressable implementation specifications implementers must be assessed and implemented as specified if reasonably appropriate. If not reasonably appropriate, such reason must be documented and an "equivalent alternative measure" must be implemented if reasonably

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[96]"'Confidentiality' means the property that data or information is not made available or disclosed to unauthorized persons or processes. 'Integrity' means the property that data or information have not been altered or destroyed in an unauthorized manner. 'Availability' means the property that data or information is accessible and useable upon demand by an authorized person." 45 C.F.R. § 164.304.

[97]45 C.F.R. § 164.306(a).

[98]45 C.F.R.§ 164.306(b).

[99]45 C.F.R. §§ 164.306(c) & (d).

appropriate.[100] Security measures implemented must be reviewed and modified as needed to ensure continued protection of ePHI and compliance with the Security Rule.[101]

### 2. Administrative Safeguards

The Administrative Safeguard Standards are as follows:

- Security Management Process: Implement policies and procedures to prevent, detect, contain, and correct security violations. This Standard has four required implementation specifications:

  (A) **Risk analysis**: conduct and assess the potential risks and vulnerabilities to ePHI;
  (B) **Risk management**: implement security measures that reduce identified risks and vulnerabilities to a reasonable and appropriate level;
  (C) **Sanction policy**: establish and apply appropriate sanctions against noncompliant workforce members;
  (D) **Information system activity review**: implement procedures to regularly review records of information system activity.

- Assigned Security Responsibility. Identify security official responsible for developing and implementing appropriate security policies and procedures.

- Workforce Security. Implement policies and procedures to ensure that only appropriate members of the workforce have access to ePHI. This should include, where appropriate, authorization and supervision procedures for employees who access ePHI, workforce clearance procedures ensure ePHI access by workforce is appropriate, and termination procedures to ensure workmember access to ePHI is appropriately cut off at end of employment.

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[100] 45 C.F.R. § 164.306(d)(3). If no alternative measure is implemented, justification must also be provided for why such alternative was not feasible.

[101] 45 C.F.R.§ 164.306(e).

- Information Access Management. Implement policies and procedures for authorizing, limiting and modifying access to ePHI that are consistent with the applicable requirements of the Privacy Rule.
- Security Awareness and Training. Implement a security awareness and training program for all employees, and also implement appropriate security measures such as periodic security reminders and updates, virus and other malicious software protection, log-in monitoring, and password management.
- Security Incident Procedures. Implement policies and procedures to identify and respond to known or suspected security incidents, to mitigate harmful effects of security incidents, and to properly document incidents and outcomes. This will include the new Breach Notification standards (discussed infra).
- Contingency Plan. Establish (and implement as needed) policies and procedures for responding to an emergency or other type of occurrence (such as fire, vandalism, system failure, natural disaster) that might damage systems that contain ePHI This includes having a data backup plan, disaster recovery plan, and emergency mode operation plan, and may include periodic testing and revision procedures, and applications and data criticality analysis procedures.
- Evaluation. Perform a periodic assessment of how well its security policies and procedures meet the requirements of the Security Rule.
- Business Associate Agreements. As required under the Privacy Rule.

### 3. Physical Safeguards

- Facility Access Controls. Implement policies and procedures to limit physical access to its facilities while ensuring that properly authorized access is permitted.
- Workstation Use. Implement policies and procedures that specify appropriate workstation use.
- Workstation Security. Implement physical safeguards on workstations to restrict access to authorized users.
- Device and Media Controls. Implement policies and procedures governing the transfer, removal, disposal, and re-use of electronic media, to ensure appropriate protection of ePHI into, within, and out of a facility.

### 4. Technical Safeguards

- Access Control. Implement technical policies and procedures for electronic information systems that maintain ePHI to ensure only authorized access to ePHI. These include safeguards for assigning unique user identification names or numbers, establishing emergency access procedures, having an automatic logoff for inactivity, and encryption and decryption mechanism implementation.
- Audit Controls. Implement hardware, software, and/or procedural mechanisms that record and examine access and activity in information systems that contain or use ePHI.
- Integrity. Implement policies and procedures to ensure that ePHI is protected from improper alteration or destruction.
- Person or Entity Authentication. Implement procedures to verify that an entity wanting access to ePHI is who it claims to be.

- Transmission Security. Implement technical security measures to guard against unauthorized access to epHI being transmitted over an electronic communications network.

## E. Organizational Requirements

These requirements tend to parallel those found in the Privacy Rule with regards to business associate contracts.[102] For instance, the standard mandates that a covered entity who knows of an activity or practice of the business associate that constitutes a material breach or violation of the obligations of the business associate under the privacy or security rule, the covered entity must take reasonable steps to cure the breach or end the violation. As discussed supra, HHS is currently in the process of developing regulations relating to business associate obligations and business associate contracts as described in the HITECH Act.

## F. Policies and Procedures Documentation

This requirement mirrors the documentation requirement of the Privacy Rule insofar as it relates to ePHI. Reasonable and appropriate policies and procedures must be adopted to comply with the provisions of the Security Rule. These written security policies and procedures and written records of required actions, activities or assessments must be documented and must be maintained for a specified period of time.[103] In addition, documentation must be periodically reviewed and updated in response to environmental or organizational changes that impact or affect the security of ePHI.[104]

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[102]45 C.F.R. § 164.314.

[103]45 C.F.R. § 164.316.

[104]45 C.F.R. § 164.316(b)(2)(iii).

### G. Enforcement and Penalties

The new enforcement and penalty provisions are discussed in detail *infra*.

## IV. BREACH NOTIFICATION

### A. Introduction

Regulations implementing the HITECH Act's new breach notification requirements are currently in effect and cover breaches occurring on or after September 23, 2009.[105]

### B. Who Must Comply

The breach notification requirements mandate that covered entities provide certain notifications of security breaches to (1) the individual, (2) the media, and (3) the Secretary of HHS, depending on the circumstances of the breach. Business associates are also required to provide breach notification to the covered entity to enable it the covered entity to provide the appropriate notification as required under the new laws.

### C. Definition of Breach

A breach is defined as an impermissible or unauthorized "acquisition, access, use, or disclosure" of PHI pursuant to the Privacy Rule that compromises the security or privacy of the PHI such that the "acquisition, access, use, or disclosure" poses a "significant risk of financial, reputational, or other harm to the individual."[106] However, a use or disclosure of PHI that does not include the identifiers of a limited data set, date of birth, and zip code is not considered a breach.

There are **three exceptions** to the definition of "breach":

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[105]45 C.F.R. § 164.400, *et. seq.*

[106]45 C.F.R. § 164.402.

- The first exception applies to the *unintentional acquisition*, access, or use of PHI by a workforce member or person acting under the authority of a covered entity or business associate, if made in good faith and within the scope of authority;
- The second exception applies to the *inadvertent disclosure* of PHI from a person authorized to access PHI at a CE or BA to another person authorized to access PHI at the same covered entity or business associate, or organized health care arrangement in which the covered entity participates.

**In the first and second exception, in order to come within the rule, there can be no further use or disclosure in a manner not permitted by the Privacy Rule.

- The final exception to breach applies if the covered entity or business associate has a *good faith belief* that the unauthorized individual, to whom the impermissible disclosure was made, *would not have been able to retain the information.*[107]

## D. Unsecured Protected Health Information and Guidance

Covered entities and business associates are only required to provide notification of a breach that involves "unsecured protected health information" (uPHI). This is PHI that has not been rendered unusable, unreadable, or indecipherable to unauthorized individuals through the use of a technology or methodology specified by the Secretary in guidance. Guidance was issued in April 2009 with a request for public comment (74 FR 19006), and later reissued specifying encryption and destruction as the technologies and methodologies for rendering PHI unusable, unreadable, or indecipherable to unauthorized individuals.[108] It should be noted that this guidance will be updated annually.

## E. Breach Notification Requirements

Following the "discovery" of a breach UPHI, there are certain notification requirements mandated by the covered entity as well as their business associates. A breach is treated as

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[107]45 C.F.R. § 164.402.

[108]45 C.F.R. § 164.402; HITECH Act, 13402(h)(2). Additionally, the guidance also applies to *unsecured personal health record identifiable health information* under the FTC regulations. Covered entities, business associates, as well as entities regulated by the FTC regulations, that secure information as specified by the guidance are relieved from providing notifications following the breach of such information.

"discovered" by a covered entity as of the first day on which such breach is known to the covered entity, or, by exercising reasonable diligence would have been known to the covered entity. A covered entity shall be deemed to have knowledge of a breach if such breach is known, or by exercising reasonable diligence would have been known, to any person, other than the person committing the breach, who is a workforce member or agent of the covered entity (determined in accordance with the federal common law of agency).[109]

### 1. Individual Notice

A covered entity is required to notify each individual whose UPHI has been, or is reasonably believed by the covered entity to have been, accessed, acquired, used, or disclosed as a result of such breach. Notice should be in written form by first-class mail, or alternatively, by e-mail if the affected individual has agreed to receive such notices electronically.

If the covered entity covered entity has insufficient or out-of-date contact information for 10 or more individuals, the covered entity must provide substitute individual notice by either posting the notice on the home page of its website or by providing the notice in major print or broadcast media where the affected individuals likely reside.[110] If the covered entity has insufficient or out-of-date contact information for fewer than 10 individuals, the covered entity may provide substitute notice by an alternative form of written, telephone, or other means. Finally, in any case where the covered entity believes that there is a possibility of imminent misuse of UPHI, the covered

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[109] 45 C.F.R. § 164.404(a)(2).

[110] 45 C.F.R. § 164.404(d)(2). Additionally, for substitute notice provided via web posting or major print or broadcast media, the notification **must include** a toll-free number for individuals to contact the covered entity to determine if *their* PHI was involved in the breach.

entity may provide information to individuals by telephone or other means, as appropriate, in addition to written notice.

The notifications must be provided by the covered entity without unreasonable delay and in no case later than 60 calendar days following the discovery of the breach. These notices must be written in plain language and must include, to the extent possible,

**(I)** a description of the breach,
**(ii)** a description of the types of information that were involved in the breach,
**(iii)** the steps affected individuals should take to protect themselves from potential harm,
**(iv)** a brief description of what the covered entity is doing to investigate the breach, mitigate the harm, and prevent further breaches, as well as
**(v)** contact information for additional information from the covered entity.[111]

**2. Media Notice**

Covered entities that experience a breach affecting more than 500 residents of a State or jurisdiction are, in addition to notifying the affected individuals, required to provide notice to prominent media outlets serving the State or jurisdiction.[112] Similar to the individual notice, the media notification must be provided without unreasonable delay and in no case later than 60 calendar days following the discovery of the breach. The content of the notice must include the same information required for individual notifications.

**3. Notice to the Secretary**

In addition to notifying affected individuals and the media (where appropriate), covered entities must notify the Secretary of breaches of UPHI.[113] The form and content of the notice shall be specified on the HHS website. If a breach affects 500 or more individuals, covered entities must

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[111]45 C.F.R. § 164.404(c).

[112]45 C.F.R. § 164.406.

[113]45 C.F.R. § 164.408.

notify the Secretary without unreasonable delay and in no case later than 60 days following a breach. If, however, a breach affects fewer than 500 individuals, the covered entity must maintain a log or other documentation of such breaches and, not later than 60 days after the end of each calendar year, provide the notification in the manner specified on the HHS Web site.

**4. Business Associates**

Following the discovery of a breach of UPHI, the business associate must notify the covered entity of the breach without unreasonable delay and no later than 60 days from the discovery of the breach. To the extent possible, the business associate should provide the covered entity with the identification of each individual affected whose UPHI has been, or is reasonably believed by the business associate to have been, accessed, acquired, used, or disclosed during the breach. by the breach, as well as any information the covered entity is required to provide in its notification.[114]

**5. Time Delay Exception for Law Enforcement**

There is an exception to the time period the notification must be provided if a law enforcement official informs the covered entity or business associate "that a notification, notice, or posting required under this subpart would impede a criminal investigation or cause damage to national security."[115] If the statement by law enforcement is provided in writing and specifies the time for which delay is required, then the covered entity or business associate shall delay their applicable notice for the time period specified. If the statement is made orally, the covered entity or business associate shall "document the statement, including the identity of the official making the

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[114]45 C.F.R. § 164.410.

[115]45 C.F.R. § 164.412.

statement, and delay the notification, notice, or posting temporarily and no longer than 30 days from the date of the oral statement, unless a written statement . . . is submitted during that time."

### 6. Administrative Requirements and Burden of Proof

Covered entities are required to comply with the administrative requirements contained in the Privacy Rule with respect to the requirements for breach notification.[116] In addition, both covered entities and business associates have the burden of demonstrating that required notifications have been provided or that a use or disclosure of UPHI did not constitute a breach.

## V. ENHANCED ENFORCEMENT AND PENALTIES

### A. Introduction

One of the biggest complaints by critics of HIPAA is that there is insufficient oversight and penalties to a too-narrow scope of applicable persons and entities. As noted supra, the HITECH Act brings business associates within the scope of HIPAA Security Rule provisions, some Privacy Rule provisions, and also expands the definition of business associate for specified entities who perform certain functions.

### B. Accountability

As stated *supra*, business associates are now directly accountable under HIPAA for failure to comply with Security Rule provisions and certain Privacy Rule provisions.

### C. Application of Criminal Penalties

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[116]45 C.F.R. § 164.414 (a). In particular, the requirements in § 164.530(b), (d), (e), (g), (h), (i), and (j).

Effective February 17, 2010, criminal penalties under HIPAA for wrongful use, access, or disclosures of PHI may now be enforced against individuals, which includes individual employees of a covered entity or business associate, when conducted "without authorization."[117]

**D. Compliance and Enforcement**

The HITECH Act provides clarification of the following issues regarding HIPAA compliance and enforcement:

- HHS and state Attorney Generals can now pursue civil HIPAA violations in cases where the DOJ declines to pursue a criminal case, even though criminal penalties would have applied;
- A formal investigation is now required after any complaint where preliminary investigation of the facts indicates possible violation through willful neglect;
- Imposition of a civil monetary penalty is now mandated if a violation is found to constitute willful neglect.[118]

Within 18 months of the Act's enactment (read **August 17, 2010)**, the Secretary is required to promulgate regulations implementing these provisions and applies to penalties imposed on or after **February 17, 2011**.

**E. Distribution of Civil Monetary Penalties**

Money collected for violations of HIPAA will no longer go to the treasury. Instead, these amounts must be transferred directly to the HHS Office for Civil Rights to be used for enforcement purposes.[119] The HITECH Act mandates the comptroller general to develop a methodology whereby persons harmed by HIPAA violations will receive a percentage of the penalty (or settlement) amount collected. This report must be made within 18 months of the Act's enactment (read August 17,

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[117]HITECH Act, Section 13409, as codified in 42 U.S.C. § 1320d-6.

[118]HITECH Act, Section 13410(a). Willful neglect is defined in 45 C.F.R. § 160.401, as "conscious, intentional failure or reckless indifference to the obligation to comply with the administrative simplification provision violated."

[119]HITECH Act, Section 13410(c).

2010). The Secretary must establish the GAO's methodology report via Regulation within three (3) years from the Act's enactment (read February 17, 2012). The effective date for Penalty/Settlement amounts to go to OCR begin **February 17, 2011**. The methodologies to provide effected individuals with a percentage will apply on and after the effective date of the Regulation implementing such methodology.

## F. Tiered Penalties

Effective February 17, 2009, the HITECH Act revised section 1176(a) of the Social Security Act by establishing:

- Four categories of violations that reflect increasing levels of culpability;
- Four corresponding tiers of penalty amounts that significantly increase the minimum penalty amount for each violation; and
- A maximum penalty amount of $1.5 million for all violations of an identical provision.[120]

**Categories of Violations and Respective Penalty Amounts Available**

| Violation Category | Each Violation | All such Violations of an Identical Provision in a Calendar Year |
|---|---|---|
| 1–covered entity *did not know* of the violation and would not have known through the exercise of *reasonable diligence* | $100 - $50,000 | $1,500,000 |
| 2–Violation due to *reasonable cause* | $1000 - $50,000 | $1,500,000 |
| 3–covered entity demonstrated *willful neglect* **but** *corrected* the violation | $10,000 - $50,000 | $1,500,000 |
| 4–covered entity demonstrated *willful neglect* **and** *did not correct* the violation | $50,000 | $1,500,000 |

[120]HITECH Act, Section 13410(d). 45 C.F.R. § 160.404 implements the HITECH Act provisions into law.

Penalty determinations will be based on the nature and extent of the violation, the nature and extent of the resulting harm, as well as the other factors such as the covered entity's history of prior compliance and/or financial condition.[121] Thus, the maximum penalty will not necessarily be issued in all cases.

The affirmative defenses that were available under HIPAA have been amended as follows:

- the previous bar on the imposition of penalties if the covered entity did not know and with the exercise of reasonable diligence would not have known of the violation has been stricken (such violations are now punishable, see category 1 above); and
- Providing a prohibition on the imposition of penalties for any violation that is corrected within a 30-day time period–as long as the violation was not due to willful neglect.

On October 30, 2009, HHS issued its interim final rule addressing only those Enforcement provisions in the HITECH Act that were made effective immediately upon its passage (i.e., February 17, 2009). This interim final rule did not address those other enforcement provisions of the HITECH Act that are not yet effective under the applicable statutory provisions. These are now promulgated into law in 45 C.F.R. §§ 160.400, *et seq*. These provisions clarify the penalty and affirmative defenses for violations that occurred prior to February 17, 2009, and violations occurring on or after February 17, 2009. For violations occurring before February 17, 2009, the old penalty amounts and affirmative defenses apply. For violations occurring on or after February 17, 2009, the new provisions discussed above apply. The interim final rule on enforcement became effective on **November 30, 2009**.

[121] 45 C.F.R. § 160.408

## G. State Attorney General Enforcement

The HITECH Act authorizes State AG's to enforce HIPAA in federal district court, even if there is no state law authorizing such enforcement.[122] The penalties imposed in such an action are the old penalties ($100 per violation; $25,000 max). Notice must be provided to the Secretary of any intent to prosecute, and the Secretary maintains the right to intervene. Applies to violations occurring on or after **February 17, 2009**.

## H. Mandatory Audits

Effective February 17, 2010, the Secretary is now mandated to perform periodic audits to ensure compliance.[123] This is a significant change from prior HIPAA practice and regulation where audits were discretionary.

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[122]HITECH Act, Section 13410(e).

[123]HITECH Act, Section 13411.

APPENDIX A:

PART 160-GENERAL ADMINISTRATIVE REQUIREMENTS

SUBPART A-GENERAL PROVISIONS



SUBPART B-PREEMPTION OF STATE LAW



SUBPART C-COMPLIANCE AND INVESTIGATIONS



SUBPART D-IMPOSITION OF CIVIL MONEY PENALTIES

SUBPART E-PROCEDURES FOR HEARINGS

PART 162-ADMINISTRATIVE REQUIREMENTS

SUBPART A-GENERAL PROVISIONS



SUBPART B-[RESERVED]

SUBPART C-[RESERVED]

SUBPART D-STANDARD UNIQUE HEALTH IDENTIFIER FOR HEALTH CARE PROVIDERS



SUBPART E-[RESERVED]

SUBPART F-STANDARD UNIQUE EMPLOYER IDENTIFIER



SUBPART G-[RESERVED]

SUBPART H-[RESERVED]

SUBPART I-GENERAL PROVISIONS FOR TRANSACTIONS

SUBPART J-CODE SETS

§ 162.1000 General requirements.
§ 162.1002 Medical data code sets.
§ 162.1011 Valid code sets.

SUBPART K-HEALTH CARE CLAIMS OR EQUIVALENT ENCOUNTER INFORMATION

§ 162.1101 Health care claims or equivalent encounter information transaction.
§ 162.1102 Standards for health care claims or equivalent encounter information transaction.

SUBPART L-ELIGIBILITY FOR A HEALTH PLAN

§ 162.1201 Eligibility for a health plan transaction.
§ 162.1202 Standards for eligibility for a health plan transaction.

SUBPART M-REFERRAL CERTIFICATION AND AUTHORIZATION

§ 162.1301 Referral certification and authorization transaction.
§ 162.1302 Standards for referral certification and authorization transaction.

SUBPART N-HEALTH CARE CLAIM STATUS

§ 162.1401 Health care claim status transaction.
§ 162.1402 Standards for health care claim status transaction.

SUBPART O-ENROLLMENT AND DISENROLLMENT IN A HEALTH PLAN

§ 162.1501 Enrollment and disenrollment in a health plan transaction.
§ 162.1502 Standards for enrollment and disenrollment in a health plan transaction.

SUBPART P-HEALTH CARE PAYMENT AND REMITTANCE ADVICE

§ 162.1601 Health care payment and remittance advice transaction.
§ 162.1602 Standards for health care payment and remittance advice transaction.

SUBPART Q-HEALTH PLAN PREMIUM PAYMENTS

§ 162.1701 Health plan premium payments transaction.
§ 162.1702 Standards for health plan premium payments transaction.

SUBPART R-COORDINATION OF BENEFITS

§ 162.1801 Coordination of benefits transaction.
§ 162.1802 Standards for coordination of benefits information transaction.

SUBPART S-MEDICAID PHARMACY SUBROGATION

§ 162.1901 Medicaid pharmacy subrogation transaction.
§ 162.1902 Standard for Medicaid pharmacy subrogation transaction.

PART 164-SECURITY AND PRIVACY

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SUBPART C-CERTIFICATION CRITERIA FOR HEALTH INFORMATION TECHNOLOGY

# PROVING & DEFENDING AGAINST DAMAGES FOR LOSS OF HOUSEHOLD SERVICES

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## INTRODUCTION

Especially in jurisdictions where caps on non-economic damages have been imposed plaintiffs look for ways to enhance claimed economic losses. In nearly every significant personal injury case one of the elements of claimed economic loss is the cost associated with the replacement of the work done around the household by the injured plaintiff or the plaintiff's decedent. In some jurisdictions this falls under the rubric of loss of consortium. In others, it is a separate element of economic loss which a jury is allowed to consider when determining the amount of damages to award. Frequently "expert" testimony is used to lay claim to hundreds of thousands of dollars in lost household services.

Typically, household services includes cutting the grass, repairing appliances, changing the oil in an automobile, cooking, acting as a purchasing agent for supplies for the household, doing the laundry, paying bills, keeping financial records and other routine maintenance activities required a household. In most jurisdictions, childcare, guidance and instruction would also be included within this damages category.[1]

The United State Supreme Court first addressed the issue of household services in 1913 in *Michigan Central Railroad v. Vreeland*, 227 U.S. 59 (1913). It was clear, even then, expert testimony was required and the expert needed to be able to explain the methodology used to arrive at the dollar value provided in the testimony. It was not permissible for the expert to provide an opinion without support that would explain how he arrived at the numbers given.

In rare instances a plaintiff may actually have incurred some cost to replace the claimed lost services. Occasionally, an injured plaintiff will hire a housekeeper to do some weekly cleaning which due to the injury the plaintiff can no longer do, or the next door neighbor may be hired to cut the grass or shovel a sidewalk. More often than not, in fact, nearly universally, plaintiffs incur no expense to replace the services. Either they are not done, or they are done

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[1] The Bureau of Labor statistics actually gathers statistics on how much time (broken down to the minute) an individual who is part of their sample spends in a given week in various categories of household services including, *inter alia* interior cleaning, laundry, sewing, repairing and maintaining textiles, storing household items among many, many other things. See American Time Use Survey Activity Lexicon 2003-08 Bureau of Labor Statistics.

gratis by a friend or family member. Somehow all of these folks manage to get by without incurring significant out of pocket costs.

Plaintiff's lawyers typically argue their clients are without the resources to pay anyone to cut the grass, grocery shop or change the oil in a vehicle all of which had been done pre-morbidly by the now incapacitated plaintiff. As a result, plaintiff's experts make many assumptions which are occasionally supported by data and then offer opinions on how much economic household services loss the plaintiff has sustained.[2]

It would seem this category of claimed economic loss should not be based on assumptions, but rather on real costs actually incurred. Jury instructions in most jurisdictions allow recovery for burial expenses. No one would seriously argue that an estate could recover these expenses based on the average amount spent by the estate of the average person. Why should household services be any different? If a plaintiff actually incurred the cost, he should be entitled to recover it from the parties found liable, but if the claimed loss is based on assumptions as to the specific services which would have been performed, how long it might have taken the decedent or an injured party to perform those services, and what the value might be for the service should that be available for the jury's consideration?[3]

In *Schulz v. Harrison Radiator Division of General Motors Corp,* 90 NY 2d 311, 683 NE 2d 307 (1997) New York took a different approach to valuing household services. Often described as "Necessary Life Costs," the Court held these damages would be determined by actual expenditures rather than estimations made by experts.)

## ***SCHULZ v. HARRISON RADIATOR SUMMARY***

The plaintiff, age forty-seven, was seriously injured when he fell from scaffolding at a construction site owned by the defendant. The trial court awarded plaintiff partial summary judgment on the issue of liability. At the trial on damages the plaintiff testified he had lost the ability to perform various household tasks after the accident and had been relying on friends and relatives to help him maintain his home. The relatives had worked for free. Plaintiff's expert testified that **IF** the plaintiff had hired someone to perform such tasks from the time of the accident until the conclusion of trial, plaintiff's expenses would have totaled $43,096. The expert also concluded that the plaintiff would require $431,927 in order to hire someone to provide such household services over his future life expectancy. The jury awarded plaintiff $43,096 for loss of

[2] In order to make it work, an expert typically assumes the plaintiff or her decedent engaged in certain types of services around the house. Occasionally, an expert may even ask a person with knowledge to provide information about the services actually done. The expert then assumes how many hours the plaintiff or the decedent would have spent doing those services over the course of a week or month. Some experts rely on information from the American Time Use Survey for the broad demographics of the injured person for the amount of time spent per week. Finally, the expert assumes a rate of pay for those hours. The expert will also use some sort of average hourly rate pulled also from Bureau of Labor Statistics for rates of pay for people who are employed in broad categories of labor that can be considered as the equivalent of the household services work the expert assumes the injured party would have performed.

[3] Michigan's Standard Jury Instructions include in a wrongful death case "losses suffered by the next of kin as a result of the decedent's death, including: . . . b. loss of service." (M Civ JI 45.02 3 b.)

household services from the accident to the date of the verdict, and $328,265 for future loss of household services.[4]

The defendant appealed and the Appellate Division affirmed without opinion. On further appeal, the defendant claimed the trial court erred by instructing the jury to award plaintiff the "value rather than actual expenditures of past loss of household services and that only the costs of obtaining future household services reasonably certain to occur could be awarded". *Schultz supra,* p 315. The Court of Appeals determined the injured man was not entitled to recover for loss of household services because he relied on the gratuitous assistance of relatives and friends.

> We now turn to the loss of household services component of the damages awarded to plaintiff. Defendant contends that since plaintiff did not incur any actual expenditures on household services between the accident and the date of verdict, having relied on the gratuitous assistance of relatives and friends, the jury improperly awarded plaintiff $43,096 in that respect. We agree.
>
> A damages award reflecting the value of such services did not serve a compensatory function and was improperly made. (Citation omitted.) The jury should also have been instructed that future damages for loss of household services should be awarded only for those services which are reasonably certain to be incurred and necessitated by plaintiff's injuries. Contrary to plaintiff's contention, such an instruction does not require him to be dependent on the charity of others. Such a charge to the jury **merely ensures that any compensatory damages awarded to plaintiff are truly compensatory**. (Emphasis added.)

*Schultz* has been distinguished in several subsequent cases. One of those deserves some mention as it severely limits the holding. In *Mono v. Peter Pan Bus Lines,* 13 F Supp 2d 471 (1998) the federal district court determined the *Schultz* holding did not apply to a wrongful death action as "no court had held that recovery for lost services in a wrongful death action required a plaintiff to actually hire someone to perform the decedent's services". *Mono, supra,* p 480.

It seems no other state has depended upon or cited *Schultz*. However, some states have adopted similar approaches when determining the damages for loss of household services.

## STATES' APPROACH TO DETERMINING THE VALUE OF HOUSEHOLD SERVICES

Other states have adopted approaches similar to New York's; however, no state has applied such a narrow, strict interpretation as the one found in *Schultz*. In fact, Kansas rejected the New York approach and ruled that actual expenditure is not necessary to recover loss of household services as a plaintiff may receive compensation for the cost of performing household

[4] The jury awarded plaintiff $646,900 for loss of future earnings and benefits and $240,000 for future medical expenses.

services the plaintiff is no longer able to perform even if the services are performed gratuitously by a friend or relative.

In Texas, if an individual is injured in an accident and does not have income at the time of the accident, then payments of benefits must be made in reimbursement of necessary and reasonable expenses incurred. This only includes essential services ordinarily performed by the injured person for care and maintenance of the family or family household. However, exact expenditures need not be proven.

In Maryland, an injured plaintiff will typically have experts determine the amount of the loss of household services and present that information to a jury. However, the amount must be confirmed in testimony at trial in order for the jury to make an informed decision. Economic damages may include loss of future income and financial support, or even placing a value on the loss of different household services the family member provided. Non-economic damages may include the loss of love, care, comfort, supervision, and guidance. In this state an award of solatium damages is limited to $350,000 in the aggregate. The solatium statute in Maryland specifically anticipates recovery for loss of household services.

In Alabama, the family has an action for the loss of the consortium occasioned by personal injuries. The loss includes all those services normally done in the household by the individual for the benefit the family. This loss is usually difficult to ascertain and is not subject to precise computation. The measure of damages is to be determined by the jury in light of its own observations and experience. The plaintiff is not required to itemize the services that he or she claims has been or will be lost.

In Kentucky, household services may, at times, be a claimed loss in a personal injury action. Such claims are usually seen as part of the loss of consortium damages. However, less attention is given to the question of whether there is a formal legal right to household services, but rather the emphasis is placed upon those contributions normally expected in the maintenance of a household.

In Illinois, the court may award damages for the loss of the plaintiff's future household services. In fact, Illinois treats household services as a part of consortium, with different requirements for how calculations are to be made.

In Colorado, damages for loss of consortium may be recovered by either spouse when there has been a personal injury to the marital partner. Loss of consortium is itself a personal injury which gives rise to a separate cause of action belonging to the injured party's spouse. To recover for loss of consortium, a plaintiff must prove that his or her spouse incurred injuries as a result of the defendant's negligence which concomitantly caused a loss of the affection, society, companionship, household services, aid or comfort to the party claiming loss of consortium.

In Missouri, if a plaintiff does not purchase household services after an injury because of poverty the court will allow questions to be asked about collateral sources which might have been used to purchase those services. It appears Missouri looks to actual costs, much like New York, but will allow testimony as to why those services were not paid for directly.

## MICHIGAN'S APPROACH TO DETERMINING HOUSEHOLD SERVICES

The Michigan Courts have recognized not only the availability of loss of household service damages, but also acknowledge these damages as economic, separate, and distinguishable from compensation for the loss of society or companionship. The necessary cost approach applied in New York has not been adopted or mentioned in any Michigan case, but household services are recovered differently if a statute specifically addresses a scenario where such damage may be recovered.

In MCL 600.2945 which is part of the 1996 tort reform for matters involving product liability "economic loss" is defined to mean "objectively verifiable pecuniary damages arising from medical expenses or medical care, rehabilitation services, custodial care, loss of wages, loss of future earnings, burial costs, loss of use of property, costs of repair or replacement of property, costs of obtaining substitute domestic services, loss of employment, or other objectively verifiable monetary losses."

While no case has determined the issue, it would seem under this statutory scheme that unless the plaintiff had incurred a cost to obtain "substitute domestic services" he would not be entitled to recover for those losses.

The wrongful death statute, which permits recovery of damages "for the loss of financial support and the loss of the society and companionship of the deceased," allows recovery of damages for economic value of household services decedent would have provided to a family or minor children. This type of damage has been determined to be an economic claim. According to MCL 600.2922(6), the court or jury may award all types of damages, including the economic value of household services that a decedent had provided to his or her minor children. Furthermore, the language of M Civ JI 45.02, specifically includes "loss of service" as a compensable damage, in addition to those items listed in MCL 600.2922(6). The plaintiffs in these cases hire an expert to determine the amount of these costs and the necessary life costs approach is not used under this statue.

According to Section 3107(b) of the Michigan No Fault Act statute, an individual is entitled to a maximum of $20 per day in replacement services during the first three years following a Michigan car accident injury. The Michigan Court of Appeals has ruled that investment services such as financial planning and investing are not recoverable as a replacement service benefit. In order to qualify for replacement service benefits, the services must have been reasonably incurred.

Initially, the insured had to prove that he or she actually paid for the services or incurred a financial obligation to pay for them, similar to *Schultz.* The Michigan Court of Appeals adopted a less strict requirement, reflected in its holding that a plaintiff's testimony that she had an oral contract with her kids to do household services was sufficient. Furthermore, replacement services can be paid even if family, friends, neighbors or anyone else performs the ordinary and necessary services. The Court has repeatedly permitted recovery of damages for attendant care services provided, at no actual charge, by family members. See *Booth v. Auto-Owners Ins Co,* 224 Mich. App 724, 727-730; 569 NW2d 903 (1997).

The worker's compensation act also entitles family members to be compensated for the value of services provided by a family member, beyond ordinary household chores, up to fifty-six hours a week. *See* MCL 418.315.

## WHAT WOULD HAPPEN IN THE EUROPEAN UNION?

The general guideline (pronounced by the German Federal Supreme Court in a decision of 1996) is:

> In order to determine damages that a plaintiff may recover because he cannot perform his household tasks, one must look at the results that he usually achieves by performing such tasks. In this respect, it is irrelevant to what extent the plaintiff would have been under an obligation to contribute to the household tasks; the only thing which is decisive is the question which contribution he would have rendered in the future if the accident had not occurred. This means that though family members are under an obligation to contribute to the performance of household tasks, there would be no damages recoverable if the respective person would not have contributed as a matter of fact. Actual circumstances and developments (for example the moving from a big house into a smaller apartment) must be taken into regard. As a general guideline, the basis for damages is the amount that one has to pay to a third party for performing the tasks that the injured person cannot perform for a certain period of time or permanently.

This means if a woman who does the household chores cannot perform such tasks due to an injury or death, her family would have a claim that the costs of having a third party do those tasks would have to be replaced. The courts look at the specific circumstances under which the family lives and to what extent the injured/deceased person contributed to the necessary household activities. This would mean that witnesses would have to be heard to what extent the respective person did such work (including not only the washing up of dishes, the ironing of clothes, the cleaning, but also garden work, repair and maintenance work etc.). If, for example, the injured person did not render such services (but spent his days drinking beer by the pool), then there is no claim for damages in this respect.

If the family does not hire somebody to take over the work, but decides to replace the injured/deceased person by taking over more work than before, then damages will be calculated on a hypothetical basis and not based upon the actual costs paid to a third party. There is a so-called "Munich Schedule" which serves as an assistance for the court to determine the hypothetical costs of household work. The basis for such procedure is the fact that §287 of the German Rules of Civil Procedure allow the court to estimate and determine the amount of damages in an appropriate manner and this is why the court would be allowed to rely upon such instruments as the so-called Munich Schedule.

There is a similar schedule which may also be applied and which has been developed by the University in Hohenheim. The university has done a lot of research and has evaluated the costs of household work (as if the household were a company). This leads to certain hourly rates and to other figures the court may rely upon.

If an injured person argues he cannot perform certain tasks for a period of time or permanently, then the court may order a doctor's expertise be obtained. The doctor will then be asked for what remaining time the injured person would have been able to render household work and what kind of household work. Such information would then constitute the basis for calculating the damages.

A court will always look at the actual consequences of the injury. If, for example, a person is found to be unable to go to work, that does not mean he is unable to perform household tasks. The Court of Appeals in *Munich* has decided that certain tasks may still be performed, for example instructing children, helping them with their homework and doing simple work which does not delay the process of healing. If the injured person cannot clearly show he has been prevented from performing his usual tasks, then it may be he will receive no compensation at all. It is always the obligation of the injured party to demonstrate to what extent and within what timeframe he would have been able to contribute to the household work.

When looking at the schedules mentioned, *supra*, one always needs to be careful they are up to date. For example, garden work no longer means a person has a big garden, growing vegetables and fruits, so what was customary 20 years ago, may not be today. As a further example: Still 20 years ago (when the Munich Schedule was developed) even the best households did not have clothes dryers, so that drying laundry was certainly something an injured person could not do under certain circumstances. Today, almost every household has a dryer and such changes need to be taken care of when the judge applies the schedule.

This also applies, to future developments. For example, if a person suffers a permanent injury at the age of 55, one needs to take note of the fact that at age 75, she will not be able to do the household work she did at 55. Therefore, when calculating the damages, the court will always have to judge on the basis of a certain prognosis which to some extent it can predict from its own experience, and otherwise based upon testimony of expert witnesses etc.

Economists are not called to determine the actual damages. Even in the course of determining the actual costs to replace the service previously rendered by the injured person, the court would mainly look at statistics and expect the plaintiff to demonstrate what he would have to pay to a person who would assist him with the tasks. Everything is very much in the hands of the court, due to §287 of the German Rules of Civil Procedure.

## CONCLUSION

One of the places where defense lawyers can make some progress in diminishing the numbers which a plaintiff may blackboard is household services. Lawyers on both sides of the courtroom and both sides of the Atlantic should not be afraid to confront creatively the issue of how to prove and how to defend against these economic damage claims. Far too often we spend nearly all of our time analyzing negligence and proximate cause and very little time wondering

what will happen if a fact finder agrees with the plaintiff's perspective on those issues. While the law may not favor a requirement that the losses may only be recovered if the cost is actually incurred, there are certainly avenues of attack both practically and legally which can be advanced.

Federation of Defense and Corporate Counsel

2010 Annual Meeting

# "WE REALLY DON'T LIKE SURPRISES"

## ANATOMY OF CASE ASSESSMENT – EARLY, ONGOING, ENDGAME

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2010 ANNUAL MEETING
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# CASE ASSESSMENT

A. Underpinnings of Case Assessment Programs

1. Purpose of Case Assessment

   a) To determine as early as possible the likely range of case value to the company so the company can plan ahead. In-house counsel and their companies can deal with bad cases IF they are given adequate and accurate case valuation information throughout the case. Surprises that arise from outside counsel's failure to gather information which is as accurate and complete as possible puts both the in-house counsel and the company at unwanted and unnecessary risk.

   b) To keep abreast of changes in case valuation as soon as possible and as frequently as necessary so that the company can adjust to new information and changing risks

   c) After the case is finalized (by settlement, dismissal, verdict, etc.), to allow the company to use the case assessment as a tool going forward to evaluate future cases which may have similar issues or risks

2. For the insurance company:

   a) Case values are critical to setting case reserves

   b) Tax liabilities are tied to case reserves

   c) Actuarial studies are based on reserves

   d) Financial statements reported to shareholders and governmental agencies reflect reserves

   e) Inaccurate reserves may result in audits from governmental watchdog agencies and or the IRS

3. For the corporation with high self-insured or self-funded retention before insurance dollars might be paid:

   a) Case values are critical to company budgeting when setting reserves for potential losses and expenses

b) Companies often adjust case reserves up or down at year-end – with such adjustments directly affecting the company's reported "bottom line," (which can affect performance bonuses)
c) Sudden shifts in reserves which affect company financial statements also affect shareholder and market perception of the company

4. For the corporation facing a claim that is not subject to insurance coverage (e.g., contract breach, governmental investigation and claims for penalties):
   a) Accurate case assessment is critical to company budgeting as to potential losses which can be significantly higher than a single lawsuit with a significant self-insured retention
   b) Dealing with a case loss (by late game settlement or unexpected high verdict) will affect the budget and the bottom line financials for the company (including issues related to dividends or performance bonuses)
   c) Like the company dealing with high self-insured retentions, large swings in case reserves can affect shareholder and market perception of the company
5. For the in-house counsel:
   a) Case assessments and valuations are reported to superiors and to the business sector of the company
   b) Case valuations and assessments – whether accurate or inaccurate – will affect in-house counsel's position within the company
   c) Sudden shifts in reserves or case valuations for which outside counsel should have properly prepared the company ahead of time can jeopardize the credibility and standing of in-house counsel with the internal client
6. For the outside counsel:
   a) Outside counsel must recognize that in-house counsel is not "the client" – but that in-house counsel actually "answers to" his/her own internal clients (i.e., superiors in the legal department, company officers, company leaders in the business sector)
   b) When outside counsel fails to provide accurate and complete information about the case, and/or fails to keep such information, sudden shifts in

case valuation can and will affect in-house counsel's level of trust and confidence in his/her outside lawyers

B. The Early Assessment Program

1. Rationale

a) Most cases settle – it makes economic sense for both sides of the litigation to discuss the value of the case and attempt to resolve it, if possible, before unnecessary expenditure of resources

b) Because most cases settle – the earlier a legitimate case value can be established, the more likely the company can evaluate the level of the risk of loss and the potential cost of such loss

c) Trade-off of paying plaintiff early in the case versus spending those dollars on legal fees, expert fees, litigation costs

2. Information to establish case value often can be gathered early

a) Experienced litigation managers know that, in general, evaluation ranges can be determined early

b) Experienced litigation managers also know that, while there are exceptions, much of the information that will determine case assessment late in the case can be obtained in some measure early on in the case

(i) Background facts

- Projected strengths and weaknesses
- Expected strong and weak fact patterns

(ii) Injury and damage claims

(iii) Judge, jury and jurisdiction

(iv) Opposing counsel

3. Time Frames

a) Preliminary case evaluation within 60-90 days of assignment of suit to outside counsel

b) Much information can be obtained earlier with informal discovery exchange than through regular discovery procedures

(i) This is particularly true of information which will eventually be subject to discovery

(ii) While it may take longer to obtain all detailed information, obtaining general information promptly can facilitate a legitimate early evaluation

4. Valuation Philosophy – for cases which could and should be settled
   a) Arrive at a fair settlement valuation early
   b) No benefit to client to settle late for the same amount the company could have and should have been willing to pay early
5. "Price Aggressively. Defend Aggressively"
   a) Messages sent by making a reasonable end-game settlement offer
      (i) tells plaintiff the company understands litigation
      (ii) tells plaintiff the company is serious about resolving early
      (iii) tells plaintiff the company will defend the case to trial if a reasonable settlement is not accepted
   b) Do not engage in false economies
   c) Set reasonable ranges of settlement early on – rather than using a "low-ball" approach
   d) If company develops reputation for making reasonable early settlement offers, plaintiff's counsel will learn that they must decide early whether to deal reasonably or plan to try cases against this company in future litigation

C. Teamwork between in-house and outside counsel
   1. Unless inside and outside counsel function as a team serving the internal client, the case assessment process will not be coherent and consistent
   2. Inside counsel must help defense counsel recognize the internal "constituencies" that must be considered in case assessment
      a) Business side of the firm – operations
      b) Financial analysts, Wall Street
      c) Employees (from CEO to the CFO to the janitor)
      d) Customers

e) Media
f) Board of directors
g) Governmental agencies (State A.G., CPSC, NHTSA, FDA)
h) Corporate brand, reputation

3. In-house and defense counsel must jointly
   a) Evaluate strength of liability claim (product defect, contract breach, construction defect, validity of consumer complaint)
   b) Establish range of damage value
   c) Evaluate jurisdiction: trial judge, jury, appellate court
   d) Examine track record in other similar cases – settlement or trial history
   e) Evaluate the law of the jurisdiction (e.g., comparative/contributory negligence, apportionment of fault, collateral source rule, punitive damages, bifurcation, economic loss doctrine, treatment of settlement by co-defendants)

D. <u>What in-house counsel should require from outside counsel for settlement evaluation</u>
   1. <u>In-house counsel considerations different than those of outside counsel</u>
      a) <u>Understand the client</u> – In devising a settlement strategy, outside counsel <u>must</u> thoroughly understand what is at stake for the business side of the company and what are the objectives of the business side
         (i) Business side of the company is the in-house counsel's "client"
         (ii) In-house counsel must provide his/her "client" with information about status, risks, strong points and weak points of case
         (iii) In-house counsel has "business" considerations beyond winning or losing the case
   2. <u>For reporting to "internal client," in-house counsel needs outside counsel's assessment and judgment on the following:</u>
      a) The expected duration of the case
      b) Projected expenses of the litigation

c) How much time the litigation will require of in-house counsel and other company personnel
d) Prospects for success
e) What the internal client is likely to achieve or lose
f) How the litigation may affect the internal client's business

3. Early development of facts and witnesses for or by in-house staff
   a) Critical documents
   b) Critical company factual witnesses
   c) Company expert witnesses
4. Early demand by in-house for outside counsel to prepare case budget
   a) Budget assists business evaluation of case:
      (i) In many cases, this helps in-house counsel balance costs of litigation against resolving the litigation early
      (ii) In some cases, the litigation will not resolve early – but "client" needs to know what the costs will be to proceed through the litigation
   b) Budget segregated by categories of tasks:
      (i) Early assessment process
      (ii) Pleadings and motions
      (iii) Factual discovery
      (iv) Expert discovery
      (v) Dispositive motions
      (vi) Pretrial preparations
      (vii) Trial
      (viii) Also segregated by time frame (for each year for financial planning purposes)
5. Legal hold memo
   a) In-house counsel should receive input from outside counsel to develop inclusive memo
   b) Capturing key documents
   c) Identifying early e-discovery issues
   d) Freezing e-mail if necessary

6. Early written risk assessment analysis report required from outside counsel
    a) The law of the case
    b) Expected evidence, good and bad
    c) Forum analysis
    d) Damage analysis
    e) Range of exposure incorporating risk, damages and costs of litigation
    f) Range of settlement, if different
7. Risk analysis report to be revised by outside counsel and used throughout the case
    a) In-house counsel should require regular updates of risk analysis as case progresses:
        (i) In-house counsel needs to be able to keep internal "client" advised of status throughout case
        (ii) Outside counsel cannot leave in-house counsel unadvised of developments in case
    b) Risk analysis becomes a tool for in-house counsel to obtain settlement authority from internal client

E. Not all cases are candidates for early settlement
1. Occasional considerations against early settlements
    a) Moving too quickly on settlement may have negative consequences:
        (i) Company may well become target for more cases:
        (ii) Feeding frenzy for the plaintiffs' lawyers
        (iii) "Dead dogs" being brought back to life
    b) Impression that the company trying to hide, thereby inviting more claims
2. The "first of many"
    a) Some cases which are test or prototype cases must be defended aggressively all the way through to trial
    b) The first cases filed in "program litigation"
    c) Product defect cases that will become mass/class cases
3. "Bet the Company" cases:

(i) "Millions for defense; not a penny for tribute"

(ii) Flagship products or product lines

4. Plaintiff's counsel is advertising for clients to sue the company
   a) Cases where plaintiff's counsel is looking for "easy money" must be discouraged from "getting in line" for the perceived handout
5. Punitive damage cases
   a) Perhaps relating to pattern of company conduct
   b) Employment cases
   c) Product cases
   d) Consumer cases with statutory allowance of punitive damages or penalties for violations

F. Ongoing Case Assessment – Critical Concerns for In-House and Outside Counsel
   1. CLIENTS DO NOT LIKE SURPRISES
      a) Worst case scenario - last minute request from outside counsel for settlement authority far beyond previous assessed values
   2. Most cases have developments that are not expected. Both inside and outside counsel must be prepared to adjust evaluations as the case moves forward
   3. Outside counsel:
      a) Must keep client counsel regularly advised of case status (in conformity with the case plan and client guidelines)
      b) Report on factual developments in discovery as they occur
      c) Prepare the client about concerns of potentially harmful developments
         (i) Upcoming discovery issues
         (ii) Upcoming motions on claims/defenses that could be decided adversely to the client
         (iii) Potentially damaging witness testimony or documents
      d) Provide immediate reports on bad news
         (i) location of "bad documents"

(ii) harmful witness testimony

(iii) harmful court rulings on dispositive motions, evidentiary motions, discovery motions

e) Changes in the case

(i) In addition to informing about the changes, advise client on how such information affects the case value

(ii) Provide written support for change in valuation so that in-house counsel can provide recommendations to the internal client

(iii) Provide objective information which forms the basis for the change

4. Inside counsel:

(i) Acknowledge the warning or "heads up" from defense counsel

(ii) "'Denial' ain't just a river in Egypt"

- Beware the temptation to deny or ignore bad news or its effect on case value and risk

(iii) Where the problem is internal to the company (e.g., bad documents, bad witness, repeat problems), acknowledge same and work to evaluate it objectively

(iv) Work with outside counsel to formulate the approach needed to address negative developments

(v) Utilize outside counsel to aid in developing the proper recommendations to the internal client (including explanations as to why and how the developments were unforeseen)

G. The Endgame in Case Assessment

1. Even when the case ends, the case assessment can be a valuable tool to both in-house counsel and defense counsel

a) Outside Counsel:

(i) Was the early assessment accurate and complete?

- If not, why not? What needs to change next time?
- If so, what was the key to getting it right?

(ii) Did counsel keep the client advised of developments timely?

- If not, figure how to correct the problem (or how to replace the client who will be looking for new lawyers)
- If so, how can you improve on the next case?

(iii) Did the case take significant unexpected turns?

- If so, why did we not see them ahead of time?
- How can we avoid that surprise next time?

b) Inside Counsel

(i) Was the early assessment accurate?

- If not, why not? And what can I do to get it correct next time?
- If so, what was the key to getting it right?

(ii) Did in-house counsel help outside counsel understand what the internal client needed

H. <u>Assessment Considerations in the Dangerous/Difficult or "Bad News" Case</u>

1. Teamwork between outside and in-house counsel most critical here

a) Differences from the more routine types of cases for the company

(i) While defense lawyers fight in the court of law, plaintiffs' lawyers will often fight in court of public opinion

(ii) Damage to company reputation or product brand has potential to be more costly than even the largest settlement made

(iii) Early document collection and review

(iv) Early interviews of significant employees

b) Outside counsel

(i) If information is properly gathered and the case looks bad, defense counsel must be prepared to deliver hard assessments and negative information to client

c) In-house counsel

(i) If assessment is thorough and points to high exposure, corporate counsel must be prepared to "sell" the hard assessment to internal client

I. Framework of Early Assessment Programs

1. Some information requires plaintiff's counsel's cooperation:
   a) Medical records
   b) Employment
   c) Education background
   d) Photographs taken early on by plaintiff's counsel
   e) Inspections:
      (i) Product or equipment inspection
      (ii) Work site
      (iii) Accident scene
   f) Photographs:
      (i) Product
      (ii) Accident scene
      (iii) Plaintiff
   g) Regardless of the time of case (although there are certainly many exceptions), defense counsel can get the fundamental outline of plaintiff's case by direct and straightforward communication with plaintiff's counsel
      (i) What plaintiff believes is the true basis for claim (e.g., what is really wrong with the product, what is the essence of the wrongful discharge claim, why the plaintiff did not precipitate the defendant's alleged breach of the contract)
      (ii) what the dangerous witnesses are likely to say
      (iii) what the extent of the damages really are
2. Much information can be obtained promptly without opposing counsel's assistance:
   a) Company witness identification and interviews
   b) News accounts of incident or case
   c) Courthouse records:
      (i) Civil or criminal records relating to plaintiff
   d) Company records
   e) Applicable company policies

f) Contract breach
    (i) Contract documents
    (ii) Records of company performance under the contract
g) Personal injury or property damage cases
    (i) Accident reports
    (ii) Contact of investigating officers
    (iii) Identity of independent witnesses
    (iv) Weather records
    (v) Company engineering analysis
h) Product cases
    (i) design information
    (ii) manufacturing, sale and warranty information

3. Knowing plaintiff's counsel:
    a) Trial lawyer or case broker
    b) Known for mass/class cases or single claim
    c) On a mission against the company?
    d) Background on willingness to consider early settlement
    e) Likelihood of plaintiff's counsel's willingness to cooperate with an early assessment program
4. Company must present a credible trial threat to plaintiff:
    a) Plaintiff's counsel must know company will try case, if necessary
    b) Plaintiff's counsel must know that defense team can and will go to trial
5. Understanding the jurisdiction:
    a) Trial judge
    b) Jury pool:
        (i) Education
        (ii) Employment
    c) Demographics of the trial jurisdiction:
        (i) Industries present
        (ii) Major employers
        (iii) Educational institutions

(iv) Educational levels of population

(v) General attitudes toward employers, manufacturers, etc.

d) Recent verdicts in similar cases

6. Personal Injury – get the facts early:

a) Police or other investigative report :

(i) Drug or alcohol use – admissible?

(ii) Auto cases - seat belt use – admissible?

(iii) Citations issued?

b) Injury – medical records or death certificate/autopsy report

c) MMI (has plaintiff reached maximum degree of medical improvement?)

d) Medical expenses - liens/subrogation interests

e) Insurance Available:

(i) Insurance Claim File

(ii) Who has settled out

(iii) For whom insurance companies have made payments

(iv) Amount, date of payment, source of the funds

7. Punitive damage issues

a) The standard used to determine whether punitive damages are recoverable

b) Underlying facts which expose the company to punitive damages

8. Considerations for different types of cases:

a) Contract cases - Construction cases:

(i) Copies of all contracts

(ii) Copies of all correspondence

(iii) Identify, locate and interview all company witnesses who likely have knowledge of contract and its performance

(iv) The identity and contact information of all opposing witnesses who likely have knowledge of contract and its performance

(v) Early evaluation of damages at issue for alleged breach

b) Consumer cases:

(i) Subscribers to services, non-injury warranty claims on products

(ii) Determine applicability of governmental regulations, penalties
- Credit cases
- Product warranty cases
- Services provided by the company that are not requested or desired by the consumer

(iii) Review of complaint files received by company

(iv) Obtain information of claims filed with governmental safety or consumer agencies

(v) Identify, locate and interview all company witnesses who likely have knowledge of product or service at issue

(vi) The identity and contact information of primary opposing witnesses who have or claim to have knowledge of product or service at issue

c) Employment cases

(i) Legal standards and requirements

(ii) Company policies

(iii) Company history re: the type of allegation

(iv) Employee history

d) Product cases with accidents:

(i) E.g., vehicles, motorcycles, tractors, industrial equipment or machinery, children's products, etc.

(ii) Photographs or videotapes of the product involved
- Alleged defective component available?
- Spoliation of evidence
- Confirm original equipment
- Early determination of modification

(iii) Photographs or videotapes of the accident scene taken before or after the accident

(iv) Identity and contact information of all witnesses to the accident

(v) Identity and contact information of any present and prior owners of the product

(vi) Records of the sale, repair and service history of the product

(vii) Listing of all facilities where the product was serviced or repaired

(viii) Any repair records and estimates for the product which company has for the product involved in the accident

(ix) Expert opinions or, at least, legitimate description of alleged defect and claim for liability

(x) "Independently" conducted investigation reports (e.g., insurance investigator, OSHA investigator, other governmental investigator)

(xi) An itemized list of all damages for which plaintiff seeks recovery

(xii) Records relating to financial losses allegedly sustained by the plaintiff as a result of the accident

(xiii) The identity and contact information of plaintiff's employer at the time of the accident, of prior employers

(xiv) The identity and contact information of all providers of medical treatment to plaintiff as a result of the accident

(xv) The identity and contact information of providers of medical treatment to plaintiff prior to accident

(xvi) The identity and contact information of any insurance company with any connection to the accident or the individuals involved in the accident, including policy numbers and claim numbers, if applicable

(xvii) The identity and contact information of each medical insurance company under which plaintiff had, medical coverage, including policy numbers

(xviii) Copies of all medical records or reports of any kind relating to plaintiff's medical care or treatment, both before and after the accident

(xix) Provide records releases to plaintiff's counsel for medical, employment and educational records – with agreement to provide copies of documents received

(xx) Copies of any and all pleadings and other documents in connection with any other claim or suit filed in connection with the accident

(xxi) Copies of necessary design documents, recall documents, governmental correspondence relating to product in question

(xxii) Copies of owners' manual/guides and other material accompanying product at sale

"We Don't Like Surprises—A Peek Inside the Window of a Company with a High Self Insured Retention" by Tyron Picard, Executive Vice President—Legal and Governmental Affairs—The Acadian Companies

## THE SIR MODEL & PHILOSOPHY

- Companies with a high self insured retention insurance program (SIR) have adopted the philosophy that they are willing to bet on the actions of their employees for future liability purposes, typically at the primary liability level, and insure only those "shock" or "catastrophic" losses, in a guaranteed pay/insurance program above certain thresholds (i.e., after $500,000 or $1 million).

- A "high self insured retention" insurance program differs from a "deductible" program in one fundamental area—control of the claim. In the high SIR program, the company (not the insurer) typically:
    a) investigates the claim
    b) selects counsel/representation
    c) sets reserves on the claim and
    d) is subject to audit on those reserves to determine actuarial integrity

- Companies which have evolved to an SIR program have done so only after a very deliberate analysis of multiple factors:
    a) review of multiple years of loss run data in an area of exposure with sufficient frequency to render valid trends
    b) evaluation of the corporate culture and executive management's commitment to the safety and risk management program
    c) establishing a risk management program with highly qualified individuals that have a clear understanding of the SIR program's objectives, and that program's place within the company's overall risks/insurance portfolio

- In the high SIR model, the Risk Manager and General Counsel have a constant interaction with the CFO, in order to update or set new reserves. At year end, the cumulative "true up" of these reserves can mean that a company has excess cash (for employee bonuses, acquisitions, capital expenditures, etc) or a reserve shortfall, which may mean that the company will miss its earnings target. If an unbudgeted increase in reserves must be affixed to the year-end budget, this unforeseen development may affect:
    a) employee or management incentive compensation (if it's based upon earnings thresholds)
    b) the ability to award merit salary increases, etc (example: The Acadian Companies $1 million equals 1% salary increase)

## INTERNAL FUNCTIONING OF THE SIR PROGRAM

- In the high SIR model, information from the Risk Management group, and by extension, external counsel, become very important to the financial performance of the company. Underreserving, late notice of a change in case posture (either liability or damages) all have a ripple effect through the Risk Management department, up to the CFO, and company Board Room.

- A high SIR company will have a Risk Department that is more akin to a small insurance company. Expect to be questioned, prodded, etc more than normal on case strategy, on discovery plan, and on your defense budget. These employees have been trained with the notion that this is their money and they are vested with stewardship responsibilities. Likewise, since they have selected external counsel, they are held accountable internally for hiccups, late disclosures, etc that may occur as a result of external counsel not communicating developments in the case in a timely fashion.

- In choosing the SIR route, the company has made a business decision which will allow it to reserve/escrow dollar amounts for actual claims, versus paying those dollars in premiums for prospective/potential future claims. This program allows more free cash flow upfront for the company, along with the expectation of consistently improving the ratio of routine non-shock losses (which is where the company will derive the financial benefit from self insuring versus paying those dollars in premiums).

- An added benefit of accurate and timely reporting to a client which has an SIR program is its aid to the General Counsel/Risk Manager with respect to the process of "loss development". On average, it generally takes three and a half years for the reserves on a claim to "settle" or mature to a point where they "plateau" and become less volatile. This means that the General Counsel and Risk Manager are having to constantly adjust numbers on cases during this multi-year "settling" process. Now remember that the Risk Manager/General Counsel are having to explain this to the CFO—(who by training, is accustomed to fixed, finite, financial transactions.) The clash of those two very different disciplines alone makes the General Counsel/Risk Manager's job very difficult! When loss development adjustments are not done accurately or timely due to a lack of reporting information from external counsel, it makes the Risk Manager/General Counsel's job in managing the loss development process all the more difficult with the financial executives of the company.

## BUSINESS FACTORS WHICH A HIGH SIR PROGRAM IMPACTS

- A high SIR program can offer a competitive advantage to a company which provides contractual services on a per unit basis. In a guaranteed cost insurance program (i.e., premium paid with deductible) that fixed amount paid for insurance coverage becomes an incremental part of the company's pricing for its services (i.e., $25 of every ambulance transport cost is associated with insurance premium) versus an SIR program (i.e., $5 of every ambulance transport cost is for insurance/liability reserves). You can see how having a very efficient SIR program can offer a company a competitive advantage over its peers in terms of its pricing structure for services, as well as offer the company better profit margins on each incremental unit of service provided.

- Another business consideration which you should understand when representing the high SIR client is the tax consequence of the case you are handling for them, and how the company may optimize its financial performance by resolving a case in one year versus another. In guaranteed payment programs (i.e., insurance with deductible), businesses typically can deduct the premium that is paid for such coverage. In SIR programs, the company is not able to deduct its annual accrued reserves, but can deduct the actual payments made in satisfaction of judgments or settlements. Here is yet another example of why timely and accurate reporting on cases with major financial implications can be of significance to the company's business; a company may have a tax advantage in resolving a case in one particular year (for example, if a company is having record profits in 2010) versus allowing the claim to carry into the following year either for trial/mediation/settlement (i.e., the company's 2011 financial lookout is not as rosy due to one factor or another). In SIR companies, the Board of Directors and Executive Management expect that the Risk Manager and General Counsel will provide it with sufficient, accurate and timely information to take advantage of windows of opportunity during which they can achieve resolution of high dollar claims when it is advantageous to do so from a tax or earnings stand point.

- Remember that a Risk Manager/General Counsel in a high SIR company will constantly be juggling multiple financial responsibilities for which he/she is accountable to the company's Board of Directors: attorney fees budget, loss reserve accruals (discussed above), Risk Management department payroll/personnel, in addition to the management of a number of liability claims all of which are at various stages of maturation. **You will be a star that stands out amongst your peers when you make his/her job easier, not harder, when he/she has to worry and inquire less (not more) on a file, because you are timely with updates, developments, strategic moves, etc.**

SUMMARY

- A clue to maintaining your relationship with a high SIR Risk Management group in a company; **forecast early and often**! If a case evolves from a $20,000 soft tissue injury to a $4 million paralysis claim, **make sure the General Counsel and the Risk Manager are with you through every step of that evolution**—it makes it easier for them to update the business executives in their own company, so that they can accurately forecast the company's budget and make decisions accordingly based upon that information. Additionally, communicate your anticipated discovery needs (travel, experts, deposition of company personnel in remote locations) as early as you possibly can—this helps to more accurately assemble the defense expense component of the reserve on the claim.

- **Surprises—avoid them at all costs!** Surprises anger executive management when they affect budget assumptions, because they realize they were operating from wrong assumptions on the reserves which were set by Risk Management—and the Risk Manger and General Counsel will be blamed for this, since they hired you. And as the old Chinese proverb says, "It rolls downhill". You do not want your reputation within the company's Board Room and the Risk Management department to be "the one who put us in hot water with the CFO/CEO because he/she surprised us".

- Finally, understanding and tapering your representation to the high SIR client will both enhance your relationship with the company, and with the company's Risk Manager/General Counsel. A high SIR company is a unique animal, and some lawyers refuse to adjust or modify their representation in consideration of these concerns and factors—and that is an individual choice. As a former external counsel, I always rationalized that it was far easier and quicker for them to replace me as their lawyer, than for me to land another large client!

# Maximizing Case Efficiency: Lessons Learned From *Lean*— A Process Management Philosophy Utilized In Automotive Manufacturing

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## 1. Cultivating Improvement In Your Case Through Lean Servicing.

> For improvement to flourish it must be carefully cultivated in a rich soil bed (a receptive organization), given constant attention (sustained leadership), assured the right amounts of light (training and support) and water (measurement and data) and protected from damage.
>
> Stephen M. Shortell, Ph.D., Professor of Organizational Behavior, University of California—Berkeley

Clients in the legal industry continuously seek efficient, high-quality legal services while minimizing costs and maximizing budget predictability. Indeed, a common sense goal; yet, one that can be elusive in today's litigation environment where so many factors are perceived to be beyond the control of trial counsel. The solution, simple in concept/enormously difficult in practice is waste reduction/value development or, as known in manufacturing, *lean*.

Lean was primarily developed in and associated with the automobile industry, but lean principles have since been applied in many other manufacturing industries. Lean manufacturing was designed by the automobile industry to: (a) improve quality, (b) eliminate waste, (c) reduce time, and (d) reduce total costs. Of course, these are four business goals that are similarly shared with service-oriented industries. Though some success has been achieved in certain areas of the banking industry, service industries have been more reluctant to adopt the lean principles and concepts that transformed the manufacturing industry. This reality is especially true for legal services.

This paper is a catalyst for discussion on whether *lean* in legal services is viable. In other words, can lean principles deliver more value to the client by decreasing waste in litigation case management *and* maintain (or increase) profitability of the law firm?

2. Waste Reduction Thinking Has Been Ubiquitous Throughout History.

*Lean* is a general term describing the concept that using less of everything will give you more. Put differently, *lean* means identifying and eliminating waste to create value for you and your client. Though many of the tools and techniques underlying the lean manufacturing approach have become quite sophisticated in the last twenty years, the importance of waste reduction in manufacturing and the basic principles of *lean* have been used for centuries to increase manufacturing process efficiency and, ultimately, value.

**A.** The Early Development of Lean Thinking in Europe.

In the early 12th Century, the Arsenale di Venezia, or Arsenal of Venice was founded as the state naval shipyard. Significantly expanded in the 15th Century, through the addition of the Novissimo Arsenale, it became the largest pre-Industrial Revolution manufacturing complex in Europe. Implementing novel approaches to shipbuilding, the Arsenal housed a production assembly-line that could build a ship's hull in mere hours. The development of this capability required rethinking the Roman practice of building the ship's hull before installing the ribs. Instead, the Venetian shipwrights first built the ship's frame and then applied the planking, a process still used today. Their manufacturing capabilities were continuously refined over time, culminating in a 1574 demonstration for King Henry III of France in which the Arsenal built a ship from keel to fully-rigged, armed and provisioned galley in less than twelve hours. *See* ROBERT C. DAVIS, SHIPBUILDERS OF THE VENETIAN ARSENAL—WORKERS AND WORKPLACE IN THE PREINDUSTRIAL CITY (The John Hopkins University Press ed. 2007) (1991), at 47-82.

**B.** The Growth Of Lean Thinking In America.

America's first to expound in print on the importance of waste reduction in business was none other than Benjamin Franklin. *See, e.g.,* BENJAMIN FRANKLIN, THE AUTOBIOGRAPHY OF BENJAMIN FRANKLIN: INCLUDING POOR RICHARD'S ALMANAC AND FAMILIAR LETTERS (Cosimo, Inc. 2005). Concerning wasted time, he declared in Poor Richard's Almanac, "He that idly loses five shillings' worth of time loses five shillings, and might as prudently throw five shillings into the sea." *Id.*, at 237. And, as to unnecessary costs, remember what Poor Richard said, "A penny saved is two pence clear; A pin a day's a groat a year." *Id.*, at 238.

Franklin also discussed the need for care in managing inventory. In The Way to Wealth, an essay Franklin wrote in 1758, Franklin preached,

> You call them goods; but if you do not take care they will prove evils to some of you. You expect they will be sold cheap, and perhaps they may for less than they cost; but if you have no occasion for them they must be dear to you. Remember what Poor Richard says: "Buy what thou hast no need of, and ere long thou shalt sell they necessaries."

BENJAMIN FRANKLIN, *supra*, at 229. Common sense, certainly, but still a major influence in connection with the future of *lean* as discussed further below.

Other Americans were also trailblazers into lean thinking. Born in 1868, Frank Gilbreath, an early champion of scientific management and motion study began his career life as a building contractor. While observing masonry work on construction projects, he noticed that masons had to bend all the way to the ground each time they needed a new brick. *See* FREDERICK WINSLOW TAYLOR, THE PRINCIPLES OF SCIENTIFIC MANAGEMENT (Feather Trail Press ed. 2010) (1911), at 49-54. He quickly grasped the inefficiency of these movements, inefficiencies that had become entrenched through long-standing

practice. His solution: bricks were delivered by laborers to scaffolds that placed the brick supply at waist level. It was a simple prescription that increased the speed of the masons almost threefold, yet the practice had become so deeply rooted that the wasted effort was never recognized. *Id*.

Frank Gilbreath and his wife Lillian went on to become early leaders in a new industry: management consulting. In that capacity, Gilbreath was: (1) the originator of the idea that nurses should manage the surgical instrument tray and hand instruments to the surgeon as requested; and (2) the developer of standardized techniques by which soldiers could be trained to rapidly strip and reassemble their weapons under any conditions.

Frederick Taylor was another early leader in consulting and is regarded as the father of scientific management. In his treatise on the subject, The Principles of Scientific Management, Taylor wrote:

> And whenever a workman proposes an improvement, it should be the policy of the management to make a careful analysis of the new method, and if necessary conduct a series of experiments to determine accurately the relative merit of the new suggestion and of the old standard. And whenever the new method is found to be markedly superior to the old, it should be adopted as the standard for the whole establishment.

*See* SCIENTIFIC MANAGEMENT, *supra*, at 79-80. Indeed, these ideas are now known as "standardization" and "best practices deployment," the later being a term that has certainly been discussed in the legal field for some time now by consultants, corporate counsel, and the lawyers who represent them.

While Gilbreath and Taylor were two early exponents of lean thinking in modern times, it was really Henry Ford who made the first big leap with his mass-production assembly lines. *See, e.g.*, HENRY FORD, MY LIFE AND WORK (Classic House Books

2009). Ford was strongly influenced by Benjamin Franklin in the development of his ideas concerning waste and production efficiency. *Id*., at 108-09. In My Life and Work, Ford observed the following:

> I believe that the average farmer puts to a really useful purpose only about 5 per cent of the energy he spends. If any one ever equipped a factory in the style, say, the average farm s fitted out, the place would be cluttered with men. . . . Not only is everything done by hand, but seldom is a thought given to a logical arrangement. A farmer doing his chores will walk up and down a rickety ladder a dozen times. He will carry water for years instead of putting in a few lengths of pipe. His whole idea, when there is extra work to do, is to hire extra men. He thinks of putting money into improvements as an expense . . . It is waste motion – waste effort – that makes farm prices high and profits low.

*Id*., at 12. It is well known that Ford's assembly line resulted in great success, but it is less well known that he originated the concept of Design for Manufacture—that every part of a manufactured item be designed so that it can be manufactured most easily. *Id*., at 49-58. He also took Eli Whitney's ideas concerning parts interchangeability to the next level by being the first to employ the use of manufacturing tolerances, an idea that reduced the need for hand-fitted parts, and hence, manufacturing effort. Finally, he created Just-In-Time manufacturing, which seeks to maximize return on investment by minimizing work-in-process inventory and the associated carrying costs. *Id*., at 108-09. So, Ford clearly understood many of the forms in which waste appears as well as the ideas of value-added time and effort.

Ultimately, though, as James Womack and Daniel Jones note in Lean Thinking, not all of Ford's methods are appropriate for the dyanmic conditions businesses face today. JAMES P. WOMACK & DANIEL T. JONES, LEAN THINKING—BANISH WASTE AND CREATE WEALTH IN YOUR CORPORATION (First Free Press ed. 2003) (1996), at 22-23.

This is evidenced by the financial difficulties the company encountered once it was forced by the marketplace to venture beyond the Model T. Recall that the Model T was only offered on one chassis, in one color and with very limited options. Once customers began demanding more choices and competitors began offering more models, Ford's inability to adjust and innovate new products, resulted in lost marketshare to General Motors among others. Nevertheless, though, many of Ford's ideas were sound, even in the modern age. Indeed, they were an instrumental component of the Allied victory in World War II. Using Ford techniques, for example, production problems with B-24 Liberator bombers were solved and the Willow Run bomber plant in San Diego, California was ultimately able to turn out a bomber per hour just as the 16th Century Venezians had been able to build a war galley per day.

### C. The Modernization Of Lean Thinking In Japan.

Post World War II, it is well known that the Japanese were faced with a daunting task when it came to the rebuilding of their industry for a peace-time economy. The teachings of two Americans, Joseph Juran and Edwards Deming, were instrumental to Japan's economic recovery and ultimate rise to global manufacturing power. *See, e.g.*, RAFEAL AGUAYO, DR. DEMING: THE AMERICAN WHO TAUGHT THE JAPANESE ABOUT QUALITY (Simon & Schuster Inc. ed. 1991) (1990). The Japanese were well-positioned to compete with United States and European manufacturers on price, but their goods suffered from a long-standing reputation of poor quality. Juran and Deming helped the Japanese overcome that reputation.

Juran, an American engineer and management consultant was an expert on managing for quality. In 1941, Juran came across the Pareto Principle while studying the writings of Vilfredo Pareto, an Italian economist of the late 19th and early 20th Centuries.

*See* JOHN BUTMAN, JURAN: A LIFTIME OF INFLUENCE (John Wiley & Sons, Inc. 1997), at 142-145. The Pareto Principle is also known as the law of the vital few, the principle of factor sparcity, or more simply—the 80/20 rule, which asserts that 80% of the effects come from 20% of the causes. As applied to quality management, the rule stands for the proposition that large gains in quality can be achieved by solving a few vital problems. *See* J. M. JURAN, MANAGERIAL BREAKTROUGH—THE CLASSIC BOOK ON IMPROVING MANAGEMENT PERFORMANCE (McGraw-Hill, Inc. ed. 1995) (1964), at 47-58. As Juran described the Principle: "In any series of elements to be controlled, a selected small fraction, in terms of number of elements, always accounts for a large fraction, in terms of effect." LIFETIME OF INFLUENCE, *supra*, at 143.

In 1954, Juran traveled to Japan and began teaching courses in managing for quality to Japanese middle and upper management. *See* LIFETIME OF INFLUENCE, *supra*, at 122-33. Results were not immediate, but by the 1970's the Japanese were begining to be known for high-quality products, and Juran's teachings contributed greatly to Japan's success in that regard. *Id*., at 137-50. Interestingly, management training was something that had generally been resisted in the United States to that point as unnecessary, which contributed to the quality crisis America faced in the 1980's.

While Juran was primarily interested in managing for quality, Deming was a statistician and consultant who taught statistical process control—the application of measurement and statistics to ensure that a process creates conforming product with a minimum of waste—and other quality concepts to scores of Japanese managers and executives. DR. DEMING, *supra*, at 5-18. Among other things, Deming taught that continually managing for quality will result in lower costs over time, but when

organizations instead focus primarily on costs, then over time costs will actually rise and quality will suffer. *Id*. Deming is regarded as something of a hero in Japanese business circles—the highly coveted Deming Prize was created by the Japanese Union of Scientists and Engineers, and he was a key figure in the revitalization of Japan's post-war industry as well as Japan's subsequent acquisition of a reputation for leadership in quality and product innovation. *Id*., at 6. Indeed, Japanese advances in quality management form the basis for modern lean thinking.

If Henry Ford and those who came before him were the progenitors of lean thinking, then it can be fairly said that the Toyota Production System, or simply TPS, is the offspring. Lean Manufacturing and the Toyotoa Production System are essentially one and the same. Toyota, which began its existence in textile manufacturing as the Toyoda Automatic Loom Works, began producing automobiles in the mid-1930's with parts purchased from General Motors.

In 1950, while the company struggled greatly from post-war troubles, Eiji Toyoda, great-nephew of the founder, visited one of Ford's manufacturing plants in Michigan with Taiichi Ohno, Toyota's production manager. Ohno determined that Ford's methods would not work in Japan because the Japanese market was small, yet required production of many models/types of vehicles. So, building on existing thought, Ohno set out to develop a new production system centered on Just In Time manufacturing, Built-In-Quality, and highly motivated people all solidly underpinned by operational stability. *See* LEAN THINKING, *supra*, at 219-246. As with those who had gone before, elimination of waste was a central idea and Ohno identified different types of waste, which are discussed below. *Id.*

3. The Principles Of Lean Thinking.

Lean thinking focuses on developing a *process* that provides more value to the client. This process, however, usually differs between manufacturing and service industries. For example, the customer in a manufacturing environment typically does not experience the process, only the product (or value) made by the process. *See* JAMIE FLINCHBAUGH & ANDY CARLINO, THE HITCHHIKER'S GUIDE TO LEAN—LESSONS FROM THE ROAD (Society of Manufacturing Engineers 2006), at 137. On the contrary, customers in a service environment are usually directly involved with the process and, consequently, value and process are intertwined. *Id.*

Regardless of the industry, lean principles address problems in the business as a process improvement system in order to eliminate waste. Specifically, lean thinking is based on five basic principles:

(1) *value*—understand what the client values;

(2) *value stream*—develop a sequence of actions that create such value for the client;

(3) *flow*—run the sequence without interruption;

(4) *pull*—pull, rather than push, the actions based on the client's actual needs; and

(5) *perfection*—make daily efforts to improve or perform such actions more efficiently.

*See* LEAN THINKING, *supra*, at 16-26. These five lean principles are intended to improve business performance by: "provid[ing] a way to do more and more with less and less—less human effort, less equipment, less time, and less space—while coming closer and closer to providing [clients] with exactly what they want." *Id.* at 15.

### A. Lean Principle One: Value—The Benefit Minus The Cost.

Legal services, much like products, are driven by the client's needs and wants, and are affected by the process(es) implemented to reach the desired results. Clients generally measure legal services based on one criterion: value.

Value is merely benefit minus cost measured by balancing (a) cost—typically billing practices, including rates, costs, expenses, and errors, with (b) satisfaction of case goals, such as budget predictability, risk management, case resolution, and attorney effectiveness. *See* LEGAL PROJECT MANAGEMENT, *supra*, at 25, 92-93. The weight of these factors varies with the client's goals, the complexity and the risk of the case. Indeed, clients have different needs and each client's needs vary from case to case. *See* GUIDE TO LEAN, *supra*, at 137-139. Thus, fundamental to lean thinking is the development of an understanding of that which the client values—that is, *fully understand the client's goals for each case and the client's definition of success*. *See* LEAN THINKING, *supra*, at 16-19.

To effectively serve a client, the impact *each* business process has on the client's goals must be reviewed thoroughly. Moreover, it is vital that each team member, through direct communication, understand the client's goals and the impact each member's actions have on those goals. Utilizing this principle will allow a law firm to customize its processes to offer the client-defined value in each case. In legal services, that means, at a minimum, answering two questions, "how does this case activity consume the client's money and time?" and "how does it advance the client's goals and values?" Keep in mind, from the client's perspective, value is not constant in quantity or form, i.e., money, time, or both. As Franklin stated, in Poor Richard's Almanac:

> Remember that time is money. He that can earn ten shillings a day by his labor and goes abroad or sits idle one-half of that day, though he spends but sixpence during his

> diversion or idleness, ought not to reckon that the one expense; he has really spent, or rather thrown away, five shillings besides.

BENJAMIN FRANKLIN, *supra*, at 239. Moreover, processes may be impacted—that is, consume money or time—by employees of varying levels, including attorneys, paralegals, secretaries, and even persons that have minimal direct involvement with cases, e.g., information technology personnel and vendors or other outside service providers. The impact on resources of the client's employees is similarly important. Time is a precious commodity, and clients must be able to efficiently manage staff time involving the case, along with their other responsibilities to the company.

Most actions in a process can be identified as value added or non-value added. A value added action meets three criteria: the client is willing to pay for it, it improves the service, *and it is done correctly the first time*. On the other hand, a non-value added action—those intended to be eliminated by lean thinking—is purely waste. *See* GUIDE TO LEAN, *supra*, at 14-15; STEVEN B. LEVY, LEGAL PROJECT MANAGEMENT—CONTROL COSTS, MEET SCHEDULES, MANAGE RISKS, AND MAINTAIN SANITY (DayPack Book 2009), at 326-329. Accordingly, an understanding of the ways in which waste manifests itself is essential to delivering value to the client. Muda (waste), mura (unevenness), and muri (overburden) are Japanese words regularly used to describe these non-value added actions.

Muda (waste), by definition, is any activity that consumes resources but creates no value. *See* LEAN THINKING, *supra*, at 15, 350. Lean thinkers have identified many forms of waste, including transport, waiting, overproduction, defect, inventory, motion (or movement), and over processing. *See id*. at 43, 351-52; GUIDE TO LEAN, *supra*, at 11-14. Regular forms of waste found in legal services are over processing, overproduction,

motion, and defect. Of these forms of waste, over processing is often difficult to detect in a litigation environment because it may be confused with "doing more" for the client, or the case. Yet, if these services exceed the client's goals for the legal services without adding value at no cost, they are merely waste. *See* GUIDE TO LEAN, *supra*, at 134-35. By way of example only:

| **WASTE** | **EXAMPLES IN LEGAL SERVICES** |
|---|---|
| Over processing | 1) Inefficient distribution of case information or materials;<br>2) Involvement in unproductive regular internal meetings about the case;<br>3) Lack of continuity within litigation team due to shifting workloads or turnover. |
| Overproduction | 1) Partner doing associate level tasks;<br>2) Too much time being spent on non-critical case task;<br>3) Unnecessary focus on perfection in performance of case development tasks, e.g., pleadings or motions. |
| Motion (Movement) | 1) Inefficient management of files;<br>2) Lack of knowledge management system, i.e., tracking down people with answers;<br>3) Outdated technology or computer systems |
| Defect | 1) Errors in case pleadings or papers;<br>2) Failure to meet case deadlines, client or court imposed;<br>3) Failure to keep client adequately apprised of case development. |

Mura (unevenness), more applicable in the manufacturing industry, is the variation or inconsistency in quality, cost, or delivery in an operation. In legal services, examples of mura involve the excessive reworking and double-checking of other's work, or unnecessary overtime incurred due to time mismanagement. Muri (overburden) is the unnecessary or unreasonable overburdening of people, equipment, or systems by

demands that exceed capacity. Yoshi Tsurumi, author of "American Management Has Missed the Point—The Point Is Management Itself," quotes "one Japanese plant manager who turned an unproductive U.S. factory into a profitable venture in less than three months" as saying:

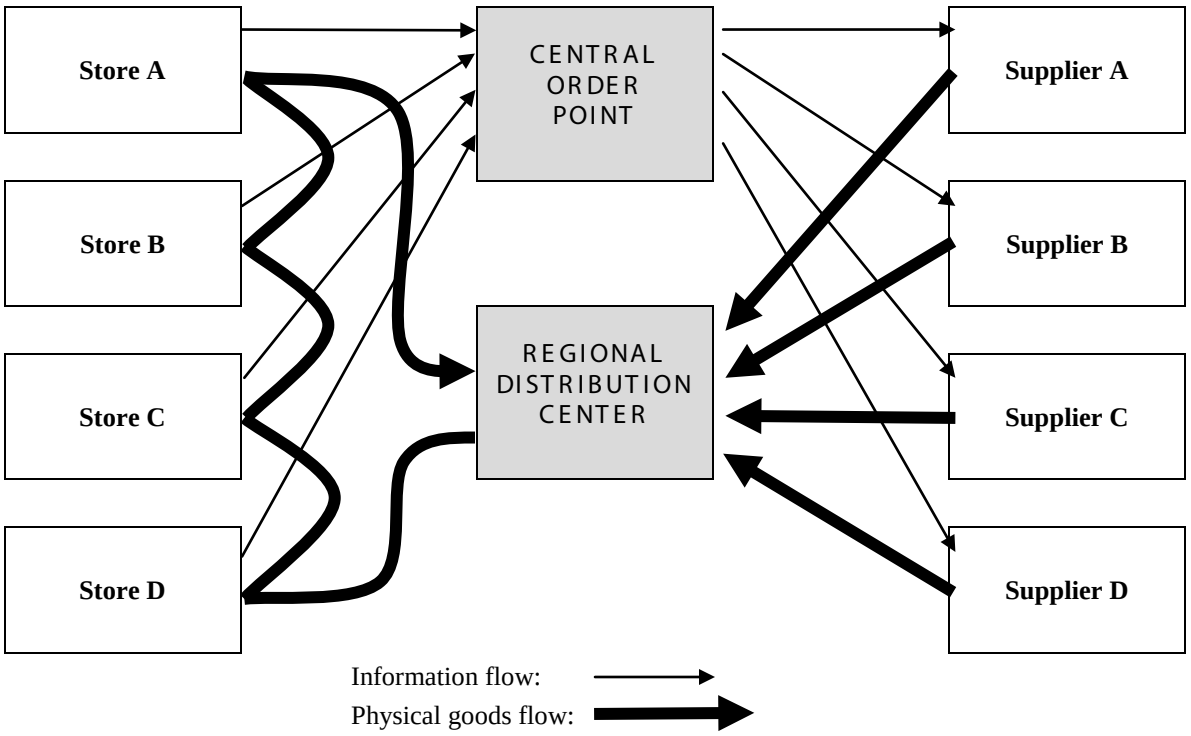
> "It is simple. You treat American workers as human beings with ordinary human needs and values. They react like human beings." Once the superficial, adversarial relationship between managers and workers is eliminated, they are more likely to pull together during difficult times and to defend their common interest in the firm's health.

DR. DEMING, *supra*, at 46. Indeed, a core tenet of lean thinking is respect for people. If a business is asking employees to repeatedly do wasteful or unnecessary tasks, then it is not respectful of employees or the foundation of lean thinking.

**B.** Lean Principle Two: Value Stream—Build A Map.

The second lean principle is building the value stream. Value stream is the set of all the specific actions required to bring a service through the critical management tasks of the business, i.e., problem solving, information management, and transformation. *See* LEAN THINKING, *supra*, at 19-21, 37-49. Manufacturing organizations or those that sell goods often create an actual map. An exemplar value stream map created by the British grocery chain Tesco concerning its reorder system follows:

*Figure 1.*




*See* LEAN THINKING, *supra*, at 46.

Such a map may be of limited utility in a service business; however, one example where a map might be useful is the graphical representation of standardized practices for handling and responding to of discovery requests.

In lean manufacturing, systems are designed to make problems visible and enable daily problem solving. *See* GUIDE TO LEAN, *supra*, at 135. As problems rise to the surface on a daily basis, an organization can solve them, thereby making its system stronger one problem at a time. *Id*. In a service organization, problems are less visible because time, as compared to inventory in manufacturing, is not a tangible element. Therefore, lean service providers should consider developing a value stream map that encourages workers to identify and solve problems as they occur. *Id*.

A value stream map in legal services could also describe the organization of the responsibilities of the attorneys, paralegals and support staff in connection with the

handling a case. This will allow firms to streamline the process by confirming that the right people are doing the right work. For example, a senior or supervising attorney can focus on strategy while junior attorneys and support staff are handling particular steps or tasks. One way to do this would involve a detailed matrix or one that is basic, such as:

*Figure 2.*

| *Jane Doe et al. v. Tommy Corporation et al.*, Case No. 80-20 | | | | | |
|---|---|---|---|---|---|
| | Client Manager | Senior Attorney | Junior Attorney | Paralegal | Expert or Consultant |
| Strategy | A | R | C | I | I |
| Pleading | I | A | R | I | I |
| Discovery | I | A | R | R | C |
| Motion | I | A | R | I | |
| Trial | A | R | R | R | C |
| Appeal | A | R | R | I | |

A = Accountable, or the person ultimately accountable to the client.
R = Responsible, or the people performing the core work.
C = Consulted, or the people whose opinions you seek, usually actively.
I = Informed, or the people you keep up to date on progress, decisions, etc.

*See* LEGAL PROJECT MANAGEMENT, *supra*, at 244-45.

Again, design the matrix to fit the firm's and your client's specific needs. Then, firms can consider bringing the value stream map to the client to demonstrate the case efficiency, and to disclose what the client should expect during the case. The client can also provide input on the value stream map to match the client's goals for the case. Indeed, it helps the firm and client understand the expected handling and budget of the case.

Perhaps a value stream map is not feasible or appropriate in cases of low risk and/or complexity. On the other hand, in complex cases or repetitive cases, it could be very valuable. It could ensure that everyone on the team understands their role and

responsibility and the mechanism of the processes, particularly in protracted litigation where uncontrollable personnel changes may take place.

Regardless, whether a value stream map is created, the root cause of waste in the processes must be identified. Root cause analysis begins by: defining the problem (or identifying the cause), gathering evidence, identifying which causes can actually change, identifying solutions that prevent recurrence without causing other problems, and implementing and measuring the changes. Similar to the Venetians rethinking of the Roman practice of ship building, a law firm should rethink the practices of the firm that are deeply rooted through long-standing practice (and likely never recognized as waste) merely because "that is how it has been done in the past."

### C. Lean Principle Four: Flow—Course of Action Through The Map.

Flow is the progressive achievement of tasks along the value stream so that a service proceeds from beginning to end with no defects or problems. *See* LEAN THINKING, *supra*, at 21-24, 50-66. Direct observation of the workplace in a service business is important. This can be a challenging lean skill to develop, however, because wasteful practices can so easily become entrenched. Without direct observation, though, it is extremely difficult to appreciate the affect that various activities and processes have on the quality and timeliness of services to the client. *See* GUIDE TO LEAN, *supra*, at 136. As with Frank Gilbreath's observations of the brick masons, the perspective of an outsider can sometimes aid in the identification of problems, so law firms should listen carefully to clients, and others who may have unique perspectives, for ideas that shed light on inefficiencies and wasteful practices. As a corollary, individual firm lawyers cannot focus solely on their trial practice, abdicating all firm management responsibility

to the management committee. Each lawyer needs to engage in some level of lean thinking to maximize value to the firm's clients.

A service environment differs from a manufacturing environment in that manufacturing environments lend themselves to direct observation, whereas service environments do not. *See* GUIDE TO LEAN, *supra*, at 136-37. A manufacturing process goes in motion "like a fine tuned machine" as the people, equipment, and material move through the assembly line. Yet, in legal services the processes, i.e., research and evaluation, investigation, discovery, trial preparation, etc. are much harder to directly observe. *Id*. at 137. Mapping, as discussed above, may help in accomplishing this observation; however, it may be necessary to develop both an activity map and a process map to capture the different tracks in a service business. As illustrated above in *Figure 2*, an activity map captures people's actions. A process map, as shown in *Figure 1*, captures what happens in a process. As an organization captures current practices, it needs to observe/assess how it designs and executes activities, connections, and process flows. *Id*.

A helpful (and common sense) tool to increase flow through the value stream map is to build common services through the five "S" building blocks: sort, straighten, scrub, systematize, and standardize. *Sort* is organization across the workplace. From sorting office materials to computer desktops and file systems, organization is fundamental to providing your client quality and timely services. Next, *straighten* the tools of service by designating central locations to access these tools of service. This is not limited to pencils and paperclips, rather, and more importantly, it includes email systems, file storage and retrieval, databases, and library resources too. The tools should be arranged in an easy to decipher and consistent manner across the workplace. Then, *scrub* and *systematize*—

regularly maintain the tools of service in an orderly and clean manner. Designate a regular schedule whereby the work environment, both private and common areas, are evaluated and maintained. Finally, *standardize* the maintenance processes of the workplace. This means using discipline and processes to ensure that the regular maintenance is performing to standardized and acceptable levels.

### D. Lean Principle Four: Pull—Pulling Value Across The Map

Although seemingly limited in application to legal services, pull is a critical component of lean manufacturing. James Womack and Daniel Jones, in *Lean Thinking*, define "pull" in its simplest terms to mean "that no one upstream should produce a ... service until the [client] downstream asks for it." LEAN THINKING, *supra*, at 67. This principle, "take one, make one," is most recognizable in lean manufacturing as it relates to inventory. *Id*. at 67-89. For example, product warehouses normally work off the batch-and-queue system or "the mass-production practice of making large lots of a part and then sending the batch to wait in the queue before the next operation in the production process." *Id*.

However, in lean businesses, the customers *pulls* the product from the business as needed rather than pushing products onto the customer. This decreases the massive inventories that create more waste and, ultimately, allows the business to implement a single-piece flow system. To create *pull*, lean businesses utilize level scheduling to keep the system operating at a steady and achievable pace. Level scheduling, at its most basic, occurs as the customer consumes a service. In response, the rest of the system is triggered to replenish what the client has used. *See* LEAN THINKING, *supra*, at 74-81. Thus, the customer's demand drives the service.

### E. Lean Principle Five: Perfection—Continue To Eliminate Waste

Lean thinking in legal services will likely be met with great resistance. However, lean thinking is about creating improvement—big or small—in the pursuit of perfection. Again, remember the proverb of Poor Richard in Necessary Hints to Those That Would Be Rich, that small savings add up over time. BENJAMIN FRANKLIN, *supra*, at 238. Lean thinkers define perfection as the complete elimination of waste so that all activities along a value stream create value. *See* LEAN THINKING, *supra*, at 25-26, 90-98. Even in the face of substantial resistance, small changes may be made in everyday behavior to create the right lean environment and deliver results to your clients. *Id.* One way to refine over time is to apply the Perato Principle as described by Juran:

1. Make a *written* list of all that stands "between us and making this change."
2. Arrange this list in *order of importance*.
3. Identify the *vital few* (the items that account for the bulk of any effect) as projects to be dealt with individually.
4. Identify the *useful many* (everything else that is not the vital few) as things to be dealt with as a class.

*See* MANAGERIAL BREAKTHROUGH, *supra*, at 48; *see also* LIFETIME OF INFLUENCE, *supra*, at 143.

If feasible, clients should have an active role in the pursuit of perfection. *See* GUIDE TO LEAN, *supra*, at 139-40. This will allow the client to experience the commitment to lean thinking in the workplace and to appreciate the value created for the client. It may also be beneficial to have an external viewpoint, in particular, that of your client. However, exposing too much of the inner workings of the business may be off-putting to client and, consequently, they may not wait for improvements. *See id.*, at 139.

Therefore, it is important to carefully balance these factors as the law firm takes steps towards maximizing value.

## 4. Conclusion.

In legal services, as in other businesses, the foundation of success is in the pursuit of client satisfaction. Lean thinking arguably provides one pathway to such success in today's litigation environment. At a minimum, the core tenet of lean thinking—that is, the increase in value by elimination of waste—may be implemented to create a living lean model in the law firm workplace. This will provide the law firm an opportunity to remove complexity in the workplace and reduce waste wherever possible. In the end, it is about delivering quality and efficient services to the client—that is, to add value.

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**"Would You Mind Explaining This? The Cultural Clash in International Litigation – What Transatlantic Clients Expect From Their Lawyers"**

**Sponsored by Property Insurance Section, Reinsurance and Excess Section, Insurance Industry Section, Technology and E-Commerce Sections**
**July 28, 2010**

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Introduction

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While Thomas Friedman has tried to convince us that in this global economy "the world is flat", litigation counsel, local counsel and insurer litigants on both sides of the Atlantic may beg to differ. Substantive and procedural practices in the U.S. & Europe and between common law & civil law jurisdictions differ in a number of respects, and it is incumbent upon counsel representing foreign insurers to not only educate clients, but also manage expectations and cost expectations. According to one study, U.S. litigation costs four times that of other OECD countries.[1] Some of the differences which increase U.S. costs are:

- U.S. emphasis on consumerism, private litigation, consumer litigation and class actions;
- Common Law jury system v. civil law judge system;
- U.S. discovery procedures which permit wide ranging discovery of records and unlimited; incursions into ESI (electronically stored material) v. limited discovery vehicles in European civil actions;
- stringent European privacy rules for the collection storage and disclosure of private communications and the perception in Europe of limited privacy protections in the US;
- differences in attorney-client and work product privilege issues;
- the risks of punitive damages in the US;
- the lack of loser pays rules in the US;
- the common law emphasis and development of mediation and ADR in U.S. and U.K. vs. the relative unfamiliarity with mediation and ADR to civil code litigants and counsel;
- broader obligations in the U.S. to provide a defense in liability actions.

In Munich, the roundtable will highlight a few of these issues, and this paper highlights a few of the issues which we may not get to delve into in Munich.

In the United States, the shift to consumerism was foreshadowed by Franklin Roosevelt in 1932, when he imagined a future belonging to the consumer, not the producer.[2] From a litigation perspective, this culture has resulted in the proliferation of private actions, bad faith and punitive damages, and more recently an explosion of class actions in insurance litigation. European carriers have expressed concern that this attitude results in substantial deployment of its resources

[1] Tillinghast Towers- Perrin, 2006 Update on U.S. Tort Costs Trends 3 (2006).
[2] Emerging Trends in International Litigation: Class Actions, Litigation Funding and Punitive Damages, Gregory L. Fowler. Mark Shelley, Silvia Kim, 3 Dispute Resolution International 2 101-123 (October 2009), citing Lawrence Glickman "A Living Wage: American Workers and the Making of Consumer Society" 156 (1997).

to address service and legal issues. [3] *Melissa D'Alelio and Christopher Kaiser outline this legacy of aggregate litigation and punitive damages.*

As you all know, U.S. discovery is broad and far reaching, endless, some would say. Litigants have the right to mandatory disclosure of relevant material, in the federal courts, including the disclosure of location and categories of all relevant documents, as well as far-reaching discovery vehicles permitted by federal and state Rules of Civil Procedure, allowing requests for sometimes vaguely identified and far-reaching areas of inquiry, between the parties. Moreover, the U.S. Rules permit easy access to third party discovery through the subpoena process. Depositions and questioning of witnesses is common and even lower seniority employees may be deposed. Due to the expansion of the definition of "documents" to include ESI (electronically stored information) the scope, and related cost of discovery has expanded even more, and the U.S. practice of obligating parties to implement litigation holds, has met resistance and disbelief in Europe. *The article by Lisa LeNay address some of the practical and cost issues which arise in managing this proliferation of documents and data in litigation.* Additionally, these obligations fly in the face of many European notions and regulations related to the protection of private information. At least in the insurance context, privacy right have developed to assure a minimal level of privacy with respect to records and documents. *The article by Meloney Perry outlines Privacy Issues in Claims Handling.*

By contrast, in Europe, litigants generally have the right to only request limited document and by specifically identifying them, and justifying their relevance. This is in accord with the European emphasis on and protections of privacy and confidentiality. *Peter Schwartz and Christian Lang provide insight into the discovery permitted in the U.K. and Switzerland, respectively.*

Finally, *Steve Snyder's Power Point* presents a general comparison of U.S. and European litigation, as well as a comparison of some of the differing obligations of insurers regarding the duty to defend between the U.S. and European jurisdictions.

[3] Id. at 105.

## TABLE OF CONTENTS

**An Introduction to the Quintessentially American "Class Action"**

Melissa M. D'Alelio, Esq.[4]

## I. Introduction

People all over the world are eagerly turning to their court systems, seeking redress for mass injuries caused by a host of different failures involving varied areas of law such as defective products, environmental exposure to toxins, violations of antitrust, securities, consumer protection laws, and civil and human rights abuses.[5] A procedural mechanism being considered worldwide, through which to address such mass lawsuits, is the class or aggregate action. Many countries have recently enacted class action laws, or are actively considering doing so, including Denmark, Italy, France, the Netherlands, Australia, Poland, Germany, Argentina, Brazil, and Mexico.[6]

The "American class action" has been around for decades, and continues to evolve as a device through which to address mass injuries. Simply put, a class action allows plaintiffs to pool their claims and bring an action even when no one single plaintiff alone has been injured so substantially that it would be economically feasible to litigate a claim individually. Thus, for the purpose of efficiency, the numerous plaintiffs are certified as a class and only a representative of the class actually conducts litigation in court, while the effects of the judgment apply to the whole class.

It should, therefore, come as no surprise that as other countries consider adopting the "class action," or some other related form of aggregate litigation, a debate has erupted around the benefits and drawbacks of the litigation device both in the United States and abroad. The purpose of this article, however, is not to explore that controversy. Indeed, several commentators have done so and continue to do so, and we commend those articles to you for your review.[7] The purpose is merely to explain how the American class action works, and, therefore, to provide those unfamiliar with the device a framework on which to build their own opinions.

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[5] *See, generally*, Deborah Hensler, *The Globalization of Class Actions: An Overview*, 622 Annals 7, 7 (March 2009).

[6] Gregory Fowler, Marc Shelly, and Silvia Kim, *Emerging Trends in International Litigation: Class Actions, Litigation Funding, and Punitive Damages*, Dispute Resolution International, Vol. 3. No. 2, 109-114 (October 2009).

[7] *See, for e.g., Id.* and Samuel Issacharoff and Geoffrey P. Miller, *Will Aggregate Litigation Come to Europe?*, New York School of Law, New York University Law and Economics Working Papers, (2008).

## II. Class Certification

Class certification is at the core of the American class action. Certification is the first threshold that a class of plaintiffs faces. Rule 23(a) of the Federal Rules of Civil Procedure ("Rule 23") establishes certain prerequisites for initiating a class action and, in this way, attempts to weed out baseless claims. For a class action to be certified, the class must meet all four of the Rule 23(a) requirements: numerosity, commonality, typicality, and adequacy of representation. In other words, members of the class can sue on behalf of all only if: (1) "the class is so numerous that joinder of all members is impracticable," (numerosity); (2) "there are questions of law or fact common to the class," (commonality); (3) "the claims or defenses of the representative parties are typical of the claims or defenses of the class," (typicality); and (4) "the representative parties will fairly and adequately protect the interests of the class," (adequacy of representation). These conditions have to be satisfied during the entire course of the litigation.

Rule 23(b) sets forth the conditions that have to be satisfied so that the suit is maintained as a class action. In addition to meeting the Rule 23(a) prerequisites, at least one of three additional conditions has to be met. The most common of these conditions is the third—which is commonly known as the "predominance and superiority" requirement. The court must find that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Rule 23(b)(3) notes that the matters pertinent to these findings include: "the class members' interests in individually controlling the prosecution or defense of separate actions; the extent and nature of any litigation concerning the controversy already begun by or against class members; the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and the likely difficulties in managing a class action."

The certification process is trying and time consuming. Given its significance, this is often the most hotly litigated stage in the class action process. At this stage, the court has the ability to decide not only if the named plaintiff can adequately represent the class, but also whether the case can proceed as a class action at all. By certifying a class, the judge establishes who will be bound by the final judgment and who is entitled to receive notice of the judgment. By refusing to certify the class, the judge may cause both the class action to be dropped and the plaintiffs to abandon their individual claims. This is perhaps most significant where the individual claims are small and it is only in the aggregate that the matter becomes worth litigating. Furthermore, many defendants view the certification stage as the penultimate stage in the litigation. After all, as soon as the class is certified, they must start paying—either in the form of litigation fees or

settlement offers. Given the enormous cost of litigation itself, it may often be in the defendants' interest to settle a class action, regardless of its merits.[8]

## III. Judicial Approval of Settlement and Attorney's Fees

Besides class certification, other features of paramount importance in American class actions include mandatory judicial approval of settlements under Rule 23(e), and of attorney's fees under Rule 23(h).

Judicial approval of the settlement or voluntary dismissal of a class action is mandated. This is considered necessary because of the effects of a class action whereby, on one hand, class actions are efficient because they permit aggregating the costs and resources of a multitude of plaintiffs with similar claims; nonetheless, on the other hand, once the controversy is adjudicated, its outcome binds all the class members who have failed to opt out and subsequent individual actions by class members are barred. Given this effect, many defendants find class actions the most efficient and cost-effective device to deal with mass-tort actions. The defendant can, through a class action, consolidate its liabilities towards the class members and get rid of them altogether by entering into a single settlement. This feature, however, might permit opportunities for substantial distortion. For example, if a class is not sufficiently cohesive or lacks adequate legal representation, the defendant can leverage on conflicts of interest existing within the class or between the class and its legal counsel to extort settlement terms. Some claim class actions present an "agency problem" since, once a class has been certified, it often becomes difficult for plaintiffs to monitor the strategy and behavior of their legal counsel. Rule 23(h) attempts to address these concerns by providing that the court may approve a settlement only after a hearing and upon a finding that the proposed settlement is fair, reasonable, and adequate.

Judicial approval is also required in order for the class' attorney to be compensated. Most often, class attorneys are compensated based on a contingency fee arrangement, whereby the attorney receives a certain percentage of the amount the class ultimately recovers. Absent judicial review under Rule 23(h), rich settlement might be ineffective to class members if the largest slice of the damages awarded dissolves in attorney's fees.

## IV. Considering Aversion at Home and Abroad

The class action undoubtedly serves an important function within the legal arena. As one commentator explains, "when the plaintiff is poor, marginalized, legally incompetent, ignorant of legal rights, or unable to assert rights for fear of sanctions or otherwise, and these disabilities are shared by other similarly situated, the class action may be the only effective means to obtain

[8] Katie Melnick, *In Defense of the Class Action Lawsuit: An Examination of the Implicit Advantages and a Response to Common Criticisms*, 22 St. John's J.L. Comm. 755, 779-783 (Winter 2008).

judicial relief."[9] In allowing such access to the courts, the class action simultaneously ensures that businesses will be held accountable for the injuries they inflict. From the defendants' perspective, the class action is somewhat beneficial, as it provides an efficient and cost-effective means by which to dispense with numerous actions though a single binding judgment.

Aversion abroad to the American class action centers around the same features of the class action that make it controversial at home, such as their opt-out nature, the role of class counsel and counsel's relationship to the class members, and the contingency fee arrangement that frequently funds class actions. There is a definite tension between principles of finality in settlement and the scope of agency power of the class representative—and of class counsel. As one commentator explained, the class action is a "state-created mechanism for subsidizing the litigation of claims that could not otherwise be justified. . . . The state in effect designates the agent, underwrites the cost of representation by removing the transactional barrier of having to contract with each client, and allows for a state-enforced taxation of the joint gains to compensate the agent."[10]

Furthermore, the role of the attorney in a class action is met with some trepidation and suspicion. The lawyer often solicits class members who may or may not know that they have been wronged until approached by counsel. Moreover, within the class action context, counsel is charged with representing an amorphous class as a whole, not an individual plaintiff. Additionally, counsel often represents the class on a contingency fee basis, which potentially pits counsels' interests against the interests of his/her own clients. Contingency fees in United States class actions generally range from 30-40% of the award to the class.[11] Contingency fee arrangements have been described by some plaintiffs' lawyers as the 'keys to the courthouse,' but opponents have asserted that such fees encourage speculative litigation allowing lawyers to receive a windfall while their clients receive little by way of compensation. It is this practice of contingency fees that seems most unacceptable to those abroad. Indeed, contingent and proportional fees are prohibited in many civil law systems, though now England, Wales, Italy, Sweden, Argentina, and Brazil have allowed for contingency fees to some degree.[12]

[9] *Id*. at 789-91.
[10] Samuel Issacharoff, Geoffrey Miller, *Will Aggregate Litigation Come to Europe?* N.Y.U. School of Law, New York University Law and Economics, 8 (2008).
[11] Gregory Fowler, Marc Shelly, and Silvia Kim, *Emerging Trends in International Litigation: Class Actions, Litigation Funding, and Punitive Damages*, Dispute Resolution International, Vol. 3. No. 2, 118 (October 2009).
[12] *Id*. at 118-119.

## V. Conclusion

Interesting developments are in progress globally around the concept of aggregate litigation. The international debate around aggregate litigation often references the negative and positive characteristics of the American class action. Hopefully, this article provides those who wish to explore this global development with a basic understanding of the American class action and the concerns explored in this global debate.

Aggregate litigation certainly has the potential to become an efficient device in any country's legal climate. Before this happens, however, some critical questions need to be addressed. These questions are not merely legal, but political, and require broader and nation-specific discussions about standing, legal access, agency, enforcement, and authority. As one scholar simply put it: "Who will organize, fund, and lead the collective efforts?"[13] Obviously, such decisions will embody larger determinations based upon a country's unique culture, ethical and societal attitudes, legal and political values, and approach to the idea of collective rights and their protection.

[13] Samuel Issacharoff and Geoffrey P. Miller, *Will Aggregate Litigation Come to Europe?*, New York School of Law, New York University Law and Economics Working Papers, 28 (2008).

# A Brief Primer on Punitive Damages in the United States

CHRISTOPHER J. KAISER[14]

## Introduction

In the United States, the power of a jury to award punitive damages in a civil case is derived from the English common law. In general, punitive damages, also called exemplary damages, are awarded for socially deplorable conduct, such as fraud or malicious, reckless, or abusive action. Punitive damages are designed to punish, not to compensate. Punitive damages are discretionary and are never given as a matter of right.

By contrast, civil law jurisdictions, which include most countries in the European Union, limit recovery of damages in private actions to compensatory damages. In these countries, punitive damages are prohibited in private actions as a form of punishment that is appropriate only in criminal proceedings.

In recent decades, courts and legislative bodies in United States, at both the federal and State governmental levels, have imposed restrictions upon juries' discretion to award punitive damages. The United States Supreme Court has held that punitive damages are subject to the Due Process clause of the United States Constitution, imposing standards of proportionality and limitations on the conduct for which punitive damages may be awarded. The United States Congress and various State legislatures have enacted statutes that limit punitive damages through absolute dollar caps or ratio limitations.

Statutes and decisional law often both play a role in the determination of the amount of an award of punitive damages and the review of such award for excessiveness. For example, in Florida, the statutory cause of action for an insurer's "bad faith" toward its insured authorizes punitive damages, in addition to compensatory damages, when the insurer's conduct is "malicious, wanton, and malicious" or in "reckless disregard for the rights" of the insured or a beneficiary of an insurance contract. Fla. Stat. § 624.155(5). If punitive damages are awarded, the amount is then subject to a three-to-one ratio of punitive-to-compensatory damages and an absolute dollar cap of $500,000, or a four-to-one ratio and a cap of $2 million if the conduct was "motivated solely by unreasonable financial gain." Fla. Stat. § 768.73(1)(a)-(b). There is no statutory limitation on punitive damages where there is "a specific intent to harm the claimant" and the "conduct did in fact harm the claimant." Fla. Stat. § 768.73(c). Finally, any punitive

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damages award must comport with the requirements of Due Process under the United States Constitution as set forth by the Supreme Court.

**Due Process Limitations on Punitive Damages Awards**

Under the Due Process clause of the United States Constitution, no person shall be deprived of "life, liberty, or property, without due process of law." U.S. Const. Amend. 14. The United States Supreme Court first reviewed a punitive damages award for excessiveness under the Due Process clause in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991), in which an insurance company's agent misappropriated policyholder's premiums, resulting in cancellation of health insurance policies. The Alabama jury awarded $840,000 in punitive damages and $200,000 in compensatory damages, resulting in a more than four-to-one ratio of punitive-to-compensatory damages. The Supreme Court held that the Due Process clause required some degree of proportionality in the ratio of punitive-to-compensatory damages, but it concluded it could not "draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case." *Id.* at 18. Although the Court was concerned that the amount of punitive damages far exceeded the fine that could be imposed under State insurance statutes, the Court nevertheless held that the punitive damages award was constitutional chiefly because the jury had been properly instructed to consider the gravity of the insurer's wrongdoing and because the award had been reviewed for excessiveness by the Alabama appellate courts under State law standards. *Id.* at 18-24.

Two years later, in *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443 (1993), an action for slander of title to rights to oil and gas developments resulted in an award by a West Virginia jury of $10 million in punitive damages and $19,000 in compensatory damages, resulting in a 526-to-one ratio of punitive-to-compensatory damages. The Court again refused to draw a mathematical bright line to determine whether a punitive damages award was so "grossly excessive" as to violate the Due Process clause, but held that a general concern for reasonableness was proper. *Id.* at 453-58. Despite "the dramatic disparity between the actual damages and the punitive award," the Court held that the punitive damages award was reasonable in light of the evidence that the defendant's conduct was "malicious and fraudulent" and that "that the scheme employed in this case was part of a larger pattern of fraud, trickery and deceit." *Id.* at 462.

The Supreme Court first struck down a punitive damages award as "grossly excessive" in *BMW of North America v. Gore*, 517 U.S. 559 (1996). An Alabama plaintiff sued automobile manufacturer BMW for fraud for failing to disclose that the new BMW he had purchased had been repainted for minor damage. At trial, BMW acknowledged that it followed a nationwide policy of not advising its dealers or customers of predelivery damage to new cars when the cost of repair did not exceed 3 percent of the car's suggested retail price. The plaintiff was awarded $2 million in punitive damages and $4,000 in compensatory damages, resulting in a 500-to-one ratio of punitive-to-compensatory damages. The Supreme Court held that the $2 million punitive damages award was "grossly excessive" in part because it appeared that BMW was being punished for conduct occurring outside of Alabama, thus exceeding Alabama's legitimate State interest in protecting its own citizens and economy. *Id.* at 572. In addition, the Supreme Court

articulated three "guideposts" or factors to aid courts in reviewing punitive damages awards for excessiveness:

(1) the reprehensibility of the conduct;

(2) the disparity in the ratio of punitive damages to the compensatory damages; and
(3) the difference between the punitive damages and the remedy authorized by or imposed in comparable cases

*Id.* at 574-75. In the case of BMW, each of those factors weighed in favor of holding the $2 million punitive damages award grossly excessive because (1) the harm caused by BMW's conduct was purely economic and limited; (2) there was a great disparity the 500-to-one ratio of punitive-to-compensatory damages; and (3) the punitive damages award was substantially greater than Alabama's applicable $ 2,000 fine and the penalties imposed in other States for similar malfeasance. *Id.* at 575-86.

In *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 436 (2001), the Supreme Court held that federal appellate courts reviewing punitive damages awards for constitutional excessiveness are to apply a *de novo* standard of review, that is, without deference to the determinations made in lower courts in the case. This represents a significant limitation on a jury's discretion to award punitive damages, as federal appellate courts are free to independently assess the reprehensibility of the defendant's conduct in addition to the other *BMW* factors.

The Supreme Court came close imposing a mathematical bright-line test as to the ratio of punitive-to-compensatory damages in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003). Following a lethal car accident in Utah, the automobile insurer refused to settle the civil case within the policy's limits, thereby exposing the insured to personal liability. The insured sued State Farm for bad faith, fraud, and intentional infliction of emotional distress. The insured was awarded $145 million in punitive damages and $1 million in compensatory damages. Reviewing the punitive damages award under the de novo standard of review and according to the three *BMW* factors, the Supreme Court held that the 145-to-one punitive-to-compensatory ratio violated due process. *Id.* at 418. Clarifying the second *BWM* factor, the Supreme Court explained that "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages ... will satisfy due process." *Id.* at 425. Although the Court disavowed imposing a mathematical bright-line test of proportionality, the Court stated that as general rule in the vast majority of case, the punitive-to-compensatory damages ratio should be less than or equal to nine-to-one. *Id.*

Two other recent cases are significant. In *Philip Morris USA v. Williams*, 549 U.S. 346 (2007), the Supreme Court struck down an Oregon $32 million punitive damages award against a cigarette manufacturer (in a 152-to-one punitive-to-compensatory damages ratio), because the jury improperly considered harm to nonparties. Although the Oregon Supreme Court had ruled that the single-digit ratio rule of *Campbell* did not apply to State Farm's egregious conduct, the United States Supreme Court declined to address the issue. In case involving maritime law, not the Due Process clause, the Supreme Court in *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605

(2008), opined that a one-to-one ratio of punitive-to-compensatory damages is a "fair upper limit" in maritime cases involving reckless behavior (specifically, the infamous *Exxon Valdez* oil spill). Although *Baker* was not decided on constitutional grounds, it continued the trend of the judicial reigning in of excessive punitive damages awards.

Taken together, *BMW* and *Campbell* are the leading cases on the Due Process limitations on punitive damages awards, setting forth the factors to determine excessiveness and a general rule of a single-digit ratio between punitive and compensatory damages. The battleground between plaintiffs and defendants in subsequent cases is often whether the defendant's conduct is sufficiently "particularly egregious" to justify a greater than single-digit ratio of punitive-to-compensatory damages as seen in *TXO*, which may now be viewed as an exception to the general rule of *Campbell*. For example, in a very recent Florida case, a defamation suit resulted in a verdict of zero compensatory damages and $5 million in punitive damages. *Lawnwood Medical Center, Inc. v. Sadow*, 35 Fla. L. Weekly D655, 2010 Fla. App. LEXIS 3813 (Fla. 4th DCA Mar. 24, 2010), *review denied*, 2010 Fla. LEXIS 673 (Fla. Apr. 27, 2010). The Florida intermediate appellate court, reviewing the punitive damages award on federal Due Process grounds (probably because the cause of action arose before the statutory caps on punitive damages were enacted), affirmed the award. The *Lawnwood* court emphasized that neither *BMW* nor *Campbell* imposed a mathematical bright-line test for constitutional excessiveness, and that *Campbell* noted that a greater than single-digit ratio of punitive-to-compensatory damages "may comport with due process where a particularly egregious act has resulted in only a small amount of economic damages." *Id.* at *36 (quoting *Campbell*, 538 U.S. at 425). The *Lawnwood* court affirmed the award on the authority of *TXO*. The Florida Supreme Court declined to reviewed lower appellate court's decision, and the defendant in that case may petition the United States Supreme Court for review.

From the insurance defense perspective, it should be noted that *TXO* and *Lawnwood* involved the intentional torts of slander of title and slander *per se*, respectively. By contrast, *Campbell* involved a claim of insurer bad faith and may be argued as controlling authority for a rule of a single-digit ratio of punitive-to-compensatory damages in that context.

**Other Judicial and Statutory Limitations on Punitive Damages Awards**

Apart from Due Process considerations, there other limitations, both procedural and substantive, on a jury's discretion to award punitive damages. In most States, a heightened "clear and convincing evidence" standard of proof is required for the imposition of punitive damages, in contrast with the "preponderance of the evidence" standard required to determine the underlying liability. An addition, it is generally accepted that punitive damages should not bankrupt a defendant, and for that reason evidence of the defendant's financial worth is permitted. A small number of States, such as New Hampshire, require express statutory authorization for punitive damages and do not recognize punitive damages as part of the common law. *See Crowley v. Global Realty, Inc.*, 474 A.2d 1056, 1058 (N.H. 1984).

In recent decades, the majority of States have placed statutory caps on punitive damages awards. For example, in addition to Florida's caps noted above, a New Jersey statute specifies that "no defendant shall be liable for punitive damages in any action in an amount in excess of

five times the liability of that defendant for compensatory damages or $350,000, whichever is greater." N.J. Stat. § 2A:15-5.14. Virginia caps all punitive damages awards at $350,000. Va. Code § 8.01-38.1. Georgia similarly caps most punitive damages awards at $250,000. Ga. Code § 51-12-5.1(g). This is by no means an exhaustive list, and statutory law in each State should be consulted for caps and other limitations on punitive damages awards.

The United States Congress has also enacted limitations on punitive damages in narrowly targeted areas. For example, while the Y2K scare was looming, Congress limited punitive damages to the lesser of three times the compensatory damages or $250,000 in any Y2K action. 15 U.S.C § 6604(b)(1). The Civil Rights Act also caps punitive damages subject to a sliding scale based on the number of employees who work for the non-complying employer. 42 U.S.C. § 1981a(b)(3)(A)-(D). In general, Congress has been less active in this area than State legislatures, but has continued the trend in limiting punitive damages awards.

## Conclusion

While the power of juries to in civil cases to punish malicious and egregious conduct remains firmly entrenched, in recent decades Due Process considerations and cap statutes have placed limitations on the amount of punitive damages awarded. The trend is toward greater predictability in the potential range of a defendant's exposure to punitive damages.

## U.S. Discovery Issues

## PRACTICAL CONSIDERATIONS IN HIRING AN ELECTRONIC DATABASE HOST

Lisa M. Le Nay

When faced with a claim or litigation involving the production of literally millions of documents, the retention of an electronic database host can be an essential tool from both the perspective of a plaintiff and a defendant. As many of you are well aware, investigating and litigating in this electronic era has proved daunting for some insureds, insurance companies, adjusters and attorneys given the sheer volume of data and information that is electronically stored. While an insured may have high expectations as to an early coverage determination, it may be overwhelming to digest critical documentation and/or information in a short period of time. During litigation, it is often difficult, if not impossible, to locate the proverbial "smoking gun" which is buried within millions of pages of documents. In these circumstances, the assistance of database technology can be most effective. This is particularly true for claims and/or litigation that involve parties and witnesses in different parts of the world. However, there are certain critical considerations that must be taken into account.

This author first discovered the need for such assistance in handling a claim wherein 19 million pages of documents were produced by the insured during the claim stage on three separate hard drives. None of the information was capable of being searched by subject, author, key dates or other criteria. For good measure, the third-party witnesses starting producing several million pages of documents each as well. It became abundantly clear that the three insurance carriers involved in the claim (and ultimate litigation) needed the expertise of an entity involved in data management. After four months of exploring our options, the retention of such an entity, the filing of a bad faith action and utilizing such technology throughout litigation until the eve of trial, counsel walked away with several "take home" points in selecting, retaining and using an internet-based document depository.[15] The following is a critical list of considerations in selecting an entity to host a document depository on the internet.

### 1. WHAT CONSIDERATIONS SHOULD BE GIVEN IN SELECTING A HOST?

A. What type of computer application or platform does the host utilize?

- Is it user friendly?
- What type of software and version of software is needed?
- Will your firm have to make a large investment in upgrading its software or hardware? Who bears that cost?

[15] A "White Paper" that was prepared by Don Swanson of Five Star Legal and Compliance Systems, Inc. in December of 2009 after the conclusion of a claim involving Enron Corporation in which the use of an electronic depository was utilized by the co-defendants is attached hereto.

- What is the retrieval capability?

- How are searches conducted? (by key word or ?)

B. What experience does the potential host have?

- What is the largest volume of data they have handled?

- Any international experience? In this regard, do they have internationally-based offices that can also load data?

C. What is the anticipated cost?

- Do they charge by gigabyte or is it a flat-rate? (Note: Usually, this is a monthly fee which increases as more data is added to the database.)

- At a certain level of volume/content, do you get a price-break?

- How often does the host reevaluate the price?

D. Inquire as to the host's servers.

- How many back-up servers do they have and where are they located?

- Type of servers

- In particular, are the servers located in an area which experiences frequent blackouts due to weather or other natural catastrophes? (i.e. Florida, Texas, etc.)

E. Host a potential vendor demonstration.

- Set up a test run of all potential services and have the persons that will spend the most time doing searches attend and experiment with searches.

- Compare the differences in document retrieval.

- Does document retrieval vary in any significant regard depending on the volume?

F. What is the availability of a help line/support service?

- 24 hours? (This is particularly important if defense counsel are operating in different time zones.)

- Do they have support staff in the vicinity of the various parties/countries?

G. Check references.

## 2. CONSIDERATIONS AS BETWEEN PARTIES/COUNSEL

A. Access to the database

- Co-Defense counsel

- Plaintiff(s) counsel?

- Experts? Be mindful to protect the attorney/client and/or work product privileges. You may want to give an expert access to the "raw" data that is dumped into the database.

B. What controls should govern the database?

- Who can make changes?

- Can each counsel create private files? Do you want to be able to create separate private files or compilations of "hot documents" that co-defense counsel cannot access?

- What documents should be loaded? Everything? Selected documents? This issue can drastically change the price per month.

- In what format should the documents be loaded? Choose a format that best suits your needs.

- Consider loading the following: policy at issue, proof of loss, complaint/pertinent pleadings, documents exchanged in discovery by parties, deposition transcripts, summaries of depositions, pertinent documents pertaining to each key witness, documents for possible use at deposition, documents to actually be used at deposition and outside sources of data, information and documentation.

- Consider creating "hot document" files for each pertinent witness.

- Any particular format for deposition transcripts that works best with the computer platform being utilized by the host?

C. Determine Cost Sharing

- Equally?

- Same Cost Responsibility for Lesser Exposed Risks? (2nd Layer Excess Carrier?)

- If more than one defendant is sharing the cost of the database, consider the following: Cost of the database is largely driven by the amount of data stored. It may not be worth it to "host" data that has a low priority.

- How much does the host charge for making the data, documents and/or information searchable? At the outset, reach an agreement with co-defense counsel about whether everything should be searchable or just critical data, documents and/or information. This can be a very expensive process.

- What are the consequences of a participant settling out? Should the others pick up that share equally? Whatever you decide, address this issue in the contract.

## 3. CONTRACT NEGOTIATION ISSUES

A. Issues to consider with the potential host

- Separate invoices to each participant.

- No responsibility by one defendant for share of another defendant.

- What if one participant/defendant settles?

- Any responsibility or indemnity from the host if the depository "crashes" due to no fault of the participants?

- How quickly will the host load pertinent data?

B. Issues to consider as between participants

- Cost sharing (Do excess carriers with less exposure pay less?)

- Settling participants.

- Format of loading documents/data.

- Who decides what should be loaded?

- Notice to other participants as to what another intends to load.

In conclusion, the utilization of an electronic data depository can prove vital whether you are an advocate of an insured's claim or defending the insurance company. Among other

advantages, it is clear that, while expensive, the use of such a service can prove economical in the long run by avoiding the laborious task by adjusters, attorneys, paralegals and/or experts of weeding through millions of documents. Used wisely and with careful consideration at the outset as to the type of database to use, how it will be used and cost sharing, it can serve as a powerful weapon in your arsenal when advocating or defending against a claim.

**PRIVACY ISSUES IN CLAIMS HANDLING**

**MELONEY CARGIL PERRY**

## I. SESSION OVERVIEW

Since 2000, insurance carriers have struggled to maintain compliance with the various statutes and regulations that Congress has passed, in part, because of the concerns being raised at the state level as to what was happening with consumers' personal information. Specifically, insurance carriers have faced situations wherein their employees are given access to confidential information of the applicants, policyholders and claimants in connection with the application for insurance or settlement of a claim. In fact, the handling of claims raises a variety of privacy issue concerns. When defending claims, insurance carriers gather confidential medical and personal information about the claimants and insureds. Properly shielding confidential medical and personal information from disclosure is, therefore, a necessary loss prevention practice. This presentation will address these issues and offer techniques to avoid this exposure.

The following are examples of when potential disclosures of confidential information arise for insurance carriers:

A. General Policy Handling

1. Scenario #1: Insured's daughter calls in to make a change on the policy and requests payment information. Can the carrier provide this information to the daughter?

2. Scenario #2: Insured requests payment information to be faxed to him at work. Can the carrier fax this information if it contains the insured's social security information and/or address, etc…?

B. Claims Handling in first and third party claims

1. Scenario #3: Claimant calls in a loss. Carrier cannot contact insured to verify loss facts, etc. Claimant calls carrier requesting insured's phone number or address to help make contact. What information, if any, can carrier give claimant?

2. Scenario #4: Insured wants copies of claimant's vehicle estimate, copies of medical bills, and copies of settlement checks made payable to the claimant. What information can the carrier give to the insured? Is the insured entitled to any of this information?

3. Scenario #5: The carrier's payment recovery unit is trying to recover Med Pay/PIP payments from an adverse carrier. All medical bills,

notes, payments, etc. are copied and sent to the adverse carrier. Is this appropriate? What, if anything, is needed in order to send the information to another carrier?

4. Scenario #6: An insured files a claim with his/her carrier for PIP benefits. The insured's attorney calls and requests a copy of the entire PIP claim file and any computer printouts. Can the carrier produce these documents?

C. Litigation

1. Scenario #7: The carrier is involved in a class action lawsuit wherein the opposing party requests the names, addresses and telephone numbers of all the carrier's insureds for a certain period of time. What safeguards, if any, does the carrier have to take when producing this information?

2. Scenario #8: A third-party claimant alleging breach of contract concerning a BI claim sues the carrier. The carrier intends to file a summary judgment. The summary judgment material includes medical records of the insured who is not a plaintiff. Can the carrier use these medical records and file them with the court?

3. Scenario #9: A carrier is sued by its insured for breach of contract and bad faith concerning a UM claim. The carrier intends to file a motion to dismiss attaching the medical records and other confidential information of the insured. Can the carrier file this material with the court?

D. Third Party Requests such as Subpoenas and Government Investigations

1. Scenario #10: One of the carrier's adjusters receives a call from the adjuster of another insurance carrier requesting a claim file concerning an accident the first carrier's insured had that settled. Can the first carrier give a copy of the claim file to the other insurance carrier?

2. Scenario #11: The carrier receives a subpoena from a Plaintiff in an unrelated lawsuit for a copy of the claim file involving the carrier's insured. Is the carrier protected from any privacy act violation because of this subpoena? Can the carrier send copies of all file information to the Plaintiff?

3. Scenario #12: The Attorney General sends a civil investigative demand to the carrier requesting specific information related to the carrier's business practices. Through this request the Attorney General seeks the names and policy information for thousands of the

carrier's insureds. Can the carrier produce the requested information pertaining to its insureds?

E. Fraud Investigations

1. Scenario #13: Insured reports claim. During the investigation the adjuster has a good faith belief that the insured has not incurred the medical expenses he/she asserts were incurred. The adjuster engages SIU to investigate the potential fraud. What information can SIU obtain and share with other insurance companies or governmental agencies?

2. Scenario #14: Insured reports a PIP claim and submits medical bills to the carrier for payment. The carrier is required by law to pay the bills within 15 days of receipt. The carrier pays the bills even though the bills contain suspicious charges. The carrier's SIU investigates the medical provider and discovers medical provider fraud. What information can the carrier share with other insurance companies or governmental agencies to prosecute this fraud?

As noted, there are exceptions to when an insurance carrier can share the confidential information learned from its policyholders and claimants. This paper briefly covers the main statutes at issue and gives pointers as to what the carrier can do to ensure compliance.

## II. FEDERAL AND STATE LAWS TO CONSIDER

There are numerous federal and state statutes and regulations that an must observe when handling claimants' and insureds' personal information. The two main Federal privacy statutes that a carrier handling claims must consider is the Gramm-Leach-Bliley Act ("GLB") and Health Insurance Portability and Accountability Act of 1996 ("HIPAA").

### A. Gramm-Leach-Bliley Act ("GLB")

In the 1990's, Congress became concerned over the merger of banks and insurance companies and unlimited access to personal financial data. Therefore, Congress combined the old law with new law and merged previously separated financial institutions and passed 15 U.S.C. § 6801, which is commonly referred to as Title V of the Gramm-Leach-Bliley Act ("GLB"). The GLB regulates, in pertinent part, the collection, transfer and sharing of "financial information" concerning consumers in relation to certain "financial institutions." 15 U.S.C. §6801(b), et. seq. The purpose of the GLB is to protect the security and confidentiality of consumers' nonpublic personal information. 15 U.S.C. § 6801 (a). The GLB applies to activities that are financial in nature as defined by 12 U.S.C. §1843(k), commonly referred to as the Bank Holding Carrier Act of 1956. 15 U.S.C. §6809(A); 12 U.S.C. §1843(k)(4). Activities that are "financial in nature" include, among other things, insuring, guaranteeing or indemnifying against loss, harm damage, illness . . . and acting as principal, agent, or broker for purposes of the foregoing, in any State." 12 U.S.C. §1843(k)(4)(B). The GLB prohibits the disclosure of "nonpublic personal information," which includes any information furnished by a consumer in

order to receive a product or service. 15 U.S.C. § 6809(A)(i), (ii). The GLB allows for states to impose their own legislation. *See e.g.*, 36 Okla. Stat. §307.2.

The definitions set forth above unequivocally establish that: (1) the GLB applies to insurers and (2) the information provided by policyholders, such as their names, last known addresses and telephone numbers, falls within the GLB definition of nonpublic personal information. Therefore, the GLB precludes the disclosure of a carrier's policyholders' names, last known addresses, and telephone numbers. Moreover, in accordance with the GLB, insurers were under notice obligations that subsequently should have resulted in the adoption of a Privacy Policy wherein each carrier discloses to its policyholders the instances in which it will not disclose nonpublic personally identifiable information to third parties. If such a Privacy Policy is not in place, the carrier should adopt a Privacy Policy that reflects these regulatory requirements, which should also coordinate with any Internet disclosures. Each carrier should also have a privacy officer to help train employees and implement compliance programs.

### B. Health Insurance Portability and Accountability Act of 1996 ("HIPAA")

HIPAA went into effect on April 14, 2001, and its enforcement began on April 14, 2003. HIPAA was intended to encourage covered entities to rely upon de-identified information. The good news is that insurers that provide automobile liability insurance that includes coverage for medical payments are exempt from HIPAA. The bad news is that the medical providers from which the adjusters have to retain claimants' and insureds' medical information are not exempt and must comply with HIPAA. HIPAA requires that covered entities must obtain patient consent in advance in order to use and/or disclose Protected Health Information ("PHI"), which is information created or received by a covered entity relating to an individual's mental or physical health, health care or payment for health care services. PHI can include all personal medical records, in whatever form, created or held by covered entities, regardless of whether the information was ever in electronic form.[16] This even includes oral communications. To obtain guidance on whether an entity is a covered entity under the Administrative Simplification provisions of HIPAA, see the Covered Entity Charts at www.cms.hhs.gov/HIPPAGenInfo/. Once there, under General Information click on the tab for "are you a covered entity" link. The HIPAA Administrative Simplification regulations exclude from the definition of "health plan" any policy, plan or program to the extent it provides, or pays for the cost of, excepted benefits, which includes automobile liability insurance and automobile medical payments coverage. *See*

[16] a. Protected Health Information ("PHI")
(1) PHI means individually identifiable health information that is "(1) transmitted be electronic media; (ii) maintained in any medium described in the definition of electronic media at § 162.103 of this subchapter; or (iii) transmitted or maintained in any other form or medium." 45 CFR 164.501.
(2) "Individually identifiable health information" is information that is a subset of health information, including demographic information collected from an individual, and:
a. Is created or received by a health care provider, health plan, employer, or health care clearinghouse; and
b. Relates to the past, present, or future physical or mental health or condition or an individual; the provision of health care to an individual; or the past present, or future payment for the provision of health care to an individual; and
i. That identifies the individual; or
ii. With respect to which there is a reasonable basis to believe the information can be used to identify the individual.
45 CFR 163.501.

42 U.S.C. §300gg-91(c)(1). Still, an adjuster needs to understand what forms will allow the medical providers to produce the necessary records in order to evaluate and handle a claim. *See* below examples of the forms needed for the covered entities to disclose information.

C. Each State's comparable statutes and regulations

Different states have implemented statutes and regulations to comply with the GLB and HIPAA. In addition, many states have detailed what type of authorization is needed for the disclosure of medical information; for example, see Texas Occupations Code at Section 159.005. To determine what a particular state has adopted see attached at Appendix 5 a list of relevant statutes and regulations for the states, which has cites to all jurisdictions and the privacy laws currently in effect.

## III. STEPS IN GENERAL EMPLOYEE TRAINING TO ENSURE COMPLIANCE BEFORE A CLAIM HAS OCCURRED

### A. Confidentiality and Non-Disclosure of Information Requirements for Employees

#### 1. Handling Procedures for Confidential Information

There are several steps that a carrier can take to ensure its employees comply with the various privacy statutes and regulations. The establishment of confidentiality and non-disclosure of information requirements for employees with access to PHI is essential. It is good business practice for a carrier to require each employee to sign a confidentiality and non-disclosure agreement. This can be a separate document or combined with a code of conduct as to how the employee is to treat policyholder information. This will help ensure confidentiality of not only policyholder information, but also the carrier's own confidential, proprietary and commercially sensitive information, which could include computer software, forms, training, financial information, and underwriting guidelines as well as various third party licenses that the carrier may have obtained from vendors. Ideally, the employees should sign a confidentiality and non-disclosure agreement at the beginning of their employment and at regular intervals such as once a year. It is also good practice for the carrier to archive a copy of each version of the confidentiality and non-disclosure agreement each employee signed in case the carrier needs to produce it in future litigation.

##### a. Privacy Policy Instruction

It is also good practice for the carrier to train its employees about the carrier's Privacy Policy and ensure that they understand that the consumer's privacy is paramount. Due to the GLB and HIPAA, every insurance carrier has a Privacy Policy that informs the consumer of the type of information that the carrier collects, which for an insurance carrier can include the following information:

- From the policyholder, address, telephone number, email address, social security number, driver's license number, and date of birth.
- From transactions with the carrier, payment history, underwriting information, and claim records.
- From third parties, (i.e., consumer reporting agencies) driving record (Motor Vehicle Report or MVR), claim history, or credit history.

Conversely, the Privacy Policy also informs the policyholder what information that the carrier discloses, which can include information that is permitted or required by law. In addition, the employee should be trained that the information provided by customers, applicants and claimants in connection with their application for insurance or settlement of a claim is to be disclosed only on a need to know basis, and may only be used for the purposes for which it was obtained.

In addition, it is a good practice for the carrier to train employees regarding the privacy procedures in place. That training should include how the employees are to report privacy complaints and that a quick response to any complaint is required. Many policyholders are not aware that insurance carriers are exempt from requirements of HIPAA since so many policyholders and claimants have been bombarded by this information at their doctors' offices. The carrier's employees need to understand how to respond to policyholders' and claimants' concerns regarding release of medical information.

### b. Concern Responding to Requests by Policyholder for Documents

In fact, there are types of information that a carrier's employees will have access to before a claim is even filed—general policy information. The employee should have an understanding about who can authorize a change to a policy. The employee should always confirm the identity of anyone who is requesting consumer information. Only the insured and his/her spouse normally have permission to make changes to or obtain information on a policy, even billing information. Any person requesting information must be authorized to receive information.

Also, ideally, the carrier should train the employee to document any request for information, the steps the employee has taken in responding to such a request, and what the employee did to confirm the identity of anyone who calls and requests policyholder (or claimant) information.

### c. Electronic Handling

Finally, the use of email has created problems in the handling of policyholder and claimant information. It is a good practice for the carrier to adopt an electronic handling policy and discuss the policy with employees that details when it is appropriate to send hard or soft copy of records, faxes or emails to someone outside of the carrier. Employees need to be reminded that copying multiple individuals on an email or forwarding emails to additional parties increases the chances that the information will be inadvertently disclosed to parties outside those who need to know and/or the carrier. Employees should also be reminded that the GLB applies in all insurance situations, whether underwriting or claims handling. They should not send sensitive customer information such as address, telephone, bank account, social security numbers, or credit card information in emails or unsecured faxes. This also applies to highly confidential consumer reports, such as MVR reports, as well as credit or insurance score information. Shredding or other adequate means of disposal of information should be utilized when necessary.

## B. Steps to ensure vendor compliance with privacy laws

A carrier needs to also ensure that its vendors keep policyholder and claimant information confidential. The carrier can prepare a confidentiality agreement that each vendor must review and sign. Most companies already require vendors to sign such an agreement in light of the GLB. This ensures compliance with the GLB and the various related state statutes.

Therefore, it is a good practice for the carrier to routinely evaluate the agreements in place as part of its third party relationships and update if necessary.

## IV. CLAIM HANDLING CONCERNS

The carrier's adjusters handle first and third party claims. Each type of claim has its own challenges with regard to disclosure of personal information. The examples illustrated in Scenarios 3, 4, 5 and 6 in the Introduction are typical of the requests for information that an adjuster encounters in his or her day-to-day claims handling.

### A. First and Third-Party Claims Scenarios

In first party claims, an adjuster is usually dealing with the policyholder or the policyholder's attorney. With third party claims, an adjuster is generally dealing with a non-policyholder and/or his or her attorney. Caution should be taken before releasing any policyholder information to a third party. The third party may request information related to the policyholder as described in the above scenarios. The carrier should express to the employee that it is necessary to document any request for information and the steps taken to respond to such a request. Moreover, it is a good practice for the adjuster to request approval from the carrier attorney, or at least a supervisor, before releasing confidential policyholder information to an insured, claimant or attorney. The adjusters need to be aware of what to produce and what not to produce even if there is no lawsuit filed. Often the policy or claim information contains not only confidential information but privileged attorney-client or work-product communications. Many times the information requested can be summarized or put in a different format to be produced to the insured, claimant or attorney without revealing the confidential or privileged information. However, the carrier should have a system in place to ensure that the adjusters seek confirmation as to what can be produced. If not, then inadvertent disclosure of confidential carrier, policyholder, and/or claimant information may occur.

### B. Types of Forms Needed to Ensure Compliance With Privacy Statutes

In either a first or third party claim, to facilitate the claims handling and also ensure compliance with the privacy statutes, the adjuster will need to obtain various authorization forms from the insured or claimant when settling the claim. The types of forms needed will vary by claim, but generally, the adjuster will need the following forms:

1. HIPAA Authorization Requirements. See attached at Appendix 1 an Exemplar.

2. Employment Authorization Requirements. See attached at Appendix 2 an Exemplar.

3. Medical Authorization, Personal Injury Protection Release Requirements or other Specific Type of Form for Claim Being Made.

## V. LITIGATION CONCERNS

Once a claim turns into a lawsuit, a whole host of new concerns arise with regard to the production of confidential information due to the need to produce documents during disclosures and/or discovery. The requested documents can contain all types of confidential information not only of the policyholder, but of the carrier as well.

### A. Discovery Requests

The insurance defense counsel and any in-house liaison with defense counsel should be aware that the insurance carrier client may collect the following information with regard to policyholders that may need to be protected from disclosure in litigation.

1. From the policyholder, address, telephone number, email address, social security number, driver's license number, and date of birth,

2. From transactions with the carrier, payment history, underwriting information, and claim records,

3. From third parties, (i.e., consumer reporting agencies) driving record (Motor Vehicle Report or MVR), claim history, or credit history.

When the defense counsel receives discovery requests from opposing counsel, he or she should scrutinize the discovery requests to determine if any necessary objections related to disclosure of policyholder and/or carrier confidential information must be maintained, and determine any steps necessary to protect the information from public disclosure.

#### 1. Objections

A standard objection that can be made is that "Defendant objects to Plaintiff's First Requests for Production to the extent that they seek documents that constitute confidential, proprietary or commercially sensitive material of the Defendant." Another appropriate objection may be the following:

> In addition, Defendant objects to this Request to the extent that it seeks material that invades the privacy of Defendant's individual policyholders. The privacy rights of Defendant's policyholders are protected by several state and federal laws, including, but not limited to, the Gramm-Leach-Bliley Act. Defendant will not produce the private information of insureds who are not named plaintiffs in this action unless directed to do so by a court order.

If you obtain a protective order as discussed below, then you can include the standard language that "subject to and without waiving the foregoing objections, Defendant responds that pursuant to the Joint Stipulation and Protective Order agreed to by the parties and filed with the Court in this case, Defendant will produce relevant, non-privileged documents responsive to this

request and will make all such non-privileged documents available for inspection and copying at a mutually convenient date and time."

### 2. Production of Documents

#### a. Forms needed for discovery in litigation for compliance with HIPAA and State Statutes and Regulations

When the carrier's defense counsel needs to request documents from third party medical providers or employers, they will also have to send forms authorizing the disclosure. See the attached draft HIPAA Authorization form, which is attached as Appendix "1"; see also the draft Employment Authorization Form, which is attached as Appendix "2". These two documents are examples of which forms are required. No longer will the doctors or employers simply turn over documents in response to a third party document request. In fact, doctors are filing objections in court when threatened with turning over patient documents when the patients have not consented to the release of such information, even if it is in response to class action litigation.

#### b. Protective Order

Once an attorney compiles documents to produce in discovery, one way he can protect policyholders' and the carrier's confidential information is to seek a joint stipulated protective order, especially if the documents are those of the kind that one would normally produce, however, the documents contain confidential policyholder and/or carrier information. See the attached draft copy of a protective order, which is attached as Appendix "3". This is a special concern in the insurance area where the policyholder and claimant both have claim material and/or underwriting material. The carrier will want to protect not only the policyholder and claimant information, but also its own confidential and commercially sensitive material such as underwriting guidelines, computer screen snapshots and training material. A protective order helps to ensure that all confidential material is protected from disclosure. Because of the highly confidential nature of documents produced, even if they are not privileged, it should be the standard practice to seek a Joint Stipulated Protective Order whenever documents are produced in a lawsuit. Undoubtedly, Plaintiffs' attorneys will suggest redaction as a solution. However, in some states, such as Texas, there is case law that supports the fact that even redacting personal information is not a solution. There are different types of protective orders that can be proposed. Typically, the Plaintiff will want a protective order that puts the burden on the Defendant in proving that the documents are, indeed, confidential. The Defendant will generally want a protective order, similar to the one attached as Appendix 3, which puts the burden on the Plaintiff to refute that the documents are confidential. Regardless, any protective order is better than no protective order. Be careful, however, that the attorney for the carrier recognizes the problems and unique handling that must occur during depositions, hearings and even on appeal when documents are designated confidential. Remember, however, that obtaining a protective order is not enough, you must 1) keep a copy on file, 2) ensure that the protective order is complied with in all aspects of discovery (see the discussion regarding depositions below), and 3) docket at the end of the litigation when the documents must be returned by the opposing counsel.

## B. Filing Concerns

### 1. E-filings & Metadata

Even if a protective order is entered there are specific problems associated with e-filing. The courts are unsure how to handle confidential documents that must be submitted under seal. The computer services that enable attorneys to e-file do not have the ability to e-file a confidential document under seal. Instead, the documents must be filed in paper format. There is also the risk that documents that ordinarily would not be confidential may contain metadata that needs to be removed prior to e-filing. If a document contained policyholder information that was redacted for the purpose of filing, the document's revisions are sometimes shown in the e-filing process, and the redacted information suddenly became available to anyone who can pay the price of the e-filing service. Therefore, metadata must be removed from documents before e-filing and documents filed under seal must be handled in paper format.

### 2. Under Seal

The court clerks may not understand that you are not sealing documents in the entire case but rather simply filing certain filings under seal pursuant to a protective order. Therefore, when filing confidential documents be sure to separate the documents that are confidential so that they can be filed under seal with the court pursuant to the terms of the Joint Stipulation and Protective Order. It is good practice to insert the documents into a separate envelope with the terms of the protective order on the cover of the envelope to ensure that the clerk files those specific documents or portions of briefs under seal. See suggested language at Appendix "4". This can be inserted into the letter to the clerk and modified for a slip sheet to be taped to the front of the package for filing.

## C. Keeping documents protected after protective order is entered

### 1. Opposing Parties' Filings

The attorney for the carrier should routinely check the opposing parties' filings to ensure that the opposing party has not inadvertently e-filed a document that should be under seal. This is also true when paper filings are accomplished. Many times the filings in some of the complex cases are so voluminous that it can be months before a party realizes that it inadvertently filed a document that should be under seal.

### 2. Deposition and Hearings

The attorney for the carrier should ensure that deposition and hearing transcripts are marked confidential, when necessary, and make the court reporter aware of the protective order. Take a copy of the protective order to all depositions or court hearings. Any documents deemed confidential should have the confidential stamp placed on the document and not merely mentioned in a letter transmitting the document to the opposing party. Vigilance is the key in keeping the information confidential.

## VI. EXCEPTIONS AND/OR CARVE-OUTS

Just as stated in the Privacy Policies provided to policyholders, there are exceptions when the carrier will have to share the confidential information.

### A. Special Investigation Unit Fraud Investigations

One long-recognized exception to the disclosure of confidential policyholder and claimant information is in the context of fraud investigations. Claims adjusters and special investigative unit ("SIU") investigators initially become aware of fraudulent activity through the handling of individual claim files. Many times the carrier will have to pay the suspicious medical bill due to the risk of the severe penalties for failure to meet the state deadlines for prompt payment of claims. A carrier may have to sue the medical provider for fraud in order to recover the monies paid. The use of policyholder and/or claimant confidential information may be necessary to prosecute the fraud. Therefore, there are civil immunity laws governing anti-fraud activities so that insurers have protections that are designed to encourage them to aggressively fight fraud. Still, there has been an impact on SIU Fraud investigations in light of the new privacy laws. The SIU investigators should have knowledge of the proper boundaries of investigations, which will allow investigators to do their job appropriately, effectively and in sync with carrier attorneys. The following are recommended Internet resource material:

- Coalition Against Insurance Fraud ("CAIF") http://www.insurancefraud.org/ The CAIF site contains various resources including legislation, regulations and state fraud laws at a glance. The legislation research site also lists a chart with a link to the state immunity laws that are specifically designed to allow insurers and others to share information related to insurance fraud investigations. *See* http://www.insurancefraud.org/immunity-laws.htm under the legislation heading for a list of state immunity laws.

- International Association of Special Investigation Units, Inc. ("IASIU") https://www.iasiu.org This site has a list of research links to various agencies and other helpful websites.

- National Insurance Crime Bureau ("NICB") www.NICB.org

- National Association of Insurance Commissioners, Inc. State Insurance Web Site Map http://www.naic.org/state_web_map.htm

- Cornell Law http://www.law.cornell.edu/

- State and Local Governments On-line http://www.statelocalgov. net/index.cfm

### B. Court Order and/or Subpoena

An exception to the disclosure of confidential policyholder and claimant information is when the court orders the production of the documents. Even so, the party producing the documents can request a protective order from the court to protect the public dissemination of such material. There are also third party subpoenas that require the production of documents. There are also third party subpoenas that require the production of documents, which are oftentimes received by adjusters and other carrier employees. These employees should be trained that they are to immediately contact the carrier legal department when they receive a subpoena for documents. The attorney should analyze the subpoena and determine the following: 1) Whether the subpoena was properly served, 2) Whether the subpoena is valid, and then call the requesting party and discuss specifics to narrow the request. Once the attorney analyzes the subpoena then he can explore the options with the client, such as 1) compiling the documents to produce, 2) filing a motion to quash the subpoena, and/or 3) having a protective order entered executed by the requestor.

### C. Request By Governmental Agency Such As State Attorney General Or Department Of Insurance

Another exception to the disclosure of confidential information is when a governmental agency, such as the state Attorney General or Department of Insurance, serves a civil investigative demand or a subpoena to review documents. Any request of this nature should immediately be sent to the carrier legal department who may refer the matter to outside defense counsel. These requests sometimes ask for confidential policyholder and/or claimant information that should be handled under a confidentiality provision usually contained in the state statutes relating to requests by the Attorney General's office and/or state statues relevant to the state's insurance laws.

### D. Freedom of Information Act ("FOIA") Requests

Many people are now requesting carrier information or information the carrier may have related to a specific person through FOIA requests. FOIA requests should be immediately referred to the carrier legal department which may then be referred to outside counsel for response. Usually, there is a ten-business-day time period to respond to these requests in which the carrier can also object to the requests. Time is of the essence in assuring that carrier information is protected.

## APPENDIX

## APPENDIX 1

## HIPAA AUTHORIZATION FORM

I hereby authorize use or disclosure of protected health information about me as described below:

1. The following specific person or class of persons or facility is authorized to make the requested use or disclosure:

_____

_____

_____

2. The following person or class of persons may receive disclosure or protected health information about me:

_____

_____

_____

3. The specific information that should be disclosed is:

Any and all records, including both medical and billing, pertaining to care, treatment, or services provided to or for _____ from _____to present.

The said records shall include but not be limited to the following: all medical, physical, therapy, mental or emotional evaluations or assessments; doctors' notes regarding any medical, physical, mental, or emotional care or evaluations; nurses' notes regarding the same; radiology reports; pathology reports; charts; graphs; reports containing, all or in part, medical, physical, mental, or emotional evaluations, assessments, or observations; forms containing information pertaining to medical, physical, mental, or emotional care or evaluations; medication records; consultant reports; correspondence pertaining to any care, treatment, or other services provided to _____ (whether generated by you or others); progress notes, and any and all billing records related to the treatment or services provided by you/your facility regarding the above injuries.

4. I understand that the information used or disclosed may be subject to re-disclosure by the person or class of persons or facility receiving it, and would then no longer be protected by federal privacy regulations.

5. I may revoke this authorization by notifying the above-referenced provider or facility in writing of my desire to revoke it. However, I understand that any action already taken in reliance on this authorization cannot be reversed, and my revocation will not affect those actions. I understand that the medical provider to whom this authorization is furnished may not condition its treatment of me on whether or not I sign the authorization.

6. This authorization expires on _____.

_____

Signature of Individual Date of Signature Date of Birth Soc. Sec. Number

OR, IF APPLICABLE

_____

Signature of Guardian Date of Signature Representatives' Authority to Act for the Individual

A copy of this completed, signed and dated form must be given to the Individual or person signing on the Individual's behalf

**APPENDIX 2**

**EMPLOYMENT RECORDS AUTHORIZATION**

TO WHOM IT MAY CONCERN at

_____
_____
_____

I hereby request and authorize you to furnish to _____, any and all information and employment records you may have concerning myself, _____, including but not limited to, employment contracts, personnel records, time records, payroll records, claims for injuries, medical records, pre-employment or employment physicals, application for employment, termination or resignation notice, or any and all other records in your possession from_____.

This authorization is provided for the purpose of litigation entitled (name of attorney) and the firm of _____ represent the Defendant in the above-mentioned matter.

A photocopy of this authorization shall be considered as effective and valid as the original.

This authorization expires on _____.

Your prompt cooperation is appreciated.

_____ _____
Date Printed Name

Signature

_____
Address

_____
City, State, Zip Code

_____
Date of Birth

_____
Social Security Number

## APPENDIX 3

**Insert Style of case**

**DRAFT JOINT STIPULATION AND PROTECTIVE ORDER**

The parties hereby stipulate to the following protective order:

1. In connection with discovery proceedings in this action, the parties may designate any document, thing, material, testimony or other information derived therefrom, as "Confidential" or "Confidential--For Attorneys' Eyes Only" under the terms of this Joint Stipulation and Protective Order (hereinafter "Protective Order").

2. "Confidential" as used herein, means any information of any type, kind or character which is designated as "Confidential" or "Confidential--For Attorneys' Eyes Only" by any of the supplying or receiving parties, whether it be a document, information contained in a document, information revealed during a deposition, information revealed in an interrogatory answer or otherwise, which information has not been made available to the public at large and which concerns or relates to trade secrets, including but not limited to the processes, operations, production, sales, income, profits, losses, savings, internal analysis of any of the aforementioned, training manuals or marketing information, the disclosure of which information may have the effect of causing harm to the competitive position of the parties, or to the organization from which the information was obtained. Only information of the most sensitive nature, which if disclosed to persons of expertise in the area would reveal significant technical or business advantages of the producing or designating party, and which includes as a major portion subject matter which is believed to be unknown to the opposing party or parties, or any of the employees of the corporate parties, shall be designated "Confidential--For Attorneys' Eyes Only."

3. Confidential information shall be so designated by stamping copies of the documents produced to a party or other information supplied as "Confidential" or "Confidential--For Attorneys' Eyes Only." Stamping the term "Confidential" or "Confidential--For Attorneys' Eyes Only" on the cover of any multi-page document shall designate all pages of the document as confidential, unless otherwise indicated by the producing party.

4. Testimony taken at a deposition, conference, hearing or trial may be designated as "Confidential" or "Confidential--For Attorneys' Eyes Only" by making a statement to that effect on the record at the deposition or other proceeding. Arrangements shall be made with the court reporter to separately bind such portions of the transcript containing information designated as "Confidential" or "Confidential--For Attorneys' Eyes Only" and to label such portions appropriately.

5. Materials designated Confidential under this Order, and the information contained therein, and any summaries, copies, abstracts, or other documents derived in whole or in part from material designated as Confidential shall be used only for the purpose of the prosecution, defense, or settlement of this action, and for no other purpose.

6. Confidential material produced pursuant to this Order may be disclosed or made available only to the Court, to counsel for a party (including in-house counsel, paralegals, clerical, secretarial and other staff employed by such counsel), and to the "qualified persons" designated below:

(a) a party, or any officer, director, or employee of a party deemed necessary by counsel to aid in the prosecution, defense, or settlement of this action;

(b) experts or consultants (together with their staff) retained by such counsel to assist in the prosecution, defense or settlement of this action;

(c) court reporter(s) employed in this action;

(d) a witness at any deposition or other proceeding in this action; and

(e) any other person as to whom the parties in writing agree.

7. Information designated by a party as "Confidential--For Attorneys' Eyes Only" shall be treated as Confidential and shall be disclosed only to the opposing counsel, the opposing counsel's staff, expert consultants retained and/or employed to assist the attorneys of record in this litigation, and, if necessary, the Court. In the event of any dispute over the use of such designation, the aggrieved party may seek appropriate relief from the Court.

8. Disclosure of Confidential Information to persons other than those specified in paragraphs 6 and 7 will be permitted only by written consent of the party designating the information "Confidential" or "Confidential--For Attorneys' Eyes Only" or by further order of the Court.

9. Nothing herein shall impose any restrictions on the use or disclosure by a party of material obtained by such party independent of discovery in this action, whether or not such material is also obtained through discovery in this action, or from a party disclosing its own Confidential Information as it deems appropriate, or if the Court orders such disclosures.

10. Documents unintentionally produced without designation as "Confidential" may be retroactively designated in the same manner and shall be treated appropriately from the date written notice of the designation is provided to the receiving party.

11. A party shall not be obligated to challenge the propriety of a designation as Confidential at the time made, and a failure to do so shall not preclude a subsequent challenge thereto. In the event that any party to this litigation disagrees at any stage of these proceedings with the designation by the designating party of any information as Confidential, or the designation of any person as a Qualified Person, the parties shall first try to resolve such dispute in good faith on an informal basis, such as production of redacted copies. If the dispute cannot be resolved, the objecting party may invoke this Protective Order by objecting in writing to the party who has designated the document or information as Confidential. The designating party shall be required to move the Court for an order preserving the designated status of such information within fourteen (14) days following the receipt of the written objection, and failure to do so shall constitute a termination of the restricted status of such item.

12. The parties may, by stipulation, provide for exceptions to this order and any party may seek an order of this Court modifying this Protective Order. Further, this Protective Order shall be without prejudice to the right of any party to present a motion to the Court for a separate protective order as to any particular document or information, including restrictions differing from those as specified herein.

13. If Confidential Information, including any portion of a deposition, shall be filed in Court, such information shall be labeled "Confidential--Subject to Protective Order" and filed under seal until further order of this Court.

14. In the event that any Confidential Information is used in any court proceeding in this action, it shall not lose its confidential status through such use, and the party using such shall take all reasonable steps to maintain its confidentiality during such use.

15. This Protective Order is entered solely for the purpose of facilitating the exchange of documents and information between the parties to this action without involving the Court unnecessarily in the process. Nothing in this Protective Order, nor the production of any information or document under the terms of this Order, nor any proceedings pursuant to this Order, shall be deemed to have the effect of an admission or waiver by either party or of altering the confidentiality or non-confidentiality of any such document or information or altering any existing obligation of any party or the absence thereof.

16. The Court shall fashion an appropriate remedy or sanction for any violation of this Protective Order. Further, this Protective Order shall survive the final termination of this action, to the extent that the information contained is not or does not become known to the public, and the Court shall retain jurisdiction to resolve any dispute concerning the use of information disclosed hereunder.

17. The terms of this Protective Order shall survive the termination of this litigation and any appeal thereof and this Court shall retain jurisdiction to resolve any dispute concerning the use of the information disclosed hereunder as set forth in Paragraph 16. After the applicable statute of limitations has expired for any claims that might be brought with regard to the handling of this litigation, counsel for the parties shall assemble and return to each other all documents, materials and deposition transcripts

designated as Confidential and all copies of the same, or shall certify the destruction thereof, except as this Court may otherwise order.

18. Any party designating any person as a Qualified Person shall have the duty to reasonably ensure that such person observes the terms of this Joint Stipulation and Protective Order. The party shall also be responsible for obtaining a written acknowledgment from the Qualified Person wherein the Qualified Person shall state that he or she has read this Joint Stipulation and Protective Order; agrees to be bound by the terms of this Protective Order; agrees to the jurisdiction of this Court as set forth in Paragraph 16; and agrees that at the termination of this litigation and any appeal thereof to return all documents received pursuant to this Protective Order to the party that designated him or her as a Qualified Person. If the party designating any person as a Qualified Person does not obtain a written acknowledgment from the Qualified Person, then that party shall be responsible upon breach of such duty for the failure of any such person to observe the terms of this Protective Order.

SO STIPULATED:
INSERT LAW FIRM NAME

By:_____

INSERT ATTORNEY INFORMATION

ATTORNEYS FOR DEFENDANTS

SO STIPULATED:
INSERT LAW FIRM INFORMATION
By:_____
INSERT ATTORNEY INFORMATION
ATTORNEYS FOR PLAINTIFFS

Respectfully submitted this _____ day of _____, 2005.

INSERT LAW FIRM AND ATTORNEY INFORMATION AS REQUIRED AND ANY REQUIRED CERTIFICATE OF MAILINGS

O R D E R

The Court, having reviewed the foregoing stipulation between the parties and being more fully advised in the premises, it is hereby ordered that the information designated as "Confidential" or "Confidential - For Attorney's Eyes Only" shall remain confidential as the parties have so stipulated.

SIGNED This _____ day of _____, 2005.

_____

HONORABLE JUDGE

## APPENDIX 4

Language for under seal filings with Court Clerk

**THE DEFENDANTS HAVE SUBMITTED EXHIBIT "A" UNDER SEAL**. THERE IS A CONFIDENTIALITY AGREEMENT BETWEEN THE UNDERSIGNED COUNSEL AND THE PLAINTIFF THAT WAS APPROVED BY THE COURT AND THAT MAY APPLY TO SOME OF THE MATTERS THAT ARE IDENTIFIED IN EXHIBIT "A". IT IS THEREFORE IMPERATIVE THAT NO ONE, OTHER THAN COURT PERSONNEL, BE ALLOWED TO REVIEW, EXAMINE, COPY OR OTHERWISE TAKE POSSESSION OF EXHIBIT "A". SUBMITTED WITH THIS LETTER ARE THREE ENVELOPES CONTAINING EXHIBIT "A". THE FIRST ENVELOPE CONTAINS THE ORIGINAL. THE SECOND AND THIRD ENVELOPES CONTAIN COPIES. ON THE TOP OF EACH ENVELOPE IS A LABEL CONTAINING THE FOLLOWING STATEMENT AND WARNING: "THIS ENVELOPE CONTAINS DOCUMENTS SUBMITTED UNDER A SEAL OF CONFIDENTIALITY. THE ENVELOPE IS NOT TO BE OPENED OR THE DOCUMENTS REVIEWED, EXAMINED, COPIED OR GIVEN INTO THE POSSESSION OF ANYONE ELSE OTHER THAN COURT PERSONNEL." PLEASE FILE AND HANDLE THESE DOCUMENTS ACCORDINGLY.

**APPENDIX 5**
**Relevant Statutes and Regulations**

FEDERAL STATUTES

1. 42 C.F.R. §§ 2.61 - 2.67
2. H. R. Com. Rep. No. 104-369
3. Private Securities Litigation Reform Act (PSLRA), 15 U.S.C. § 78u-4(b)
4. S. Rep. No. 104-98

STATE STATUTES

5. Ariz. Rev. Stat. Ann. § 36-665
6. Ark. Code Ann. § 20-15-904
7. Cal. Health & Safety Code § 120975
8. Cal. Health & Safety Code § 121025
9. Cal. Civ. Code §§ 56.10 & 56.104
10. Col. Rev. Stat. Ann. §§ 10-16-1003 & 10-16-423
11. Del. Code Ann. tit. 16, § 1232
12. Fla. Stat. Ann. § 397.501
13. Ga. Code Arm. § 37-3-166
14. Haw. Rev. Stat. § 334-5
15. Idaho Code Ann. § 39-610
16. Idaho Code Ann. § 39-308
17. 740 Ill. Compo Stat. Ann. 110/1 - 110/17
18. 20 Ill. Compo Stat. Ann. 301/30-5
19. Ind. Code Ann. 16-41-8-1
20. Ind. Code Arm. 16-39-2-6 & 16-39-3
21. Iowa Code Ann. §§ 125.37 & 125.93
22. 21 U.S.C. § 1175 (1976)
23. Iowa Code Ann. § 141A.9
24. Iowa Code Ann. § 228.2
25. Kan. Stat. Ann. §§ 65-5602 & 65-5603
26. Ky. Rev. Stat. Ann. § 304.17 A-555
27. La. Rev. Stat. Ann. § 40:1300.15
28. Me. Rev. Stat. Ann. tit. 5, § 19203
29. Mich. Comp. Laws Ann. § 330.11748(2)

30. Mich. Comp. Laws Ann. § 333.6113
31. Miss. Code. Ann. § 41-30-33
32. Mont. Code Ann. 33-19-306
33. Mont. Code Ann. 50-16-1009
34. Mont. Code Ann. 53-24-306
35. Neb. Rev. St. § 71-503.01
36. Nev. Rev. Stat. § 458.280
37. N.J. Stat. Ann. § 26:4-41
38. N.J. Stat. Ann. § 26:5C-9
39. N.M. Stat. Ann. § 43-1-19
40. N.M. Stat. Ann. § 24-1-9.5
41. N.Y. Mental Hyg. Law § 33.13(c)
42. Okla. Stat. Ann. 43A § 1-109
43. Or. Rev. Stat. Ann. § 433.045
44. Or. Rev. Stat. Ann. § 430.399
45. 35 P.S. § 7608(a)
46. 50 Pa. Cons. Stat. Ann. § 7111
47. 71 Pa. Cons. Stat. Ann. § 1690.108
48. S.C. Code Ann. § 44-26-130
49. S.C. Code Ann. § 44-22-100
50. SD CL § 27A-12-31
51. S.D. Codified Laws § 34-23-2
52. S.D. Codified Laws § 34-20A-90
53. Tenn. Code Ann. § 68-24-508
54. Tex. Health & Safety Code Ann. §§ 611.001 - 611.008
55. Tex. Health & Safety Code Ann. § 81.103
56. Vt. Stat. Ann. tit. 18, § 1001 (d)
57. Vt. Stat. Ann. tit. 18, § 7103
58. Wash. Rev. Code Ann. 70.24.105(f)
59. Wash. Rev. Code Ann. 70.96A.150(l)
60. W. Va. Code Ann. § 16-3C-3(9)
61. W. Va. Code Ann. § 27-3-1(b)
62. Wyo. Stat. Ann. § 25-10-122
63. Wyo. Stat. Ann. § 35-4-132

# DISCLOSURE UNDER ENGLISH LAW

**Peter Schwartz**
Saman Salimi-Pour

This note sets out the position in England and Wales in relation to disclosure. A process whereby a court will order each party to disclose all documentation in its possession which relates to the issues at dispute between the parties.

By way of background, English civil procedure operates on an "all cards on the table" basis. Disclosure therefore allows each party to weigh up the strengths and weaknesses of not only their own case but also, that of their opponents. All documentation, even that which is adverse to the case being advanced, must be disclosed. Disclosure is often an extremely complex, time consuming and detailed part of any litigation process because documents which may be adverse to a party's case including, for example, notes written on documents by employees years before anyone ever foresaw that the matter might end in litigation are disclosable. Documents cannot be altered or the comments removed. The fact that documents may be confidential or commercially sensitive does not create a reason for not giving disclosure save in extremely specific and rare circumstances. The Civil Procedure Rules ("CPR") and the Practice Directions govern the conduct of proceedings.

## Pre-action disclosure

This is of limited scope as CPR 31.16 set out the procedure available in respect of applying for pre-action disclosure against a potential party to the proceedings. The application needs to be supported by a witness statement specifying the document for which disclosure is requested and the grounds of this.
It is possible to make such an application, where there are documents within the control of a person who is likely to become a party to proceedings (CPR 31.16(3)(a)); if proceedings had started the documents fall under standard disclosure (CPR 31.16(3)(c)); disclosure of those documents before proceedings have started is desirable to dispose fairly of the anticipated proceedings; assist the resolution of the dispute without proceedings; or save costs CPR 31.16(3)(d). The applicant must have sought copies of the documents in correspondence but they have not been provided and no satisfactory explanation for the failure to provide them has been given. Although the court can make an order for pre-action disclosure (CPR 31.16(3)), even if the jurisdictional tests in CPR 31.16 are satisfied, the court has a discretion whether or not to grant the order.

## The scope of disclosure

Part 31 of the CPR deals with disclosure of documents. Rule 31.6 sets out the documents that a party needs to disclose; these include:

(a) Documents that a party intends to rely on, and

(b) The documents which

(i) adversely affect his own case;

(ii) adversely affect another party's case; or

(iii) support another party's case; and

(c) the documents, which he is required to disclose by a relevant practice direction.

As "Documents" extend not only to hard copy written documents but electronic sources such as computer disks, database records, email, electronic folder messages and records of email traffic, electronic disclosure is also of particular importance.

In 2006 Practice Direction 2A (Disclosure and Inspection) was introduced confirming that the definition of documents in Rule 31.4 extended to electronic documents. Therefore, any party in completing form N265 in relation to standard disclosure has to specify whether in searching for relevant documents, it has carried out an electronic search of the PCs, databases, back-up tapes, mobile phones, notebooks, PDA devices, portable data storage media, servers, off-site storage, laptops and handheld devices. Form N265 not only requires the disclosing party to specify whether it has carried out such electronic searches and to state in a list what was searched and the extent of the searches made but also requires the party to specify, which databases it had not searched. Listed in the form are all the above databases, additionally the disclosing party is required to state whether it has searched for the relevant documents in the mail files, calendar files, spreadsheet files, document files, web-based applications, graphic and presentation files. The keywords or phrases used to carry out the search have to be disclosed as well. Particular attention must be paid to the metadata containing the history of electronic documents, the date of their creation, modification and the individuals, who have had access to them. This would potentially have to be disclosed and needs to be preserved at an early stage.

CPR 31.8 limits the extent of disclosure to documents, which are or have been in a party's control. This includes a document, which is or was in his physical possession; he has or he has a right to possession of it; or has or has a right to inspect and taking copies of it.

Where documents are no longer available or cannot be found by one party or the other the obligation is to carry out a reasonable search bearing in mind the principle of proportionality in relation to time and costs of the exercise and the relevance of the document to the issues. The reasonableness requirement cannot be taken as an excuse for hiding or withholding documentation. In considering whether a reasonable search has been carried out the court will consider the matter in dispute, the complexity of the issues and the relevance of the documents or documentation which cannot be traced. It should be noted that the obligation to disclose documents extends to documents which are not in the client's actual possession, for example, documents which the client had at one time but no longer has so long as he is able to trace the same and the documents available to the clients' agents.

While 'Standard Disclosure" is norm under **CPR** 31.12, the court can order a party which has given inadequate standard disclosure to disclose additional documents or classes of documents and carry out a search for additional specified documents and disclose these. The court may also order specific disclosure related to specific documents which relate to

particular issues **in** the case.

## The duty to preserve documentation and evidence

Severe penalties will be imposed on parties who intentionally destroy documentation in an attempt to avoid the disclosure process. At the very least this may well adversely affect the case. The client must be advised not to destroy any documents in his possession custody or control. If not already taken, steps should therefore be taken at the outset of the case to ensure that any routine document destruction procedures do not result in the destruction of documents which may be relevant to the issues in the matter. Document management and preservation is extremely important. It would be sensible to advise the client to appoint one person to collate (or oversee the collection of) all documentation and have this stored in a central area. All potentially relevant materials should be provided to the client's legal advisors. The client's IT Department should also be consulted to ensure that all electronic records are preserved and relevant documentation backed up.

## Procedure

The first stage in the disclosure process is to search for and collate all relevant documentation both physical and electronic. The next stage is to provide the opposite party with a list of all such documentation. The mandatory practice form N265 supplied for Standard Disclosure calls for the relevant documents in a party's control to be listed and numbered with a short description of each document. Agreement can be reached between the parties as to the form of this list. It can be extremely detailed and specific or more generalized. Finally, the parties will be entitled to inspect each other's documentation by attendance at their respective solicitors' offices and to request copy documentation. Where copy documentation is requested it is normal for the requesting party to pay the reasonable copying expenses of the other party. The form usually has three section in respect of available documents to be disclosed, documents which are privileged described generically and not disclosed and those that are no longer available. Once ready the parties exchange their lists. Disclosure is not automatic and takes place when an order for disclosure has been made usually at the first Case Management Conference. The parties need to liaise and co-operate with each other prior to the Case Management Conference in respect of disclosure.

To ensure that disclosure obligations have been carried out properly, especially with regard to searching for documents, a party must provide a "disclosure statement" which sets out the extent to which a search has been carried out to locate relevant documents. The statement will also record that the party understands and has been informed about the duty to disclose documents and that to the best of their knowledge they have carried out the duty imposed upon them. (CPR 31.10). It must be noted that CPR 31.11 states that the duty of disclosure continues until the proceedings are concluded and lack of compliance with disclosure requirements has severe consequences. CPR 31.21 states that a party may not rely on any document, which he fails to disclose or in respect of which he fails to permit inspection unless permitted by the court. CPR 31.23 goes on to say that proceeding for contempt of court may be brought against a person if he makes or causes to be made, a false disclosure statement, without an honest belief in its truth.

CPR 31.10 states that the disclosure statement is a statement made by the party disclosing the documents, which is normally the client or its representative. The CPR permits a party's solicitor to sign the disclosure statement on the party's behalf. In circumstances where disclosure is given by a corporation, the disclosure statement should identify the person who made the statement and explain why that person is the appropriate person to make the statement.

**Dissemination of documentation**

Parties are often concerned about the publication of what may be sensitive and confidential information. This concern does not create a reason why disclosure of a particular document should not be given (save for exceptional cases). There is however protection by reason of the fact that documents disclosed in the course of litigation can only be used for the purpose of the proceedings in which they are disclosed (unless the parties agree otherwise or the court gives permission or the document has been read or referred to in open court) (CPR 31.22). It is important to stress this limitation to any third parties (e.g. experts or witnesses) who may be shown such documentation. However once a document is referred to in open court proceedings then that document does become public and loses its shield of confidentiality. Similarly the restriction on its use is removed.

Documents marked "private and confidential" are not exempt from disclosure. The fact that a document may be confidential or contain sensitive material does not confer any particular protection once a matter is being litigated. This extends to documentation which comes into a particular party's hands from another source. It is not an excuse in the disclosure process to refuse to disclose a relevant document on the basis that it was provided in "confidence". A limited exception concerns cases where documentation may detail extremely sensitive material or "trade secrets".

In these circumstances, while documentation must still be disclosed, the court can exercise its discretion to restrict the disclosure so that only those who truly need to consider the materials have access to them.

**Privilege**

Certain documentation, however, does not have to be produced for inspection on disclosure. This documentation is often referred to as "privileged" documentation. There are currently two forms of privilege known as "litigation privilege" and "legal advice privilege". However, to the extent that documents fall within either of these two categories, they will be protected from production. This protection can be lost where privileged documents are openly disclosed. It is therefore important to ensure the right to privilege is maintained and not waived. Legal advice needs to be given in relation to the scope of documentation which may attract legal privilege.

*Legal Advice Privilege:* This applies to confidential communications between a client and his lawyer, which have come into existence for the purpose of giving or receiving legal advice about what should prudently and sensibly be done in the relevant legal context *(Three Rivers District Council & Ors v. Bank of England [2004] UKHL 48).* Such communications are

privileged unless privilege is waived. Legal advice privilege only applies to communications between a lawyer and client whereas litigation privilege can apply to communications by a client or his lawyer and a third party. The general rule is that if a lawyer commits to paper during the course of his retainer matters which he knows only as a consequence of the professional relationship with his client, those papers will be privileged. This would include factual summaries of information gathered from third parties. It was accepted by the Court of Appeal in *Three Rivers (No.5) and USP Strategies Plc & Anor v London General Holdings Ltd & Ors [2004] EWHC 373 (Ch)).* that a lawyers' own drafts of documents and memoranda were privileged even if not transmitted to the client. In relation to in-house lawyers, communications relating to their legal function is privileged but the part of their work which is business advice or administration will not be privileged. Therefore, they should avoid including communications relating to their executive/compliance function in the same document as communications relating to their legal function. Failure to do so can result in the privilege in the whole document being lost. By contrast, the need for communication will always apply to documents going from client to his lawyer. Consequently, memoranda prepared by the client as a preparatory step to obtaining legal advice are unlikely to be privileged. This is different from the status of draft requests for legal advice. Although the Court of Appeal in *Three Rivers District Council & Ors v Governor & Co of the Bank of England [2004] EWCA Civ 218* did not consider this point, it is likely that for reasons of public policy such drafts would be privileged since otherwise the consequence would be effectively to remove privilege between legal adviser and client via the back door. Where information is passed between the lawyer and his client to keep both informed so that advice may be sought and given as required, privilege applies. A communication from the client may end with a specific request asking for advice but even if it does not, it will usually be implied in the relationship that the lawyer will at each stage provide appropriate advice as necessary *(Balabel and another v Air India [1988] 2 All ER 246).* In *R (on the application of Prudential PLC & Anor) v Special Commissioner of Income Tax & Anor [2009] EWHC 2494 (Admin),* the Court decided that legal advice privilege applied only to advice given by lawyers and not to legal advice given by a non-lawyer e.g. accountants.

*Litigation Privilege:* this arises from the principle that a litigant or potential litigant should be free to seek evidence without being obliged to disclose the result of his researches to his opponent. For litigation privilege to apply, the material in question must satisfy four conditions. It must be confidential, be a communication between a lawyer (acting in a professional capacity) and his client and between either the lawyer (acting in a professional capacity) or the client and a third party, be made for the dominant purpose of litigation and litigation must be pending, reasonably contemplated or existing.

Since litigation privilege applies to communications with third parties, the difficulties that arise in identifying the client for the purposes of legal advice privilege are not relevant. The court will look at the purpose of the document objectively. In *Westminster International BV and Others v Dornoch Limited and Others [2009] EWCA Civ 1323,* the Court of Appeal confirmed that the words "in prospect" in the phrase "litigation reasonably in prospect" could be said to mean "may happen" when there is a real prospect of litigation, which was more than a mere possibility but not necessarily greater than 50%. The court found that the

expression "and could well give rise to litigation in the future" was a suitable description satisfying the test.

Therefore, from the moment that litigation is pending, reasonably contemplated or existing, all communications between the client and his solicitor or agent, or between one of them and a third party, will be privileged if they came into existence for the dominant purpose of giving or receiving advice in relation to the litigation, or collecting evidence for use in the litigation.

Litigation privilege applies to proceedings in the High Court, county court, employment tribunals and where subject to English procedural law / arbitration. According to *Three Rivers District Council v The Governor and Company of the Bank of England [2004] UKHL 48,* one of the criteria for establishing litigation privilege was said to be that the litigation must be "adversarial" not investigative or inquisitorial. Litigation must be a real likelihood rather than a mere possibility *(USA v Philip Morris Inc. and British American Tobacco (Investments) Ltd [2003] All ER (D) 191 (Dec),* approved by Court of Appeal, *[2004] All ER (D) 448 (Mar)).* Neither a distinct possibility that sooner or later someone might make a claim, nor a general apprehension of future litigation is enough. Often clients will wish to engage in a fact finding exercise following an incident. If there is a real likelihood of adversarial proceedings, then litigation privilege will apply. Otherwise if lawyers are involved and are advising in "a relevant legal context", legal advice privilege could apply. To maximize protection, the investigation should be led by lawyers (internal or external) and any interviews should be conducted by lawyers. If a written or oral report is produced at the conclusion of the exercise this should be written by a lawyer and incorporate legal analysis and fact.

The other class of documents which cannot be disclosed to the court are those which are "without prejudice" i.e. those documents whose genuine purpose is aimed at settling a dispute. However it is important to realize that there are exceptions to the general rule that "without prejudice" documentation cannot be relied upon. For example, such documentation can be reviewed by the court in order to ascertain the terms or existence of a settlement agreement. Furthermore, not every document that is marked "without prejudice" will be privileged from disclosure. The purpose for which each document so marked was created will need to be considered.

**The identity of the client with respect to privilege**

In *Three Rivers (No. 5),* the Court of Appeal gave a very restrictive definition of client and held it would only cover communications between the lawyer and a small group of the bank's employees actually charged with instructing the Bank's lawyers. The position was not clarified in *Three Rivers (HL).* This means where the client is a company, not all documents produced by employees and sent directly to lawyers will be privileged.

Legal advice privilege will not cover internal documents generated by employees of the client in general even if they are necessary to provide information to lawyers to obtain legal advice *(Three Rivers (No.5)* although these may be covered by litigation privilege. Caution must be exercised regarding communications with the client's agents. Although this point was not directly considered in the *Three Rivers* cases, the restrictive interpretation placed on the meaning of the word "client" by the Court of Appeal in *Three Rivers (No. 5)* may affect the

commonly held view that privilege covers communications between lawyer and agent as well as between lawyer and principal.

Presentational advice on how to present evidence in the course of an inquiry will also be privileged if given in the relevant legal context. Legal advice is therefore not limited to advice on the client's rights and liabilities. Nevertheless, pure business advice given by a solicitor will not be privileged, for example, advice on investment or finance policy, as it will lack the relevant legal context *(Three Rivers (HL))*. Hence, it should be carefully considered whether the lawyer is acting in his capacity as legal adviser or as a man of business *(Three Rivers (HL)* at paragraph 38). If the advice involves risk management, then it is likely to be privileged since it arguably comes within a relevant legal context. Advice on document retention and organization can clearly be contrasted with examples of advice that would definitely not be privileged, such as advice on investment and finance policy.
Communication of privileged advice from the recipient within the company to a company's board of directors should not cause loss of privilege (either in the original document or in the subsequent communication), nor should oral submissions of advice at a board meeting. A board minute summarizing or attaching a copy of legal advice received will be privileged, but if the minute goes on to discuss the advice or its implication, the privilege will be lost. Circulation of privileged information throughout the company (except to the board) by the designated client team must be avoided. If this is done, it is best to state that the documents are privileged and providing them are unlikely to amount to a waiver of privilege.

**Instructing experts and privilege**

CPR 35.10(3)(4) provide that the expert's report must state the substance of all material instructions, whether written or oral, on the basis of which the report was written and such instructions shall not be privileged against disclosure but the court will not, in relation to those instructions order disclosure of any specific documents; or permit any questioning in court, other than by the party who instructed the expert unless it is satisfied there are reasonable grounds to consider the statement of instructions given to be inaccurate or incomplete. CPR 31.14(2) provides that a party may inspect documents referred to in an expert report. An expert is therefore required to state the substance of all material instructions. If he fails to do so, then those instructions may have to be disclosed (Morris v Bank of India, unreported, 15 November 2001). In Lucas v Barking, Havering & Redbridge Hospitals NHS Trust [2003] EWCA Civ 1102 the Court of Appeal gave useful guidance on when a document will form part of an expert's "instructions", and so have the benefit of the limited protection from disclosure contained in CPR 35.10(4). The claimant had produced experts' reports which referring to other documents which had been provided to the experts when they were instructed. The defendants, in reliance on CPR 31.14(2), sought an order for inspection of these documents. The Court of Appeal held that material supplied by an instructing party to an expert as the basis on which the expert is asked to advise should be considered part of the expert's instructions and should therefore be protected under CPR 35.10(4).

In the light of CPR 35.10(4), it is advisable not to send privileged documents to the expert. Since the emphasis is now on expert impartiality, the courts may have little sympathy with privilege claims in circumstances where the expert refers to privileged documents in his report, or oral evidence. To minimize

the risk of disclosure of instructions, it is best to ensure that the summary of instructions given by an expert in his report is accurate and complete.

## Disclosure under the Arbitration 1996

Section 34 of the Arbitration Act 1996 provides that the tribunal can decide all procedural and evidential matters subject to the right of the parties to agree any matter. This includes whether any and if so which documents or classes of documents should be disclosed between and produced by the parties and at what stage. In practice the parties normally follow the principles of standard disclosure set out above and refer to the tribunal in case of disagreement.

## Practical Advice

In this modern era of electronic document production it is extremely important to have in place a well managed document system. The client should be able to demonstrate to the court that it has control over all documentation (including both incoming and outgoing communications) and is able to detail the standard document destruction process (if any) and explain how documentation is stored.

Advanced document management systems can streamline the disclosure process and reduce costs. The following factors may, however, assist when entering into proceedings. The client should be advised to carry out the following steps immediately (if not already in place) and in the future as soon as any dispute is likely to arise:

(i) All personnel should be warned against creating new documents concerning the case. While communications with lawyers concerning the case will attract legal professional privilege, other documents (including Board Minutes recording a discussion about the case) will not.

(ii) Personnel should not make handwritten comments on original documents. The most innocent comment can prove harmful to the client's case. There is no implied right to redact relevant written comments on documents.

(iii) Privilege in legal advice can be lost if such advice is generally circulated. Circulation of legal advice should therefore be restricted to those in the company who need to consider it.

(iv) The creation of internal memoranda and notes which review or comment upon legal advice should be avoided. It is far better to circulate the actual advice and then hold an internal discussion.

(v) Once litigation is contemplated or has begun it is sensible for the appointed lawyer to conduct correspondence with third parties in order to maintain legal privilege. This is especially the case with experts in litigation where their report must state the substance of their instructions. Although the instructions are not privileged against disclosure the court may in certain circumstances order disclosure of specific documents which form part of

the expert instructions and retainer CPR 35.10(4).

(vi) Wherever possible, communications and correspondence should be channeled through the client's lawyers and not unduly copied, disseminated or discussed.

(vii) Consideration of whether potentially relevant documents are discloseable should be a task delegated to the client's lawyers as should communication with witnesses and experts.

(viii) It is a useful procedure to mark as "privileged" documentation which is intended to be so. This also assists in ensuring that privileged materials are not accidentally disclosed.

(ix) Handwritten notes on or appended to privileged documents may not themselves be privileged. For this reason adding a handwritten note on a document can be fatal resulting in the loss of privilege in that document.

# TAKING OF EVIDENCE IN SWITZERLAND

*By Christian Lang, LL.M. (NYU), and Eliane Rossire,*

Switzerland, similar to the United States, is organized as a federation of 26 (partially) sovereign states called cantons. Most substantive law, however, is federal law, while the procedural rules and the organization of the judiciary has been the domain of the cantons for more than a century. Thus, while the cantonal courts have been applying federal law for most of the time, they were governed by their own procedural rules. This is about to change. As of 1st January 2011, the Federal Civil Procedure Code ("*Zivilprozessordnung / ZPO*") and the Federal Criminal Procedure Code ("*Strafprozessordnung / StPO*") will come into effect as federal law derogating the respective cantonal statutes. The organization of the judiciary (e.g. how judges are elected or appointed, how the districts are organized, etc.) will remain the cantons' responsibility. They may pass legislation within the guidelines set by these new federal statutes.
The new Federal Civil Procedure Code will incorporate the core principles found in most of today's cantonal civil procedure laws, as well as those which have been developed by the Federal Supreme Court in its case law over the last decades, and is aimed at setting a consistent national standard on how these concepts are applied.

## RULES ON THE TAKING OF EVIDENCE

The rules on the taking of evidence in most civil law countries differ fundamentally from the rules and procedures applicable in the United States. Some standard U.S. procedures of taking of evidence are entirely unknown in civil law jurisdictions such as Switzerland. In fact, they may not only be unknown and thus ineffective, but their use could compromise the value or admissibility of otherwise valuable evidence.[17]

In Switzerland, courts in civil procedures are usually composed of either one, three, or five judges, depending on the type of claim and the amount at issue. In contrast to the U.S. jury system, the court is the fact finder in Swiss proceedings. It is up to the court to decide what evidence is necessary to decide a case and it will freely assess the reliability and weight of the evidence introduced into the proceedings by the parties. The court applies the law to the found set of facts *ex officio*. It is deemed to know the relevant law (concept of *iura novit curia*). The parties are therefore not obliged to plead the applicable law (although a diligent lawyer will do so) and the court is free to base its decision on a legal provision the applicability of which has not been pled by any party.[18] However, it obviously is crucial for legal counsel to know what legal provisions may apply to the respective case in order to gather and submit all the relevant evidence.[19]

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[17] See the discussion of this issue below under the caption "DEPOSITIONS AND AFFIDAVITS".
[18] However, if a court intends to base its decision on a legal provision which has not been made an issue in any party's pleadings, the right to be heard requires the court to bring this to the parties' attention and to give them the opportunity to comment on it. See Hotz, N 28 Art. 29 in: Ehrenzeller/Mastronardi/Schweizer/Vallender, Die schweizerische Bundesverfassung, Kommentar, Zürich 2002.
[19] Staehelin/Staehelin/Grolimund, Zivilprozessrecht, Zürich 2008, p. 118.

## NO PRE-TRIAL DISCOVERY

The U.S. concept of pre-trial discovery is unknown to Swiss procedural law. In Switzerland, a party who draws any legal conclusion from an alleged fact or circumstance must prove the existence of such fact or circumstance, unless otherwise provided for by law.[20] This legal provision requires the plaintiff to produce all necessary evidence in order to substantiate its claim. If a party is not able to produce sufficient evidence to support a relevant fact, it has to bear the procedural disadvantage resulting from such lack of evidence.[21] Further, a party only needs to provide the evidence which supports its own position. Evidence which is detrimental to its case does not need to be submitted to the court voluntarily. Thus, the opposing party might never become aware of the existence of such evidence. Should the opposing party, however, know of the existence of such helpful evidence, it can request its production in the pending proceedings. Such request need to sufficiently specify the document and its relevance for the case (e.g. the approximate date of the document, its alleged content, materiality of the document for the respective case, etc). It is then up to the judge to decide whether he considers the requested document as relevant for the question at issue and whether it is therefore justified to compel the opponent to produce it.[22] The requesting party has to show that its request is not a mere "fishing expedition", which would be illegal, but that it has reliable indications that the requested evidence actually exists.

Should the party which is ordered to produce evidence fail to comply with the court's order, the court will take this behavior into account for its consideration of the evidence.[23] This can result in the court accepting the requesting party's allegation as to the content of the document as proven. For example: if the plaintiff alleges that the defendant had admitted vis-à-vis a third party in writing that the object at issue indeed had a design defect, and the defendant refuses to produce this document, the court can – in the absence of a contractual obligation of the defendant give plaintiff access to this document – not force the defendant to produce the said writing. It will rather sanction the non-compliance of the defendant by accepting the alleged written admission of a design defect as being true.[24]

There are certain statutory obligations to submit evidence.[25, 26] If a party fails to comply with such specific statutory obligations, the court may issue a separate order to compel production of the documents, under penalty of a fine in the case of non-adherence. In certain areas of law it is the statutory duty of the court to establish the relevant facts (concept of "*Untersuchungsmaxime",* e.g in divorce proceedings, in the field of child custody and support, in employment matters, and in landlord/tenant matters). Since civil courts are not as well equipped as the criminal

[20] Art. 8 Swiss Civil Code.
[21] BGer 2C.662/2009, February 2, 2010, c. 2.
[22] Spühler/Vock, Urkundenedition nach den Prozessordnungen der Kantone Zürich und Bern, SJZ 95 (1999) Nr. 3, p. 42.
[23] Art. 164 ZPO.
[24] Thus, the defendant will quite likely only refuse to produce the requested document if it is even more detrimental to its case that plaintiff knows.
[25] E.g. Art. 170 Swiss Civil Code, according to which a spouse has the right to request information on the other spouse's income, assets and acquired debts. This includes the production of related documents.
[26] Spühler/Vock, Urkundenedition nach den Prozessordnungen der Kantone Zürich und Bern, op. cit., p. 41.

prosecution authorities it is nevertheless required that the involved parties present their case and submit the necessary evidence to prove it. The difference is that under the "Untersuchungsmaxime" the court can and has to request the production of additional evidence from the litigants or third parties if considered as relevant for the outcome of the proceedings.

A third party may be obliged by procedural and sometimes also substantive law to produce, upon request by the court or another judiciary authority, all documents in its possession.[27] In addition, any person residing in Switzerland is obliged to testify if called on the stand by a court.[28] Only in special circumstances are third parties allowed to withhold their testimony or documents in their possession (e.g. if the witness is related to one of the parties, if the witness is bound by professional secrets or if a specific privilege applies).[29] A third party's refusal to cooperate, to submit documents or to testify as witness may be sanctioned by fines and may result in criminal prosecution.[30]

The court's freedom to assess the evidence submitted according to its own discretion is limited by Article 29 (2) of the Swiss Constitution and Article 8 of the Swiss Civil Code which provide that a party generally has a right to be heard in court and to present evidence to support its claim in accordance with the applicable procedural rules. The court may, however, nevertheless restrict the amount of evidence admitted and make an anticipatory assessment of the relevant evidence if it is convinced that any additionally or newly offered evidence is clearly superfluous, concerns a legally irrelevant fact, or if the additionally offered evidence would not be able to change the outcome of the proceedings in any way.[31] For example: if during a dispute regarding a construction project the court is able to clearly determine based on the wording of the respective contract whether the obligations assumed thereunder were fulfilled, it is no longer necessary to produce the underlying construction plans to further specify these obligations.[32]

## DEPOSITIONS AND AFFIDAVITS

In Swiss procedural law there is nothing comparable to the taking of depositions by the parties' counsel or testimony in the form of an affidavit. In civil procedures, witness testimony can only be obtained by direct interrogation by a judge. This was confirmed by a recent decision of the Zurich Court of Appeal rendered in 2007.[33] It was held that the current Civil Procedure Act of the Canton of Zurich does not allow the parties' legal counsel to conduct witness examinations themselves since this right is reserved solely to the competent judge.[34] In fact, the court went even further and held that if a written statement is obtained through the assistance of a party's legal counsel, the witness is no longer free to testify in court because it is likely to feel bound by the earlier written statements and its testimony in court may therefore lack credibility. Thus, contacts between counsel and potential witnesses can substantially damage the credibility of otherwise helpful witness testimony in court.

[27] Vogel/Spühler, op. cit., p. 279; also Art. 160 ZPO.
[28] Art. 160 para. 1 lit. a ZPO.
[29] Vogel/Spühler, op. cit., p. 281-282; see also Art. 163 f. ZPO.
[30] Art. 167 ZPO.
[31] BGer 4A.71/2009, March 25, 2009, c. 3.5.
[32] See BGE 4A.71/2009, March 25, 2009, c. 3.5.
[33] ZR 106 (2007) Nr. 14.
[34] ZR 104 (2005) Nr. 62, c. 6b.

However, it is possible to have a witness hearing before a judge scheduled even before formal legal proceedings have been commenced if there is a considerable risk that the witness is about to pass away, leave the country, or if his or her memory is about to deteriorate considerably. Further, article 158 of the revised ZPO allows such a forehanded taking of evidence if other good reasons so require. It appears possible to qualify the need to assess the merits of a case as a sufficient reason for such forehanded taking of evidence; to what extent the courts will endorse such pre-trial taking of evidence remains to be seen.

Obviously, it is also admissible to produce memoranda regarding discussions or relevant information received, which may later be used in proceedings as evidence for the drafters' understanding of these facts at the time.[35] According to a judgment rendered by the Attorneys' Supervisory Commission of Zurich in 2007, it is exceptionally admissible for an attorney to formally question a potential witness before proceedings have begun, as long as the following three criteria are satisfied: contacting the witness is in the best interest of the client (e.g. inquiries with the potential witness with regard to his or her knowledge of the relevant facts in order to prevent testimony which is less helpful than anticipated), the witness must not be unduly influenced by the attorney contacting him or her out of court (the questioning has to be done in a way which prevents biasing the possible witness regarding the future court proceedings), and it is absolutely necessary to proceed without the participation of the authorities.[36] In that case of 2007 it was held that the plaintiff's attorney had not satisfied any of the three criteria. The attorney had shown a picture to the potential witness and had asked him whether this was the person to whom he had delivered a certain document. It was held that it was not in the client's interest to contact the witness as this would have shortened the proceedings only slightly. In addition, the attorney was found to have unduly influenced the witness by showing him a picture of the alleged recipient of the document, and that there had been no need to proceed without the court's involvement since the witness had been called to testify in court anyway.[37]

## TAKING OF EVIDENCE IN AN INTERNATIONAL SETTING

If evidence located in Switzerland is to be obtained by a foreign party, such party needs to proceed according to the rules of the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters ("the Hague Convention") of 1970. Not adhering to the rules of this convention may lead to criminal prosecution for illegal activity for a foreign state as stipulated in Article 271 (1) of the Swiss Penal Code (PC) which reads as follows:

*"Whoever, without being authorized, performs acts for a foreign state on Swiss territory that are reserved to an authority or an official , whoever performs such acts for a foreign party or another foreign organization, whoever aids and abets such acts, shall be punished with imprisonment and, in serious cases, sentenced to the penitentiary."*

However, Article 271 (1) PC does not apply to the gathering of evidence in connection with foreign arbitral proceedings because arbitral proceedings are not considered state proceedings,

[35] Hafter, Strategie und Technik des Zivilprozesses, Zürich 2004, p. 309 N 1752.
[36] ZR 106 Nr. 81, c. 2.
[37] ZR 106 Nr. 81, c. 3.

and the taking of evidence to be introduced in arbitration is therefore not an act on behalf or at the behest of a foreign state. Therefore, one is not required to obtain official authorization to gather evidence in Switzerland in the course of foreign arbitral proceedings.[38]

The performance of an act for a foreign state includes the collection of any evidence, be it through witness statements (e.g. the taking of depositions[39]) or by means of documents. Article 271 (1) PC does not apply if documents are offered voluntarily.[40] Informal contacts intended to determine whether a possible witness could be helpful regarding future proceedings are admissible as long as the information received during such meetings is not submitted as evidence in foreign proceedings.[41]

Generally, it is in line with Art. 271 PC to transmit official documents to parties in Switzerland without using judicial assistance. However, if service of such documents is a legally relevant operation, e.g. if such service leads to the running of a statutory period or sets a deadline for the recipient to react, it is necessary to transmit this document through the official channels. Otherwise the transmission may infringe Art. 271 PC.[42]

The strict application of Article 271 PC has not remained undisputed by Swiss legal scholars and practitioners. It was argued that such strict rules are no longer adequate in a globalized world and economy, where legal disputes often involve a number of different jurisdictions with different rules and procedures. A decision handed down in 2006 by the Attorney General of the Canton of Zurich supports this view.[43] In connection with divorce proceedings before a court in the United States, the wife's Swiss attorney was asked to investigate whether the husband had assets in Switzerland and with Swiss banks. The attorney made some investigations and finally produced an affidavit, "duly sworn", containing his findings intended for the use in the U.S. proceedings. The question before the Attorney General was whether the lawyer had infringed Article 271 PC by interviewing people regarding the husband's assets and by signing a respective affidavit. The Attorney General decided not to prosecute the lawyer. It was held that a report containing information about interviews with potential witnesses could not be considered the same as actually receiving a witness' testimony. The Attorney General reasoned that even under Zurich civil procedural laws it is not prohibited for counsel to speak to witnesses as long as they are not unduly influenced. It was further noted that prohibiting private investigations might even be incompatible with the Swiss Constitution and the European Convention on Human Rights. Since speaking to witnesses does not constitute a crime in a purely domestic setting either, the Attorney General decided to close the investigation. Thus, it appears fair to conclude that signing an affidavits describing one's own knowledge in Switzerland for the use in foreign proceedings is likely not to be considered an infringement of article 271 PC.

[38] Schramm, Entwicklung bei der Strafbarkeit von privaten Zeugenbefragungen in der Schweiz durch Anwälte für ausländische Verfahren, AJP / PJA 2006 p. 491 f; p. 492.
[39] Donatsch, Art. 271 Ziff. 1 StGB und das Recht auf Befragung von Entlastungszeugen, p. 590 in: Festschrift für Stefan Trechsel, Zürich 2002.
[40] Hopf, Nr. 15 to Art. 271 in: BSK-Strafrecht II, Art. 111-392 StGB, 2nd edition, Basel 2007.
[41] Hopf, Nr. 15 to Art. 271 in: BSK-Strafrecht II, Art. 111-392 StGB, 2nd edition, Basel 2007
[42] Hopf, Nr. 15 to Art. 271 in: BSK-Strafrecht II, Art. 111-392 StGB, 2nd edition, Basel 2007
[43] ZR 104 Nr. 62.

If the parties want to be sure to avoid criminal prosecution when gathering evidence located in Switzerland, it is advisable to comply with the rules of the Hague Convention. However, also the Hague Convention does not give foreign claimants the right to request pre-trial discovery in Switzerland. Article 23 of the Hague Convention provides that every contracting state may opt to declare that it will not execute letters of request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries. Switzerland has chosen to make use of this right[44] and will not execute letters of request if the documents sought have no direct or necessary link to the proceedings in question, if the requested documents are not sufficiently specified[45], or if third parties' interests are at risk. In 2005, the Swiss Federal Supreme Court denied a U.S. request for judicial assistance based on Article 23 of the Hague Convention.[46] In that case, the U.S. court had asked for the production of all available documents without specifying the documents any further. The Federal Supreme Court found that under such circumstances it was not even possible to adopt a so-called "blue pencil approach" and reduce the request to an acceptable level.[47]

**SUMMARY**

Under Swiss law, a party to civil proceedings is allowed to withhold evidence from the legal proceedings which is potentially detrimental to its position. Unless the opponent knows of the existence of such evidence and can sufficiently specify it, it is almost impossible to obtain it. Fishing expeditions of any kind are not permitted under current legislation; this will remain unchanged also under the new Federal Swiss Civil Procedure Code. This can lead to a situation where material evidence will never be introduced into the proceedings because the interested party is not aware of its existence. This is a result which is generally accepted by Swiss law, which weighs the right of the individual for protection of its personal or commercial information higher than the interest to have every possibly relevant piece of information introduced into civil proceedings. It is basically considered each party's own responsibility to ensure that it is in possession of the relevant evidence to prove its case, should a matter become litigious one day.

While it is generally admissible for a person to voluntarily sign an affidavit in Switzerland which is then used in proceedings before a foreign state authority, other evidence to be used in foreign proceedings must be taken in accordance with the Hague Convention on the Taking of Evidence Abroad only. The taking of depositions in Switzerland by the parties' attorneys or service of process in Switzerland other than through the local court is prohibited by law and can lead to criminal prosecution of the acting individuals. All these restrictions, however, do not apply to the taking of evidence for an arbitration, which is considered a private institution for dispute resolution.

[44] Art. 6 of the Swiss declaration concerning the Hague Convention.
[45] With regard to this criterion, a similar standard as in domesticc cases is applied.
[46] BGer 5P.267/2005, December 21 2005.
[47] BGer 5P.267/2005, December 21 2005, c. 3.2.

# Comparison of U.S. & European Litigation

**Steven Snyder AIC**
Vice President of the Foreign Casualty and AOG Casualty Claims, ACE

# Litigation

- United States
  - Best Argument
- Discovery
  - Written Inquisition
  - Documentary
  - Testimonial
- Motion Practice
  - Limit issues in Dispute

- International
  - Truth
- Discovery
  - Documentation
  - No Testimonial
  - Little to no Written inquisition other than experts
- Motion Practice
  - Limited to none

# Litigation

- **Unites States Evidence**
- Documentary
  - Expert reports
  - Medical reports
- Written Response
  - Response to written inquisition
- Testimonial
  - Cross examination of all witnesses by both sides.

- **International Evidence**
- Documentary
  - Expert reports
  - Witness affidavit
- Testimonial
  - Limited
  - Usually only cross examination is conducted by the Court

# Litigation

- Contingency Fee
  - Increases litigation
- Jury unpredictability
  - Raises stakes to try case
  - Every jury is different
  - Emotions
  - No limitations
  - Runaway verdict
  - Punitive damages
    - Insurability
- Looser pays
  - Raises stakes to try case.
- More predictable
  - Damage caps
  - Less emotional factors
  - More narrow verdict range
  - No Punitive Damages

# Duty to Defend

- United States
- Policy terms
- Judicial interpretation
  - Broader than duty to Indemnify
  - Potential for coverage
  - 4 Corner/Extrinsic Evidence
  - More valuable that indemnity obligation

- International
- Policy Terms
  - Obligation to indemnify for defense expense.
- Judicial Interpretation

  Enforce terms as stated.

  No broader than duty to indemnify.

# Bad Faith

- Tort that arises in contract
- Implied duty to act in good faith
  - Fulfilling contractual obligation
- Denial of Coverage
  - Potential for coverage/breach of duty to defend
- Reasonableness standard
  - Jury question

# Damages

- Statutory (2x – 3x Damages)
- Jury discretion (no limits)
- Punitive Damages
  - Must have some relationship to compensatory damages but not clear how it is defined.

# Bad Faith Litigation

- Involves insurance company employees
  - Claim handler
  - Direct management
  - Senior management
  - Executive management
  - Pattern & Practice

# THE LAWYER GAME:

# RESPONDING TO UNETHICAL CONDUCT

**FDCC ANNUAL MEETING**

**JULY 24-31, 2010**

**MUNICH, GERMANY**

**Presented by**:

**Jack T. Riley, Jr.**, Johnson & Bell, Chicago, IL
**John M. Intondi**, AXIS Insurance, Alpharetta, GA
**Helen J. Alford**, Alford, Clausen & McDonald LLC, Mobile, AL
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**Barbara A. O'Donnell**, Zelle McDonough & Cohen LLP, Boston, MA

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**"Look Before You Leap, Ethical Considerations for Corporate or Outside Counsel Speaking to the Media Regarding a Corporate Crisis"**

**By Cindy Williams and Jack Riley Jr.**

## Synopsis

An outside attorney or corporate counsel representing a business during a crisis often has the responsibility not only to prepare a strategy for handling the legal issues arising from the event, but also to consider and try to manage the effect media coverage may have on probable future (or pending) litigation facing the corporation. Consultants may advise company employees to avoid contact with the media themselves and allow their counsel to speak for them. However, ethical considerations should to be taken into account when attorneys make public statements on behalf of a client. The Model Rules of Professional Conduct provide some guidance regarding the ethical implications of this responsibility. This paper presents an overview of some of the issues corporate counsel should consider, including those dealing with legal ethics, when in the midst of a corporate crisis where litigation may not necessarily have commenced but is, nonetheless, probable.

## Introduction

A corporate crisis can be more problematic than other serious issues confronting corporate counsel due to the public relations considerations that must factor into the decision-making process, the often urgent need to make major decisions rapidly before the next media cycle begins, and the far-reaching financial and legal consequences of either inaction or actions taken. The attorney's role in this situation is distinct: to protect a client from the potential legal liabilities that another individual within the company might not envision. The prospect of adverse media publicity is a legitimate factor in the shaping of a lawyer's crisis management and pre-litigation strategy. Attorneys often advise their client, and anyone who could be construed as speaking on its behalf – to say nothing publicly, or at least as little as possible, and certainly to admit no responsibility or possibly even that a crisis exists.

An attorney as spokesman for the corporation is probably the best outlet for any necessary public statements or interviews when a corporate crisis occurs. Lawyers not only must have the economic interests of the client's business in mind, but also must consider the ramifications that public statements may have on private litigation or even civil, criminal, or governmental enforcement actions that may arise either from the conduct creating the crisis or from the reaction by the corporation to it. However, in representing a company during a crisis affecting its business and/or the public, lawyers should be aware of the ethical implications inherent in speaking to the media on behalf of the company from the beginning of the situation and continuing through any subsequent litigation involving its business operations, its shareholders, its customers, and/or the public.

**Model Rule 3.6**

Rule 3.6 of the Model Rules of Professional conduct provides the ethical guidelines for what an attorney may and may not state publicly on behalf of a client. It begins:

> A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

The Rule thus places restrictions on attorney statements to the public or in the media during a legal controversy. It includes a general prohibition against a lawyer making public statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding. The Rule goes on to denote the public statements that may be made by an attorney, including statements relating to the general nature of a claim or defense, information contained in the public record, and the result of any step in litigation. There is nothing in Rule 3.6 that limits its application only to statements made in the pendency of the litigation. As noted above, the Rule states that it applies to "a lawyer who is participating or has participated in the investigation or litigation of a matter ..." (emphasis added). Therefore, even prior to the filing of a suit, the ethical boundaries for a lawyer making public statements should be considered.

The U.S. Supreme Court in Gentile v. Nev. State Bar, interpreted the seemingly vague ethical standard of avoiding public statements where there is "substantial likelihood of material prejudice." 501 U.S. 1030 (1991). The Court reasoned that lawyers in pending cases have "special access to information" related to discovery and client communication. As such, their statements could be perceived as "highly authoritative," which would be detrimental to the administration of justice. Statements made by lawyers during litigation could influence the outcome of the matter. Yet, the Court emphasized that restrictions on public statements by an attorney apply only to statements substantially likely to have a materially prejudicial effect on an adjudication.

Rule 3.6 provides no real guidance on how lawyers should conduct themselves when there is little or no substantial likelihood that their statement will significantly influence a judicial proceeding, or how that is to be determined. However, the Ninth Circuit subsequently interpreted Gentile to mean that a lawyer's statement that has no relation to the matter pending before the court and makes no direct or immediate impact on the trial, only violates ethical obligations if there is a clear and present danger to the administration of justice. *See* Standing Comm. v. Yagman, 55 F.3d 1430, 1443 (9th Cir. 1995). In Yagman, the court reviewed public comments made by an attorney criticizing the judge involved in the attorney's case. The Ninth Circuit held that there was no "substantial likelihood of material prejudice" to any proceeding regarding the matter because, essentially, the comments did not impair the "fair rights of litigants," which was the primary concern of the court in Gentile. Therefore, the finding by the district court sanctioning the attorney for misconduct was reversed.

Once again, these cautionary opinions are not necessarily limited to circumstances where civil litigation or enforcement actions have already been filed, and could apply in the course of an investigation of the facts of a crisis when there is a reasonable likelihood that litigation will ensue. Furthermore, in this information age of instant communications, and given the tendency of plaintiffs' attorneys to stampede to the courthouse to gain publicity and advantage by being the first to file suit, it is possible that litigation may already be underway without knowledge of the company by the time a public pronouncement is actually made regarding a crisis.

*Ethical Considerations*

Numerous factors are involved when counsel plan for making public statements in dealing with a corporate crisis, some of which may have ethical implications and could affect a lawyers' ability to issue public statements on behalf of a corporate client. These factors include the following:

- Counsel as a potential witness in a legal proceeding
- Full disclosure issues, omission and commission
- Perceived or actual media bias
- Timing of public statements with regard to the stage of the crisis, investigation, decision making, public awareness, pending or anticipated litigation, and the medial cycle
- Importance of fair and partial judicial proceedings
- Nature of the proceedings or likely proceedings
- Use of public statements as an admission in litigation
- Actual express authority of the lawyer to issue specific public statements

Some of these factors are discussed in more detail below.

*Counsel as Potential Witness*

A lawyer should also be mindful of public statements made when there is a reasonable possibility of future litigation because if litigation commences, corporate counsel who are also officers of the company may thus be considered a necessary participant in trial proceedings. This could interfere with a corporate counsel acting as the company representative at trial, and for defense counsel, this could impede the lawyer's ability to represent the corporation at trial or even result in disqualification. Rule 3.7 of the Model Rules prohibits lawyers from acting as an advocate at a trial in which the lawyer is also likely to be called as a necessary witness. The prohibition against a lawyer serving as an advocate and testifying as a witness in the same proceeding is intended to eliminate possible confusion by the jury about the lawyer's role in the matter.

*Disclosure Issues*

Another ethical consideration for an attorney making statements to the media regarding a corporate crisis is the scope and accuracy of disclosure that is required of publicly-held corporations. Rule 10b-5 constrains corporate communications by prohibiting any "untrue statement of a material fact or to omit to state a fact necessary to make the statements made, in

the light of the circumstances under which they were made, not misleading." Rule 10b-5, Securities Exchange Act of 1934. This Rule has also been interpreted to create a duty also to update or correct previous statements made in good faith that have subsequently become misleading due to new developments in the matter. Violations can lead to government prosecutions or civil suits. This is another consideration for an attorney planning public statements and calculating the best strategy the company should adopt during a corporate crisis.

*Attempts to Create Bias*

The attorney's actual or apparent objectives in issuing public statements on behalf of his client may be an important a factor in determining whether that attorney is fulfilling his ethical obligations. Statements that evince a clear and deliberate attempt to create an unfair bias or prejudice within the media and thus the information consuming public to the advantage of his client or to the detriment of a potential adversary could constitute a violation of ethical standards, if intended to influence the trier of fact in subsequent litigation.

*Timing of Public Statements*

The Model Rules do not specify whether public statements made closer in time to judicial proceedings rather than statements made months in advance in anticipation of litigation would have a greater propensity to influence them, and thus should be subject to greater scrutiny. Some courts have found that statements made closer to the actual trial can have a highly prejudicial effect on the jury. *See* U.S. v. Bingham, 769 F. Supp. 1039 (N.D. Ill. 1991) (lawyers representing members of Chicago street gang violated a state ethics rule – identical to corresponding Model Rule – regarding public discussion of criminal litigation by making statements on the eve of jury selection criticizing the judge's decision to impanel anonymous jury). That being said, even adverse media coverage months in advance of a trial could foster strong prejudice in the eventual jury pool. *See* Irvin v. Dowd, 366 U.S. 717, 725-26 (1961) (conviction was overturned due to lack of impartial jury where, on voir dire, jurors had expressed their opinion as to defendant's guilt for a crime that had received significant media coverage).

*Importance of Fair and Partial Judicial Proceedings*

An attorney's statements to the media even months before a trial could possibly influence potential jurors and materially affect the outcome. The restrictions placed on attorney statements by Model Rule 3.6 are intended to prevent undue influence on a jury before or during a trial. These restrictions could also place limits on the activities of corporate or outside counsel in making statements to the media in the wake of a crisis, or even in advising their clients on what statements to make. Specifically, the Alabama and Pennsylvania State Bars' ethics authorities have stated that attorneys may not evade ethical restrictions on public statements by advising their clients to make statements that the attorney would not be permitted to make.

*Authority of Attorney to Make Public Statements*

An attorney may appear to have the implied authority to act on behalf of the client in a way which will serve the purpose for which he or she was retained. Yet, with the distinct situation

presented by a corporate crisis, counsel should recognize that explicit authority and approval from the client dictates what an attorney may or may not say publicly. Outside the strictures of a pre-approved prepared statement, an attorney should not make statements which would be interpreted as binding on the client without express authorization to make that statement.
Typically, issues regarding whether an attorney acting outside the scope of authority arise when an attorney enters into a settlement agreement with the opposing party without first obtaining the client's authorization, or when an attorney surrenders or waives any substantial rights of a client without its consent. Thus, public statements by counsel which might be considered an offer on behalf of a company to settle actual or potential claims or to be a waiver of rights, which lack the client's express authorization, could lead to the client disavowing the attorney's representations and could potentially subject the attorney to a claim for breach of implied warranty of authority. *See* Joe & Dan Int'l Corp. v. U.S. Fid. & Guar. Co., 178 Ill.App.3d 741, 746 (1st Dist. 1988) *citing* Restatement (Second) Agency § 329 (1987).

**Conclusion**

While there are clearly other issues and considerations that come into play, the Model Rules of Professional Conduct may provide a framework of ethical boundaries for an attorney's statements to the public during a corporate crisis, Counsel should be aware of the ramifications of statements made by them on behalf of their client during pending litigation, but also prior to the commencement of legal proceedings in light of the nature of a corporate crisis and the fact that litigation may occur. Taking the above factors into account will place counsel on more even footing when taking the leap of speaking to the public during this serious and sensitive period.

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*FDCC 2010 Annual Meeting*

*The Lawyer Game – Responding to Unethical Litigation Conduct*
Thursday, July 29, 2010

**Scenario A:** Vroom, Vroom and Social Interaction

*L. Edward Foot v. Vroom Motors, et al.* Foot, a Las Vegas real estate agent was involved in an "unintended acceleration" accident in his 2007 Vroom automobile. Following the accident, he retains an attorney and commences an action for bodily injuries against Vroom. Vroom suspects that Foot's accident is staged, in part because Foot had become well known the year before when he crashed a pre-Super Bowl party at a well known Las Vegas "Gentleman's Club" as part of his audition for "Real Sleazebags of Las Vegas" a reality show being pitched to various cable television networks. Also, Foot appeared remarkably composed immediately after the accident and was wearing a visible coat of television pancake makeup and was being trailed by a camera crew for the reality show.

Foot's attorney has sued Vroom. Because the case is venued in a Judicial Hellhole Vroom hired a well known local defense firm. Now, facing a slew of unintended acceleration claims, it is seeking to retain national coordinating counsel. Local defense counsel has made a series of recommendations and Vroom's head of litigation is seeking the input of the candidates for coordinating counsel regarding those recommendations:

a. Foot has an active social life and frequents the internet. He has a Facebook page, but has marked it private. Local counsel has suggested that its receptionist, an attractive young woman who regularly gets selected by doormen to get into "exclusive" clubs "friend" Foot in order to gain access to his private Facebook pages and photo albums.

b. As an alternative, local counsel has suggested that its receptionist frequent the same clubs and get to know Foot's friends in the hope of obtaining additional information regarding his activities.

c. In addition, local counsel has reported that his paralegal went to high school with Foot and is already a "friend" of Foot, although they hardly associated in high school and have little in common now. Local counsel proposes to have the paralegal download and save Foot's Facebook pages.

d. Local counsel has also reported that one of his secretary's friends is trying to set the secretary up on a blind date with Foot, completely unrelated to the lawsuit, of which the friend is unaware. The secretary believes Foot is "creepy" but, having a firm-first attitude, is prepared to go on the date if asked.

e. Foot has his own vanity website "LEdFoot.com" on which he posts information and pictures. Local counsel proposes to download the pages from that website, and also to go to the "wayback machine" at www.archive.org to download the historical pages from LEdFoot.com.

f. Local counsel has TIVO'd every episode of "Real Sleazebags of Las Vegas" - "for research purposes only" and proposes to use clips from that series in the defense.

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**Scenario B**: The Lawyer as Hurricane Witness

Counsel files suit under Homeowner's Policy for property damage incurred by insured as a result of a hurricane. Home was insured for $300,000 and was totally destroyed by the storm. Prior to the storm and destruction of the property, Insured entered into contract to sell the home for $1,500,000, but sale was to be concluded within 6 months. Post storm/ destruction, contract was amended and purchase price reduced to $1,200,000 in recognition of fact that structure on property no longer existed. Insured receives $300,000 for damage to structure from flood and homeowner's carriers. Insured also completes sale of home for $1,200,000 and thus recovers entire contract amount.

Lawsuit alleges breach of contract, bad faith, conspiracy to under-insure, negligence, wantonness and fraud stemming from the adjustment of the property claim. Deposition of Insured's expert reflects that prior to the storm, Insured's lawyer and Expert allegedly tried to increase coverage from $300,000 to $600,000, visited both the retail and broker (also defendants) and Lawyer allegedly paid cash to increase the insured's coverage. Lawyer withdraws as counsel, but his partner appears and continues to represent the Insured.

By affidavit filed in opposition to summary judgment, Lawyer also claims to have talked with adjusters and experts on site for the Insurer who indicated that damages would be covered, but also stated that Insured would never get paid. Further, Lawyer claims to have been personally present during the hurricane and to have personally observed wind damage to the property before it was washed away by the storm surge. Lawyer's affidavit directly contradicts testimony of Insured (and common sense).

Summary judgment is granted based on the fact that Insured has been made whole and has suffered no damages.

1. Can Lawyer's partner represent the Insured if Lawyer is a witness?

   **Yes, so long as that representation is not precluded by Rules 1.7 or 1.9, dealing with conflicts posed by the representation of current and former clients, respectively.** In fact, under the ABA Model Rules of Professional Conduct, Lawyer may still represent the Insured in the matter, other than "as advocate at trial." *See* Rule 3.7, Lawyer as Witness ("A lawyer shall not act as advocate at trial in which the lawyer is likely to be a necessary witness. ... "). *See also Pyne v. Procacci Bros. Sales Corp.*, 1997 WL 634370 (E. Dist. Penn. 1997) ("That an attorney may be the subject of discovery as a fact witness or may be called as a witness at trial does not preclude his or her representation of a party in all pretrial matters. The Federal Rules of Civil Procedure do not specifically prohibit taking opposing counsel's deposition. ... A deposition of opposing counsel is not encouraged and is typically permitted only where a clear need is shown. Such

depositions are permitted, however, where an attorney takes part in 'significant relevant pre-litigation events and the attorney-client privilege does not apply to the testimony.' [citations omitted] There is simply no reason to delay discovery or to preclude current counsel from continuing to represent defendants in pretrial matters.")

But see, for example, the Texas rule, which specifically precludes a lawyer from accepting or continuing employment "as an advocate before a tribunal in a contemplated or pending adjudicatory proceeding" if the lawyer knows or believes she or he is to be a witness, and extends such preclusion to other lawyers in the firm without the client's informed consent. Rule 3.8, Texas Disciplinary Rules of Professional Conduct.

2. What are your ethical obligations with regard to reporting?

**Rule 8.3(a) of the ABA Model Rules of Professional Conduct provides that a lawyer who "knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority."**

Failure to report is itself a violation of the Rules of Professional Conduct. The Illinois Supreme Court suspended a lawyer for one year for his failure to report another lawyer's misconduct, in part because the failure to report interfered with an investigation in the misconduct, and perhaps resulted in additional misuse of client funds. *In re Himmel*, 533 N.E. 2d 790, 796 (Ill. 1988).

3. What if reporting may be detrimental to your client?

The Model Rules do not provide any specific exception to the duty to report misconduct based merely on detrimental impact to an attorney's client. However, **Rule 8.3(c) provides that a lawyer is not required to disclose information protected by Rule 1.6, which provides that information relating to the client's representation shall be kept confidential.**

In several jurisdictions, Rule 8.3 has been applied to relieve the attorney of reporting misconduct if doing so would violate confidentiality, the client's instructions, or the client's best interests. *E.g. In re Ethics Advisory Panel Opinion No. 92-1*, 627 A.2d 317 (Rhode Island 1993) (lawyer prohibited by Rule 1.6 from reporting fact that client's former lawyer had embezzled and subsequently repaid a substantial amount of his client's money); Arizona Bar Ass'n Ethics Op. No. 90-13 (1990) (information about a client's rape by another lawyer may not be disclosed where client explicitly instructs lawyer not to report); Maryland State Bar Ass'n Comm. on Ethics, Op. No. 89-46 (1989) (client instruction not to report breach of fiduciary duty precludes reporting); Connecticut Bar Ass'n Comm. on Professional Ethics, Informal Op. 89-14 (1989) (in-house corporate lawyer may not disclose other corporate lawyer's misconduct if disclosure could be adverse to corporation's interests); Wisconsin State Bar Comm. on Professional Ethics,

Formal Op. E-89-12, (1989) (disclosure prohibited if it would entail revelation of any client information, whether or not it would prejudice client).

Some jurisdictions' rules include additional requirements which affect the duty to report. Rule 1.3(b)(2) of the District of Columbia Rules of Professional Conduct provides that a lawyer shall not "intentionally prejudice or damage a client during the course of the professional relationship." Application of this rule suggests that the attorney still has the obligation to report misconduct, but that where it could serve to prejudice or damage the client, reporting must wait until the course of the professional relationship ends, so as to avoid harming the client.

In any event, where information placing a lawyer on notice of attorney misconduct arises from a non-confidential, non-client source, the lawyer will not be relieved of the duty to report the misconduct. *E.g.* Maryland State Bar Ass'n Comm. on Ethics, Op. No. 89-36 (Feb. 14, 1989) (lawyer representing other lawyers must report their misconduct if he has actual knowledge thereof which has already been revealed to a court and, therefore, is a matter of public record); Philadelphia Bar Ass'n Professional Guidance Comm., Op. 83-23 (1988) (lawyer who receives communication directly from another party to a pending litigation alleging unethical conduct by that party's lawyer must report the information to the disciplinary board of the Pennsylvania Supreme Court. Confidentiality does not apply, as the information came from another party to the litigation, not from the lawyer's client.).

4. If you have to report, when do you report?

The Model Rules provide no time frame for reporting, and case law dealing specifically with the timing of reporting is minimal. The commentary to the District of Columbia's Rule 8.3 states that a lawyer must make an **immediate** report if delay will likely result in injury to the client or to another, but that when immediate action is not necessary, the lawyer may wait to report until the "matter is concluded." As indicated above, this comment is consistent with the District of Columbia's Rule 1.3(b)(2), which suggests that where reporting misconduct could serve to prejudice or damage the client, reporting must wait until the course of the professional relationship ends, so as to avoid harming the client.

5. Do you have an obligation to consider whether Lawyer's conduct is detrimental to Plaintiff?

**Yes. Rule 8.4(d) of the Model Rules of Professional Conduct provides that is misconduct for a lawyer to "engage in conduct that is prejudicial to the administration of justice."** That may include conduct that is prejudicial to a lawyer's own client's access to justice. However, the Model Rules, and the preponderance of jurisdictions applying rules of professional conduct that approximate the Model Rules, make plain that the primary duty is owed to the client and the protection of client confidences.

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**Scenario C:** Family Feud

In *Lord v. Lord*, family factions are embroiled in contentious litigation over their ownership interests in a grocery chain with assets exceeding $1 billion. One side of the family alleges that the other side fraudulently transferred stock and diverted corporate opportunities in breach of their fiduciary obligations. Following a jury waived trial in 2006, Judge Maria entered judgment for the plaintiffs on several of their claims, with the damages determination reserved for future proceedings. Given the adverse judgment and other pretrial rulings favoring the plaintiffs, the defendants are convinced that the Judge is biased against them and certain that they will lose control over their family business and fortune if the coming damages phase is tried before the same judge. They have also expressed their displeasure over having paid millions in legal fees to the group of attorneys and firms that have represented their interests in the litigation to date.

George Lord, the head of the defendants' side of the family, has convened this meeting with existing and prospective successor defense counsel to decide who will represent defendants in the upcoming damages proceedings and to discuss ways to get the matter before a different judge who will not be predisposed to rule for the plaintiffs. Bear in mind that Judge Maria denied a prior motion to recuse about a year before the initial jury waived trial on the fraudulent transfer and breach of fiduciary obligation claims.

Attorney A (lead counsel for the current defense team) recommends a renewed motion to recuse with a request to have the motion heard by a different judge. In addition to pointing to the court's disregard of evidence favorable to the defense, the renewed motion will offer evidence that the Judge was observed socializing with plaintiffs' counsel at a Boston restaurant owned by the Judge's husband not long before the jury waived trial.

Attorney B (another member of the current defense team) recommends filing a complaint with the Judicial Conduct Commission that would draw on the information presented by the previously denied motion to recuse and the information available for the proposed renewed motion.

Attorney C (potential successor counsel) comes to the meeting with detailed information concerning the Judge's background and her rulings in other decisions and information gained from other sources that Attorney C believes demonstrate that the jury waived trial was "over before it began" because Judge Maria had already decided to rule for the plaintiffs. Attorney C was invited to this meeting after contacting George Lord to apprise him of information he had obtained that he believed called the Judge's integrity and impartiality into question. Claiming that Judge Maria had previously done a "big favor" for another individual in a "big case," Attorney C argued that the case was "fixed" and also insisted that Judge Maria was not smart enough to write the lengthy decision detailing her finding on the stock transfer, corporate opportunity and breach of fiduciary obligation findings. Lacking any specific information or

documentation to support his accusations, Attorney C recommends the dual strategy of (a) hiring an investigator to obtain evidence of the Judge's prior judicial misconduct, and (b) inviting the Judge's prior law clerk, Paul Walsh, to a sham interview to obtain information about his role in writing the decision following the jury waived trial and to explore whether he would corroborate the suspicions the Judge was pre-disposed to rule in favor of the plaintiffs. The law clerk had circulated his resume to several Boston firms when his judicial clerkship ended the prior year. While he was presently employed by a small Boston firm, he remains interested in exploring other opportunities.

Convinced that his side of the family would lose control over their share of the family business if Judge Maria was allowed to preside over future proceedings in their lawsuit, George Lord embraces Attorney C's recommendations and gives his existing defense team the choice of working with Attorney C to carry out those recommendations as a means of obtaining compelling support for a motion to recuse, or yielding control over the litigation going forward to Attorney C. In response to concerns voiced by Attorneys A and B, George Lord reminds the assembled attorneys that the millions of dollars in legal fees paid to date have not yielded any favorable results for the defendants, demonstrating the futility of pursuing a traditional litigation strategy.

So, Attorneys A and B, are you in or out?

Attorney B declines to participate and withdraws from the team.

Attorney A, a prominent attorney with a large Boston firm who previously headed up the judicial nominating committee and who previously handled white collar criminal investigations at the U.S. Attorney's office, agrees to participate provided that he remains lead counsel with Attorney C reporting to him regarding the investigation results and law clerk interview.

Now working together, Attorneys A and C coordinate the following:

- The investigator, posing as a recruiter, contacts the former law clerk, Paul Walsh, on behalf of corporation looking for in-house counsel with excellent writing skills. When asked if he worked on any cases of particular note during his clerkship, Walsh said he wrote the *Lord v. Lord* decision.

- A month later, the investigator called Walsh to say his client was impressed by his writing samples, especially the *Lord v. Lord* decision, and arranged an initial interview. During that interview, the investigator (posing as a recruiter) lauded the lucrative and adventurous aspects of the in-house position and probed more deeply into the authorship of the *Lord v. Lord* decision and the decision-making process. Walsh said that while he and Judge Maria discussed the case at length during the trial, the legal conclusions concerning the fraudulent transfers and the breach of fiduciary obligation claims were his. The investigator/recruiter said his client would like to meet Walsh during a further interview in Halifax or New York (both jurisdictions permit recording conversations with one party's consent).

- The interview went forward in Halifax about a month later after elaborate preparations, including preparation of business cards for British Pacific Surplus Risks, the fictitious international insurance underwriting business allegedly interested in hiring Walsh. The cards listed a working facsimile number and telephone number that was answered by someone with a British accent. Prior to the interview, the investigator/recruiter sent Walsh a round trip airline ticket and $300 to compensate him for missing a day's work. At the interview, Attorney C posed as the director of operations of British Pacific with another private detective posing as the person who "put out fires" for British Pacific. At the interview, Walsh was again asked detailed questions about Judge Maria's deliberative process and personal conduct. According to the investigators, Walsh told them Judge Maria told him before trial started that she knew who "the good guys and bad guys" were and who the "winners and losers" were going to be. When shown a letter recommending him for admission to the Massachusetts Bar, Walsh volunteered that he did not personally know the individual who wrote the letter but obtained that recommendation through another attorney who was unable to submit his own letter of recommendation.

- Attorney C and the investigator both prepared affidavits detailing the statements made by Walsh during the interview to demonstrate Judge Maria's bias for use in the forthcoming renewed motion to recuse.

- During a client meeting a few days later, Attorneys A and C discussed whether to proceed with the motion to recuse and/or submission to the Commission on Judicial Conduct with the existing affidavits or conduct a further interview in New York or Bermuda where the clerk's statements could be lawfully recorded.

- Reluctant to rely on Attorney C's information, Attorney A decided that the best course of action would be to conduct a further interview in New York where Walsh would be invited to meet with a decision maker at British Pacific (an investigator selected by Attorney A). At the interview at the Four Seasons Hotel in New York City, Walsh was again asked about his role in writing the *Lord v. Lord* decision and the Judge's predisposition to rule for the plaintiffs.

- With the benefit of Walsh's recorded statement, Attorney A arranged for a third "interview" in Boston. At this meeting, Attorney A and his investigator confronted Walsh with his recorded statement and said that if he did not cooperate with their efforts to remove Judge Maria from the case, they would inform the Board of Bar Overseers of Walsh's submission of the falsified bar recommendation letter, ending his career before it started. Emphasizing that time was of the essence, Attorney A gives Walsh his card and urged him to call him the next day to confirm his willingness to assist in their efforts to remove the Judge.

Distraught, Walsh returns to the small firm where he works and seeks the advice of the senior partner.

What options do you suggest? Did defense counsel cross the line in their efforts to protect their client against what they viewed as compelling evidence of judicial bias?

* * *

Here is a snapshot of the aftermath of this real world saga, *Demoulas v. Demoulas*, and related proceedings:[1]

- The distraught law clerk, Paul Walsh, was guided by attorney, Harry Manion, in working with the Department of Justice to obtain evidence through wiretapped meetings with defense counsel of their efforts to interfere with the judicial process by undermining the reputation of Judge Maria Lopez.

- Defendants filed a renewed motion for recusal that included as additional support the contention that the Judge is directly adverse to the defendants because of the DOJ criminal investigation into their efforts to undermine the Judge and intervene with the proceedings. Judge Lopez denied the motion and entered judgment in favor of the plaintiffs. Following appeal, both decisions were affirmed. Defendants also filed a complaint with the Judicial Conduct Commission that was rejected.

- While criminal indictments against defense counsel were later dropped, disciplinary proceedings before the Board of Bar Overseers resulted in the disbarment of 2 of the 3 defense counsel with a suspension of the third. Gary Crossen, one of the disbarred attorneys, was a former head of the judicial nominating commission and an ethics advisor to Massachusetts Governor Weld. The suspended attorney was the former head of the Massachusetts Board of Bar Overseers. Throughout their disciplinary proceedings, all three defense counsel remained adamant that their actions were appropriately taken to obtain evidence of judicial bias and to protect their clients' interests. The Massachusetts Supreme Judicial Court disagreed in its 2008 decisions upholding Bar Counsel's Orders disbarring Crossen and Curry.

- In upholding the sanction of disbarment, the Court held that the ethical violations carried out by attorneys Crossen and Curry included the following: [2]

    - Engaging in conduct involving "dishonesty, fraud, deceit, or misrepresentation" in violation of Massachusetts DR 1-102(A)(4)[3] and DR 7-102(A)(5).[4] As the Court

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[1] *Demoulas v. Demoulas*, 432 Mass 43 (2000) (history of the intrafamily litigation); *Demoulas v. Demoulas Super Mkts, Inc*. 424 Mass. 501 (1997) (recounting substance of dispute); *Demoulas v. Demoulas*, 428 Mass. 555 (1998). *Matter of Crossen*, 450 Mass. 533 (2008) (bar disciplinary proceedings); *Matter of Curry*, 450 Mass. 503 (2008) (bar disciplinary proceedings).

[2] The disciplinary proceedings addressed the Massachusetts Code of Professional Responsibility and Canons of Ethics and Disciplinary Rules in effect in 1997. In 1998, Massachusetts adopted the Massachusetts Rules of Professional Conduct to conform in most respects to the ABA Model Rules of Professional Conduct. *See*, 426 Mass. 1303 (1998). There is no indication in the Court's decisions that application of the Model Rules would have resulted in a different outcome.

[3] Mass. R. Prof. C. 8.4 (replacing D.R. 1-102(A)(4) and adopting ABA Model Rule 8.4) states in relevant part that it is professional misconduct for an attorney to: (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another; (c) engage in conduct

observed, these rules "are not obscure. They harbor no implicit exception. Nor are they limited to statements made in court or to interactions between the lawyer and the client." *Matter of Curry*, 450 Mass. 503, 521 (2008).

- Harm to the administration of justice, in violation of DR 1-102(A)(5) by attempting to discredit the judge in an ongoing matter without credible evidence of bias or misconduct. As the Court observed, because "the administration of justice depends on a baseline of confidence in the integrity of the judicial system," the attorneys' self-serving and duplicitous scheme was "prejudicial to the administration of justice." *Id*. at 525. The Court also cautioned that statements by an attorney critical of a judge in a pending case in which the attorney is engaged "are especially disfavored."

- The attorneys' efforts to pierce the confidential communications between a former law clerk and the judge in a pending matter to benefit one of the litigants also constituted "conduct prejudicial to the administration of justice" in violation of DR 1-102(A)(5). *Id*. at 526. The Court recognized that Massachusetts has not adopted a privilege for communications between a judge and his or her law clerk, but held that the absence of a recognized privilege does not permit an attorney to induce or coerce a clerk into revealing confidential communications about an ongoing matter to benefit a litigant. "The administration of justice requires respect for internal deliberations and processes that form the basis of judicial decisions, at the very least while the matter is still pending." *Id*.

- Engaging in conduct that "adversely reflects on [an attorney's] fitness to practice law" in violation of DR 1-102(A)(6).[5] In this regard, the Court found that the attorneys' conduct called into question their candor, motives, and respect for the legal system to the extent that they were not longer "worthy of the trust the courts and public must place in [an attorney's] representations, conduct and character." *Id*. at 528.

- Soliciting or encouraging client misconduct in violation of DR 7-102(A)(7).[6] The attorneys violated this rule by encouraging their client to authorize, fund and

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involving dishonesty, fraud, deceit, or misrepresentation; (d) engage in conduct that is prejudicial to the administration of justice; or (h) engage in any other conduct that adversely reflects on his or her fitness to practice law.

[4] Massachusetts Rule of Professional Conduct 4.1 (replacing D.R. 7-102(A)(5) and adopting ABA Model Rule 4.1) states that "in the course of representing a client, a lawyer shall not knowingly (a) make a false statement of material fact or law to a third person."

[5] Mass. R. Prof. C. 8.4(h), prohibiting conduct that adversely reflects on an attorney's fitness to practice law, replaces D.R. 102(A)(6). This catch all provision does not have a direct counterpart in the ABA Model Rules.

[6] D.R. 7-102(A)(7) provides that, in representing a client, a lawyer shall not "[c]ounsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent."[6] Mass. R. Prof. C. 1.2(d), the successor to this Rule and counterpart to ABA Model Rule 1.2, states that a "lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any

continue multiple attempts to pressure the law clerk by means of dishonesty, fraud, deceit and misrepresentation. *Id*.

- In 2003, Judge Lopez resigned rather than accept a recommended six month suspension following an investigation into her handling of a different criminal matter.

- In 2006 and 2007, she was featured in *Judge Maria Lopez*, a courtroom reality show that was cancelled after two seasons due to poor ratings.

proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law."

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**Scenario D:** A Deal Too Good To Be True

Well known plaintiff's lawyer "Runaway Hailey" has made a fortune pursuing class actions resulting from the financial meltdown. Having prospered during the meltdown and having finally paid off all of his ex-wives, Hailey is ready to take it easy. But, plaintiffs keep seeking him out.

One of Hailey's cases is against Financial Engineering Co Universal. Over the past two years, Hailey has taken over $300,000,000 from FECU, and he's posed now to take more. FECU, tired of paying almost 5% of what it pays in bonuses to its own employees, to Hailey, is looking for new defense counsel, an open secret in the financial meltdown bar. The week before the beauty contest Hailey takes FECU's General Counsel to lunch. Over a lunch remarkably similar to that served at Federation Committee Meetings, Hailey offers to stop taking FECU cases if FECU will simply settle the pending case at a level 50% above the per-class member gross recoveries in the earlier cases.

Having once attended a Federation Meeting as a guest, the General Counsel knows there is no such thing as a free lunch, so he raises the issue at the Beauty Contest.

a. Can FECU cut a deal with Hailey?

b. Does it make a difference that the class members in the pending suit will collect the majority of any overage, not Hailey? What if Hailey agrees to waive his fees on the overage?

c. If FECU, true to its corporate mission statement, says "no," can its attorneys ever negotiate with Hailey without exposing themselves to ethics charges?

d. Must FECU report Hailey to any regulatory authorities?

## CURRICULUM VITAE

### Jack T. Riley

Jack T. Riley is a founding shareholder of Johnson & Bell, Ltd., and has been with the firm for more than 30 years. Mr. Riley has a wealth of experience in jury trials/civil litigation and currently concentrates his practice in health care and complex/catastrophic litigation. Having tried numerous catastrophic and/or complex tort cases in both state and federal court, he is a frequent author and lecturer on tort and civil practice issues for the Chicago Bar Association, the Illinois Association of Defense Trial Counsel, the Federation of Defense & Corporate Counsel, and the Defense Research Institute. Mr. Riley has been acknowledged by a number of organizations and was the recipient of the first John E. Guy Award in 1994 from the Illinois Association of Defense Trial Counsel (IDC) for his contributions to the defense bar. Mr. Riley was also nominated, by his peers, as an Illinois Super Lawyer for 2007, 2008 and 2009. His success as a trial attorney has been recognized by his peers, who have honored him with an AV-rating from Martindale-Hubbell.

Mr. Riley is a member of the Defense Research Institute (Board of Directors 2002-2005), the Trial Lawyers Club, and the Society of Trial Lawyers. He has been active in several defense organizations, including the IDC, where he was the founding editor of The IDC Quarterly and served as editor-in-chief from 1989 until 1994 and served as president from 1999 to 2000. He was president of the Federation of Defense & Corporate Counsel from 2003 to 2004; he also chaired the FDCC Publications Committee from 1994 until 1998, with overall responsibility for all publications, including its law journal, The FDCC Quarterly. Mr. Riley has been a director (2002-2005) and member of the Executive committee (2003-3004) of Lawyers for Civil Justice in Washington, D.C.

### John M. Intondi

John M. Intondi is Executive Vice President and Insurance Claims Director for AXIS Insurance, with claim offices in Alpharetta, GA, Berkeley Heights, NJ, Kansas City, MO, Bermuda, Dublin and London. Prior to joining AXIS in 2002, Mr. Intondi was the SVP of Claims for Combined Specialty Group, Royal Specialty Underwriting, Inc., ACE USA and Westchester Specialty Group.

He is an active member of the FDCC, having Chaired or Vice-Chaired the Excess & Surplus Lines Section, Technology Committee, Admissions Committee and the Membership Development & Retention Committee. He has been involved as faculty with both the FDCC's Litigation Management College and Graduate School since their inception. Mr. Intondi is also the AXIS representative to the International Association of Claims Professionals.

Mr. Intondi received his undergraduate degree at the State University of New York at Stony Brook and holds a Masters degree in Management from Farleigh Dickenson University in Rutherford, NJ. In 1980 he earned the Chartered Property and Casualty Underwriter (CPCU) designation and subsequently taught various CPCU classes for 10 years.

**Helen J. Alford**

Helen Alford is a senior member of the law firm of Alford, Clausen & McDonald, LLC in Mobile, Alabama.

A graduate of Tulane University, having received her JD cum laude in 1982, Helen has practiced in Mobile for 28 years. She is also a member of the Bars of Mississippi, Texas, and Tennessee. Helen serves as a Vice-President of the Federation of Defense Corporate Counsel. Helen is an active member of the Defense Research Institute, and is past President of the Alabama Defense Lawyers Association. She is also a member of the National Retail & Restaurant Defense Association. She is registered on the Alabama State Court Mediator Roster and Alabama Arbitrator Roster and is a member of the American Arbitration Association panel of arbitrators. In addition to an active workers' compensation defense practice, Helen practices in the areas of alternative dispute resolution, construction claims, extra-contractual and bad faith law, insurance coverage, product liability, and complex litigation. She has authored numerous articles for the profession and is a frequent lecturer for professional and civic organizations. Helen was named by Business Alabama as an Outstanding Woman in Business in 2005 and selected as an Alabama "Super Lawyer" in 2008, 2009 and 2010. Helen currently serves as a President of the Board of Directors for Girl Scouts of Southern Alabama.

**Andrew B. Downs**

Andrew B. Downs is a shareholder in the firm of Bullivant Houser Bailey PC, primarily resident in its San Francisco office and is also the Shareholder in Charge of Bullivant's Las Vegas office. Admitted in both California and Nevada, he practices throughout both states with an emphasis upon the defense of complex coverage and bad faith litigation, including class actions and multi-district litigation. Mr. Downs recently concluded the defense of a $100,000,000 plus series of actions which included over 15 state court actions in multiple states and multiple federal class actions as well as multiple bankruptcies. Currently a Vice Chair of the Federation's Extra-Contractual Liability Section, Mr. Downs is a former Chair of the Federation's Property Insurance Section and is also a former Chair of the Property Insurance Law Committee of the Tort, Trial & Insurance Practice Section of the ABA. A frequent author and speaker, Mr. Downs is one of the Editors of the *Property Insurance Litigator's Handbook* published by the American Bar Association in 2007 and is a member of the Conference Committee for the 2009-2011 Claims Conferences sponsored by the Property Loss Research Bureau and the Liability Insurance Research Bureau. He is a 1983 graduate of the University of California Los Angeles School of Law and a 1980 graduate of The Johns Hopkins University.

**Susan B. Harwood**

Susan B. Harwood is the managing partner of Boehm, Brown, Fischer, Harwood, Kelly & Scheihing, P.A.'s Orlando, Florida office. She concentrates her practice in the areas of first and third party insurance coverage disputes.

Ms. Harwood has been a member of the Federation of Defense and Corporate Counsel ("FDCC") since 2001. She was chair of the FDCC's Property Insurance Section in 2007-2009,

and she currently serves on the FDCC's Project and Objectives, Admissions, Amicus, Diversity Initiative and Defense of the Judiciary committees. Ms. Harwood is also the associate dean of the FDCC's Litigation Management College's Graduate Program.

A member of the Tort Trial and Insurance Practice Section of the American Bar Association ("TIPS"), Ms. Harwood has served on the Women and Minority Involvement Committee, as chair of the Property Insurance Law Committee and on the editorial board of The Brief, a TIPS publication.

Ms. Harwood currently sits on the board of directors of the Windstorm Insurance Network (WIND), an organization dedicated to promoting awareness of windstorm insurance issues through the application of educational initiatives. She was convention chair for WIND's annual 2006 conference held in Orlando, Florida.

A frequent speaker on insurance coverage topics, Ms. Harwood recently gave the keynote speech at the Australian Insurance Law Association's 2009 Annual Conference in Melbourne, Australia on recent catastrophic losses in the U.S.

Ms. Harwood was admitted to the Florida Bar in 1983. She is "AV" rated by Martindale-Hubbell. Ms. Harwood is also a certified circuit mediator in Florida. She attended Wake Forest University (B.A. 1979) and Wake Forest University's School of Law (J.D. 1983).

**Barbara A. O'Donnell**

Barbara O'Donnell has more than 20 years of experience in matters of insurance coverage, extra contractual liability, insurance agent/broker liability, employment, and professional liability law. Ms. O'Donnell's practice is regional, and she has handled matters in several state and federal courts and before administrative and arbitration tribunals.

Ms. O'Donnell's insurance coverage practice includes the resolution and litigation of a broad range of liability coverage issues under commercial, specialty lines, professional, directors and officers, employment practices, and other standard form and manuscript policies. She regularly advises and represents insurers in complex coverage disputes involving allocation issues, primary/excess obligations, advertising injury coverage, additional and other insured questions, application misrepresentation defenses, and the application of exclusions under claims made and occurrence based policies. Ms. O'Donnell also counsels insurers concerning claims handling obligations and effective ways to minimize exposure to extra-contractual liability claims.

Drawing on the breadth of her insurance coverage and industry experience, Ms. O'Donnell also drafts policy forms and endorsements for insurers. Ms. O'Donnell also prepares and presents custom tailored training programs for insurance professional on claims handling best practices and insurance coverage obligations and defenses to assist clients in avoiding costly coverage disputes.

Ms. O'Donnell's professional liability practice includes the representation of insurance agent/brokers against claims alleging the failure to procure requested or appropriate coverages.

In defending agent/brokers against these claims, Ms. O'Donnell often draws upon her insurance coverage experience to establish that the agent/broker's conduct did not cause the alleged loss in any event.

In her employment law practice, Ms. O'Donnell counsels employers about effective ways to minimize liability exposure under the expanding array of state and federal laws governing employee/employer relations. Ms. O'Donnell regularly negotiates and prepares agreements to resolve disputes, including separation, nondisclosure, and settlement agreements.

Ms. O'Donnell holds leadership positions in national bar organizations and industry organizations. She is a current Vice Chair of the Extra Contractual Liability Section of the Federation of Defense and Corporate Counsel ("FDCC"), and an immediate past Vice Chair of the FDCC's Insurance Coverage Section. A past chair of the ABA/TIPS Insurance Coverage Litigation Committee, Ms. O'Donnell currently serves on the ABA/TIPS Book Publishing Board and the ABA Standing Committee on Publishing Oversight. She is a past editor of *TortSource*, an ABA/TIPS publication, and also served for several years on the editorial board of the ABA/TIPS Tort Trial and Insurance Practice Law Journal. Between 1998 and 2009, Ms. O'Donnell served as the articles editor for The CGL Reporter, a biannual International Risk Management Institute publication.

Ms. O'Donnell frequently writes and speaks on insurance coverage topics. She authored the opening chapter on "Insurance Policy Interpretation and Construction" in the West Group/American Bar Association (ABA) treatise entitled THE LAW AND PRACTICE OF INSURANCE COVERAGE LITIGATION. Ms. O'Donnell's article entitled "The First Wave of Decisions Interpreting Employment Practices Liability Policies" appeared in the Fall 2005 issue of *The Brief*, an ABA Tort and Insurance Practice Section (TIPS) publication. In recognition of her insurance coverage expertise, Ms. O'Donnell has been appointed to serve on the American Arbitration Association's Complex Coverage Neutral Evaluation panel.

Ms. O'Donnell received her B.A., with distinction, from the University of Virginia and her J.D., cum laude, from Boston College Law School. She is admitted to practice in the Commonwealth of Massachusetts and in the United States Court of Appeals for the First Circuit. Ms. O'Donnell also holds a Martindale-Hubble AV rating.

# FDCC

## 2010 Annual Meeting

Munich

July 24-July 31, 2010

# Swimming in the Titanic's Wake:

# *What Reactionary Regulation Means For Industry*

## PANEL MEMBERS:

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*The panel is grateful to Mr. Ben Delanghe of McMillan LLP for his assistance in the preparation of this paper.*

We find ourselves in a fascinating period along the global economic timeline. We live in a time when the need for remediation of market excesses and improved management of credit deleveraging is producing new public sector instruments throughout the global marketplace. While economists and other experts warn us of the dangers of "peak oil", we face the dual threats of global warming and environmental contamination to carbon resource extraction. And while market economists preach the virtues of globalization, domestic consumers press for tighter regulation of "foreign" products.

In times of crisis and uncertainty, governments are under increased pressure regulate industry, to regulate financial markets, and to regulate other sectors that may only be peripherally relevant to the crisis *du jour*. There are two overarching reasons governments turn to regulation at such times. First, regulation is an inexpensive means of demonstrating action to voters. Second, regulation can be a veiled short-term method of increasing government revenues. This reactionary approach to regulating industry will have become apparent to corporations and their outside counsel in America and abroad in recent times. It may be said to be the one true unifying theme present in every legal jurisdiction in the world.

As demonstrated by the examples discussed in this paper, when regulations are reactionary in nature, regulatory waters become a greater challenge for corporations and their counsel to navigate. The law of unintended consequences, a theory developed by sociologist Robert Merton in the 1930s, illuminates the sometimes perverse unanticipated effects of regulation.[1] Several factors of the law of unintended consequences come in to play with respect to reactionary regulation - namely, ignorance, error and what Merton called the "imperious

[1] Margaret Howard, "The Law of Unintended Consequences" (2006-2007) 31 S. Ill. U. L.J. 452 (HeinOnline).

immediacy of interest".[2] This last concept refers to instances in which a government wants the intended consequence of an action *so much* that it purposefully chooses to ignore any unintended effects. The unintended consequences of overreaching remedial legislation often cause as many problems as the legislation itself claims to solve. As such, it is often left to corporations and their lawyers to figure out and manage the unintended consequences and carry the burden and the expenses caused by a government's "rush to legislate".

This paper aims to provide an overview of developments in litigation that have arisen or are likely to arise as a result of new governmental regulation. This paper will show that reactionary regulation comes with undesirable unintended consequences. Recent efforts of various jurisdictions to regulate the financial services industry, regulate consumer products, and regulate environmental concerns exemplify this thesis.

Naturally, alongside increased regulation often comes higher expectations for corporate conduct, the creation of new duties, and higher standards of care. This tends to increase the call for corporate responsibility and threatens to open up previously unavailable avenues of recourse against corporate actors. There is a reasonable prospect that this tendency will converge with the current trend toward the broader availability of class actions worldwide, creating an even more challenging litigation environment for major corporations in the years to come.

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[2] *Ibid.*

**Regulation of the U.S. Financial Industry**

At the time of this paper's writing, securities reform legislation sponsored by Democratic Senator Christopher Dodd had just arrived for debate on the Senate floor. The "Dodd Bill"[3] proposes what the New York Times calls "the most far-reaching overhaul of the nation's financial regulatory system since the aftermath of the Depression."[4] Without reviewing the past two years of the severe global economic downturn, it is useful to colour the climate in which U.S. legislators are currently operating. We have seen, among other things, unprecedented fraud by the likes of Bernie Madoff, the default of asset-backed commercial loans, the collapse of the subprime mortgage market, the resulting bankruptcies of Lehman Brothers and Bear Stearns and the ultimate financial crisis that forced the U.S. to extend $700 billion in taxpayer funds to companies including Citigroup and the Bank of America. All of these have certainly given legislators an opportunity for drastic reform.

It is in this same environment, however, that governments are prone to fall victim to what Merton called the "imperious immediacy of interest." When a crisis this complex and far reaching occurs in such a short timeframe, the knee-jerk reaction is a rush to regulate. Not only does regulation appeal to the electorate's demands for action, but it is also a cost effective way to appear to be remedying real systemic problems. When this kind of reactive, crisis-driven, spontaneous law-making dominates, however, it often produces bad law - law with unplanned and unintended consequences.

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[3] Bill Number S. 3217 for the 111th Congress is titled "Restoring American Financial Stability Act of 2010", online: The Library of Congress:
<http://thomas.loc.gov/cgi-bin/query/z?c111:S.3217:>.

[4] Carl Hulse, "Republicans Allow Debate on Financial Overhaul" *The New York Times* (29 April 2010), online: The New York Times <http://www.nytimes.com/2010/04/29/business/29regulate.html>.

The 1,300 page Dodd bill includes a number of provisions that international corporations and their counsel, whether in the financial industry or not, will need to quickly understand. The following summarizes a few highlights of the bill and what it may mean to financial institutions and corporations within the ambitious reach of the bill.[5]

*Creation of the Consumer Financial Protection Agency*

As is well known, American consumers already have protections against faulty appliances, contaminated food, and dangerous toys. The Dodd bill creates an independent watchdog to ensure American consumers get clear, accurate information related to their choice of mortgages, credit cards, and other financial products, while prohibiting hidden fees, abusive terms, and deceptive practices. The Consumer Financial Protection Agency ("**CFPA**") will consolidate consumer protection responsibilities currently shared among 6 other federal agencies, including the Federal Deposit Insurance Corporation, the Federal Reserve, and the Federal Trade Commission.

Politically speaking, establishing the CFPA appeals to populist sentiment. The U.S. Chamber of Commerce, however, is concerned that the new CFPA will inevitably come into conflict with the prudential bank regulators that provide primary oversight of the nation's banks, namely those institutions mentioned above. The Chamber also contends that the creation of an independent, unilateral consumer agency would make it nearly impossible for "mom and pop" banks and lenders to stay competitive due to the increased costs of compliance.[6] The

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[5] Senate Committee on Banking, Housing, and Urban Affairs, Chairman Chris Dodd (D-CT) Press Release, Summary: Restoring dweller Financial Stability – Discussion Draft, July 2009.
[6] U.S. Chamber of Commerce, Press Release, "American Voters Want Consumer Protection Without Hurting Jobs and Main Street" (20 April 2010), online: U.S. Chamber of Commerce <http://www.uschamber.com/press/releases/2010/april/100420_cfpa.htm >

American Bankers Association has said that the CFPA is "an unneeded, intrusive new agency that would increase the cost of doing business."[7]

*Ends "Too Big to Fail"*

The bill is aimed at preventing excessively large or complex financial companies from bringing down the economy, as experienced by the failure of Lehman Brothers and the bailout of AIG. The bill attempts to create a safe way to shut them down if they fail and imposes tough new requirements for capital. It also updates the Federal government's lender of last resort authority to allow system-wide support up to $50 billion, but not the ability to prop up individual institutions. It is widely expected, however, that any bailout allowance will be struck from the bill and that the enacted legislation will focus more on proper bankruptcy protocol for the companies at risk of failing.

*Systemic Risks*

The new financial reform would create an independent agency with a board of regulators to identify and address systemic risks posed by large, complex companies, products, and activities before they threaten the stability of the financial system. The agency could require companies that threaten the economy to divest some of their holdings. This agency would be comprised of 9 members under the direction of the Treasury secretary tasked with closing gaps in the current system regulation, imposing strict rules that restrict growth where it poses risks to the financial system. The agency will have authority to break up large companies if they pose a

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[7] Robert G. Kaiser, "The CFPA: How a crusade to protect consumers lost its steam" *The Washington Post*, (31 January 2010), online: The Washington Post <http://www.washingtonpost.com/wp-dyn/content/article/2010/01/30/AR2010013000034.html>.

threat to the financial stability of the U.S. These provisions are staunchly opposed by the banking community as they argue this would force them into a regulatory straightjacket.

*Executive Compensation and Corporate Governance*

This regime would provide shareholders with a say on pay and corporate affairs with a non-binding vote on executive compensation and director nominations. Although seen as largely symbolic, if shareholders are given the statutory right to vote on pay, there could be a rise in shareholder rights remedy actions brought against directors where the remuneration of the directors do not accord with the wishes of the shareholders. Oppression remedy actions or derivative actions in which the directors are accused of excessive remuneration may have a greater likelihood of success where the shareholders can point to their non-binding voting results as evidence of the directors not acting in the best interests of the corporation. It may also be more difficult, then, for the corporation to use the business judgment rule if it is clear the shareholders did not approve of certain decisions before they were made. It would be encouraged more than ever that corporate officers and directors seek independent advice when signing executive employment contracts and ensure the independence of compensation committees that advise the board.

It is difficult to anticipate what will be the ultimate consequences of the Dodd Bill, but one thing is certain: whatever the final form of the legislation, the American financial sector will become, at least on paper, the most highly regulated financial industry in the world. The reasons for doing so seem obvious, but the consequences of such extensive regulation (both intended and unintended) will likely not be known for years.

**Regulation of Consumer Products in Canada and the US**

*Consumer Product Regulation in the U.S.*

In the United States, the *Consumer Product Safety Improvement Act* ("**CPSIA**") became law in February of 2009, with a phasing in period of certain provisions by early 2011. Certainly the greatest overhaul of consumer product legislation in the past 30 years, the CPSIA was enacted mainly in response to the high profile recalls of Chinese manufactured toys in 2007 and 2008.

The CPSIA is targeted mostly toward "children's products", which are defined as "any consumer product designed or intended primarily for children 12 years of age or younger." The CPSIA also affects any product that is subject to anything the Consumer Product Safety Commission ("**CPSC**") regulates by requiring certificates of conformance which show that the product was tested to conform to the imposed regulations.

In addition to changes in product safety and testing requirements, the CPSIA includes numerous other changes affecting manufacturers, suppliers and distributors of consumer products. These include:

- significantly increased civil penalties and criminal penalties—up to $100,000 per violation and up to $15 million total liability (the previous liability cap was $1.25 million);
- enforcement of the provisions by the Attorney General;
- a voluntary certification mark for compliant products;
- the creation of a public consumer product safety database where consumers will be able to submit safety concerns;

- an ongoing identification requirement of a product's supply chain - manufacturers or suppliers must be able to identify the factory, distributor and subcontractors involved with each item;
- enhanced recall authority of the CPSC; and
- all voluntary corrective action plans must be approved by the CPSC;

The burden the CPSIA has put on corporations has already been well documented and numerous complaints are being levelled at Congress by large and small manufacturers alike. Namely, the unrealistic timelines for conformance, the emphasis on manufacturing and not design, and the ambiguous definition of what constitutes a children's product has left much of the industry in a state of confusion. It has been reported that more than $1 billion in inventory has been returned from retailers or is being held in warehouses in hopes for exemptions, amendments, or clarifications. It is under this pressure that Congress requested recommendations for reform from the governing CPSC earlier this year.

The first among several recommendations to Congress in CPSC's January 2010 report concerned Section 101 of the CPSIA, which mandates that all children's products must not exceed certain proscribed lead levels. The CPSC recommended that certain products be excluded from the constraints of Section 101, particularly parts described as not likely to have been among those for which the CPSIA was intended, such as parts found in children's bicycles and ATV vehicles. The ban has left many motorsports retailers with unsalable products given the lead content in motorcycle and ATV valve stems and in the battery terminals. Further, books and other reading material with illustrations published prior to 1985 were printed using a process that had a lead content exceeding the proscribed levels. Some have suggested that books were

not intended to be covered by the CPSIA and the CPSC has proposed the law be clarified to exclude books and other children's printed materials.

Further suggestions for reforming the legislation, not coming directly from the CPSC, however, include harmonizing the CPSIA standards with the European Union's EN-71 standards to remove the regulatory trade barrier which the CPSIA created between the U.S. and the EU. This would include changing the lead content standard from an "untenable total lead standard" to an "absorbable lead standard." In the EU, the safety of toys is harmonised so that the essential requirements can be met at the manufacturing stage. The standards laid down by the European standardisation bodies provide evidence of compliance with the essential requirements. Toys that meet these requirements bear a "CE" conformity marking. Certainly an effort to harmonize the CPSIA with the EU's EN-71 standards would be a welcome trade initiative and would be a significant move towards a global product safety standard.

*The Canadian Experience*[8]

On the heels of the CPSIA comes the proposed Bill C-6 in Canada, the *Canada Consumer Product Safety Act* ("**CCPSA**"). The bill has passed both the House of Commons and the Senate and is waiting to be declared in force by the Governor in Council. When it becomes law, the CCPSA will change significantly the regulatory regime applicable to consumer product safety in Canada. A summary of noteworthy provisions follows.

The CCPSA applies to "consumer products", defined as products designed to be used by individuals for non-commercial purposes, including their components, parts, accessories

[8] The panel would like to thank The Honourable Senator Hugh Segal, Teresa Dufort and Myriam Seers of McMillan LLP for their research and input on Bill C-6.

and packaging. Certain products will be exempted because they are subject to more specific legislation. These include food, drugs, controlled substances, plants, seeds, cosmetics, medical devices, motor vehicles and firearms. The CCPSA will prohibit the manufacture, importation, advertising and sale (or lease) of a consumer product that:

- is a "danger to human health or safety";
- is the subject of a recall or "measure" ordered under the CCPSA or of a voluntary recall because the product is a “danger to human health or safety”;
- does not meet the regulatory requirements that apply to that product.

"Danger to human health or safety", a threshold phrase used throughout the CCPSA, is defined as "any unreasonable hazard – existing or potential – that is posed by a consumer product during or as a result of its normal or foreseeable use and that may reasonably be expected to cause the death of an individual exposed to it or including an injury – whether or not the adverse effect occurs immediately after the exposure to the hazard, and includes any exposure to a consumer product that may reasonably be expected to have a chronic adverse effect on human health."

The CCPSA also prohibits the packaging or labelling of a consumer product in a manner that creates an erroneous impression that the product is not a danger to human health or safety or regarding its compliance with safety standards or regulations.

The manufacture, importation, advertising or sale of certain products will be prohibited altogether. These products will be listed in a schedule which will replace the list of "Prohibited Products" under the Hazardous Products Act. Upon becoming aware of an "incident", manufacturers, importers and sellers of consumer products must provide regulators

with all related information within two days and manufacturers and importers must provide a more comprehensive report within seven days.

Notably for the international community, "incident" is defined as:

- an occurrence in Canada *or elsewhere*;
- a defect or characteristic;
- or incorrect or insufficient information on a label or in instructions, or the lack of a label or instructions

that resulted or may reasonably have been or be expected to result in an individual's death or serious adverse effects on their health, including a serious injury. "Incident" also includes a recall or other measure *initiated by a foreign entity or provincial government* for human health or safety reasons.

The CCPSA gives regulators the power to order manufacturers and importers of consumer products to conduct tests or studies on a product, to provide documents related to those tests and studies and to compile any information required to verify compliance with the CCPSA. Inspectors will also have broad examination, testing, analysis and seizure powers. Further, regulators will have the power to disclose confidential business information in relation to a consumer product in certain circumstances. The preamble to the CCPSA emphasizes the importance of information sharing with foreign governments.

Inspectors charged with the administration and enforcement of the act will have new wide-ranging powers including the power to order a recall where they believe, on

reasonable grounds, that a consumer product is a danger to human health or safety. Inspectors will also have the power to stop the manufacturing, importation, packaging, storing, advertising, selling, labelling, testing or transportation of a consumer product or to order any other measure to remedy any non-compliance with the CCPSA.

These powers may be invoked even where there is a lack of full scientific certainty that there is a danger to human health or safety. The preamble to the CCPSA provides that a lack of full scientific certainty is not to be used as a reason for postponing measures where the impact on human health could be serious or irreversible.[9]

Companies and their directors, officers and employees may be held *criminally* liable for contravening the CCPSA, with criminal penalties including fines ranging from $250,000 to $5 million to "an amount in the court's discretion", and terms of imprisonment of up to five years. In addition to criminal liability, the CCPSA creates an "administrative monetary penalty" regime for the violation of recall orders or other measures ordered by an inspector. The penalties for these violations will be specified in the regulations to the CCPSA.

The proposed CCPSA is a classic example of regulatory overreach and has important implications for the right to privacy and the presumption of innocence. As indicated above, the CCPSA, if enacted in its current form, would allow Health Canada to appoint inspectors who can:

- seize property without a warrant
- seize private property without court supervision

[9] Otherwise known as the “precautionary principle”.

- destroy private property without court supervision
- take control of businesses without court supervision
- impose penalties that could shut down the many distributors, retailers and manufacturers.

In abolishing the law of trespass and allowing, in some administrative circumstances, the guilt of a target person, business, company or store to be determined, not by a court of law, but by the Minister, offends nearly all the core principles of the rule of law. The far-reaching scope and the unchecked criminal enforcement provisions of the proposed CCPSA arguably outweigh substantially the intended positive consequences that may result from its enactment.

If Bill C-6 is passed in its current form, the compliance costs, and the financial and reputational risks of dealing in consumer products in Canada will significantly increase. Manufacturers, importers, distributors and retailers who have become accustomed to the relatively unregulated environment that currently exists for consumer products in Canada will have to adjust to a radically new way of doing business. Companies will have to become familiar with the new requirements and make sure that they have in place the necessary policies and procedures to ensure compliance. Just as we are presently seeing with the scaling back of the U.S. CPSIA, it likely won't be long, if passed in its current form, before the CCPSA undergoes similar amendments.

**Environmental Regulation**

*Climate Change Litigation*

Climate change and environmental concerns have been a global hot topic for over twenty years. Legislation related to these concerns, however, has lagged well behind the global outcry, and even when present, the legislation often lacks realistic enforcement provisions.

Just as often as not, legislators look first to the courts before drafting regulations. The United States remains the centre of international focus as many countries have adopted a 'wait-and-see' approach to the implementation of domestic climate change legislation based on U.S. developments. In addition to monitoring U.S. legislative developments, however, large emitters of greenhouse gases worldwide should consider the potential impacts of recent judicial decisions in the U.S.

At present, there are two types of climate change litigation available to those affected in North America - judicial review applications and civil actions. The judicial review applications are typically brought under existing federal or state laws for the purpose of regulating greenhouses gases by forcing the creation of climate change regulations or conditions of licensing. Civil actions, on the other hand, seek damages and injunctions against businesses based upon existing tort law regimes, alleging that the business' creation of greenhouse gases constitutes a nuisance, negligence, or possibly a new cause of action.

In its brief history dealing with these issues, the courts in the United States have dismissed actions brought by plaintiffs alleging damages caused by climate change on the basis that the issues constituted non-justiciable "political questions" which are more appropriately

addressed by political branches of the government.[10] However, two recent appellate level cases in the U.S. may pave the way for climate change litigation in the U.S.. In *Connecticut v. American Electric Power Company*[11], eight states and the city of New York brought an action for injunctive relief against five of the largest carbon dioxide producers in the world. Following a dismissal for lack of jurisdiction and failure to state a claim, the plaintiffs appealed to the Court of Appeals for the Second Circuit. The Second Circuit vacated the dismissal and remanded the matter for further proceedings, holding that that the plaintiffs had presented a justiciable issue. Specifically, the Second Circuit ruled that in the absence of a federal policy relating to climate change, which would otherwise pre-empt claims of nuisance, such claims are justiciable. Second, the court reasoned, with respect to the political question doctrine, that the adjudication of a *particular* instance of nuisance "does not involve assessing and balancing the kind of broad interests that a legislature…might consider in formulating a national emissions policy."[12]

*Comer v. Murphy Oil*[13] involved a number of residents and owners who suffered property damage due to Hurricane Katrina. The plaintiffs alleged that the activities of the defendants, who consist of energy and power companies, contributed to the magnitude of Hurricane Katrina on account of their greenhouse gas emissions. The lower court decided that the subject matter was non-justiciable on the basis of it being a political question. On appeal, however, the Court of Appeals for the Fifth Circuit ruled that the plaintiff's claims in nuisance, negligence and trespass satisfied the threshold test for standing because the plaintiff's injuries

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[10] See, for example: *California v. General Motors Corp. (California)*, 2007 WL 2726871 (N.D. Cal. 2007) (appeal dismissed on consent); *Kivalina v. ExxonMobil Corporation*, 663 F.Supp.2d 863 (N.D. Cal. 2009) (awaiting appeal).

[11] *Connecticut v. American Electric Power Company*, 582 F. 3d 309 (2d Cir. 2009), reversing 406 F.Supp. 2d 265 (S.D.N.Y. 2005) [*Connecticut*].

[12] *Ibid.* at p. 30.

[13] *Comer v. Murphy Oil*, 585 F.3d 855 (5th Cir. 2009) [*Comer*].

have a "fairly traceable connection" to the defendant's actions. The Fifth Circuit noted that it arrived at its decision independently but that its decisions was consistent with the 2nd Circuit's decision in *Connecticut*.

It is highly likely that the recent trend of civil environmental actions will expand to other common law jurisdictions. Corporations and their counsel would be wise to follow the recent decisions in the United States that have been reverted to the respective lower courts. Courts worldwide will soon need to wrestle with the concept of contribution to global warming and whether a defendant's contribution to a worldwide problem can result in liability. Further, issues of jurisdiction and quantum of damages will likely be front and center in the anticipated wave of climate change litigation. As of now, it is difficult to ascertain what steps will need to be taken by large greenhouse gas emitters to limit their exposure should the trend in climate change litigation gain footing in North America and abroad.

*Recent Attempts at "Green Regulation"*

Ontario, Canada's largest province, recently enacted the *Green Energy Act*[14], which has been internationally recognized as the most progressive renewable energy legislation in North America. It is intended to attract new investment, create new green jobs and stimulate a green economy in Ontario. Its success after its first year in force has been debated at length, with

[14] *Green Energy Act*, S.O. 2009 C.12.

proponents of the act pointing to increased trade and funding of green industry, and detractors pointing to the costs of funding these initiatives that are borne by the taxpayers. [15]

Wisconsin's proposed *Clean Energy Jobs Act* seemed poised to be the most ambitious state-led effort at environmental regulation in the U.S.. The act was aimed to combat climate change by encouraging the development of renewable energy. The bill as originally drafted mandated that 25% of Wisconsin's energy come from renewable sources by 2025, established a 5 year, 2% reduction goal in state-wide energy consumption, proposed renewable tariffs for the purchase of privately produced renewable energy, mandated stricter vehicle emission standards similar to those in force in California, and encouraged the construction of new nuclear plants. Ironically, the bill failed to pass both houses of Wisconsin legislature on the 40th anniversary of Earth Day in 2010.

The *American Clean Energy and Security Act*[16] was approved by the House of Representatives by a narrow margin on June 26, 2009, but is still in consideration in the Senate. The bill proposes a cap and trade system, under which the government sets a limit on the total amount of greenhouse gases that can be emitted nationally. Companies then buy or sell permits to emit these gases, primarily carbon dioxide. The legislation would set a cap on total emissions over the 2012–2050 period and would require regulated entities to hold rights, or allowances, to

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[15] Inspection, enforcement and penalty provisions had all been excised from the bill before being passed into law.

[16] Bill H.R.2454 for the 111th Congress is titled "American Clean Energy and Security Act of 2009", online: The Library of Congress:
<http://thomas.loc.gov/cgi-bin/query/z?c111:H.R.2454:>

emit greenhouse gases. After allowances are initially distributed, entities would be free to buy and sell the permits, resulting in an economic incentive to reduce emissions.

In addition to providing regulatory certainty, such legislation has the potential to pre-empt climate change litigation based on common law claims. Under the U.S. constitutional doctrine of pre-emption, would be plaintiffs might be barred from bringing actions in common law if there exists a clear Congressional attempt to create a comprehensive scheme (i.e. one that addresses greenhouse gas emissions) and includes penalties and remedies. In contrast, any federal legislation in Canada would have to expressly restrict a common law cause of action to pre-empt tort claims by would-be plaintiffs.

*The Next Wave of Oil Litigation*

A discussion of general environmental litigation would not be complete without mention of the recent BP oil spill in the Gulf of Mexico. At the time of this paper's writing it is unclear what the environmental impact of the actual spill will be, let alone what legislation will be passed in its wake. However, as the Exxon-Valdez litigation has now lasted over 20 years, and with a number of class action suits already pending against BP, it is safe to say this catastrophe may greatly expedite the passage of reformed oil exploration and oil pollution laws, and may even spark the enactment of ancillary environmental legislation worldwide.

At this time, the U.S. 1990 *Oil Pollution Act* governs in these circumstances and the direct liability of oil companies for environmental damages appears limited. Currently, the responsible party must cover all costs related to clean up; however, there is a $75 million cap on liability for economic damages, such as lost business revenues from fishing and tourism, natural resources damages or lost local tax revenues. Immediately following the recent spill in the Gulf

of Mexico, U.S. Democratic Senators have scrambled to retroactively change the law by introducing the "*Big Oil Bailout Prevention Act*" which would raise the liability limit more than hundred-fold to $10-billion. As evidenced by its working title, the act is designed to make oil companies responsible for their actions to the exclusion of the government.

**Class Action Litigation in Light of Increased Regulation**

As was pointed out in this paper's introductory passage, the financial, safety, and environmental crises of today provide a fertile setting for the enactment of heavy-handed legislation. Governments tend to err on the side of overregulation with the excuse that regulations can be clawed back once their initial effects have been evaluated (as seen already with the CPSIA). In the period between overregulation and legislative normalization, however, the litigation environment is inevitably altered for the regulated corporations. Regulations can raise the standard of care expected from corporations[17], impose duties that would not otherwise exist at common law, and revise existing duties of care. Whenever such a shift occurs, the litigation environment becomes more challenging for corporate defendants. This time around it will be no different.

It is easy to see that the broadening availability of class actions occurring throughout the legal world offers a convenient solution for plaintiffs who have been affected by one of the recent crises. Any of the recently enacted or proposed legislative reforms discussed above may facilitate or encourage such actions. Financial institutions, for example, are already being faced with an increasing number of class action claims, and these will no doubt continue to

[17] For example, under Canadian law, regulations can be used as evidence of the appropriate standard of care in negligence cases.

increase in light of the Dodd bill and pending the conclusion of the recent Securities and Exchange Commission investigation into Goldman Sachs. Just as antitrust investigations into various corporations commenced by the European Commission have caused a wave of antitrust class action proceedings in the United States, the SEC investigations into financial institutions may prove to be fertile ground for class action plaintiffs' lawyers the world over.

In this environment, the proliferation of class action or other aggregative litigation procedures worldwide compounds the risks for major companies. Many countries, including most European and several South American nations, now recognize some form of representative or group action.[18] As more and more countries adopt a class action regime, the number of class action proceedings will inevitably rise worldwide. In a 2007 survey of 240 European business executives and lawyers conducted by *The Economist*, it was found that there is a widespread expectation that aggregative litigation will become "prevalent" in Europe over the next decade.[19] Companies doing business in countries that have adopted aggregative litigation procedures will inevitably face greater litigation challenges as a result of reactionary regulation. The increasing costs of defending lawsuits in this environment cannot be ignored.[20]

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[18] Mark Behrens, Gregory Fowler, and Silvia Kim, "Global Litigation Trends", (2008-2009) 17:2 Mich. St. J. Int'l L. 165 at pp. 167-168.

[19] *Ibid.* at p. 169.

[20] In a recent survey of over 400 companies in the U.S. and the U.K., 53% of respondents spent US$1 million per year or more on litigation efforts in 2008. See, Fulbright & Jaworski L.L.P, "Fulbright's 6th Annual Litigation Trends Survey Report" (Nov. 3, 2009), online: Fulbright & Jaworski L.L.P. <http://www.fulbright.com/images/publications/FulbrightForum6thAnnualLitigationTrends.pdf.

**Conclusion**

The examples above demonstrate how the unintended consequences of overreaching remedial legislation can cause as many problems as the legislation purports to solve. In a government's rush to placate its citizens by way of inexpensive action (as well as increase its own revenues), the burden of unintended consequences will inevitably fall on corporations and their litigation counsel. Corporate counsel must therefore be alive to new regulations both within and outside of their own industry so that they can manage the unintended consequences that accompany them. The prospects for an elevated standard of care, the creation and imposition of new duties and the reformulation of old duties are ever present when new regulations are enacted. Thus increased regulation will almost always cause an increase in litigation and regulatory proceedings. This increase is already underway as the world reacts to the regulation of financial services industries, consumer products industries, and industries rife with environmental concerns. The need for excellent defence counsel won't be declining any time soon.

# Sex, Lies, and Videotape – Cyber Liability Issues in a Digital World

**FEDERATION OF DEFENSE AND CORPORATE COUNSEL**
**2010 ANNUAL MEETING**
**WESTIN GRAND ARABELLAPARK HOTEL**
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**July 24 – July 31, 2010**


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### *Gordon & Rees, LLP*

**Mercedes Colwin** is the managing partner of Gordon & Rees" New York office. She handles a wide variety of litigation, including employment law, commercial litigation, products liability, civil rights violations and criminal law.

Ms. Colwin has successfully tried 43 cases to verdict in various jurisdictions throughout the nation. Ms. Colwin regularly defends corporate executives from Fortune 500 companies accused of wrongdoing including claims of sexual misconduct. Prior to private practice, Ms. Colwin served as an Administrative Law Judge for the New York State Division of Human Rights.

During her nine years of service, while a partner at a major regional New York law firm, she presided over three thousand cases brought under the federal and state discrimination laws. Recently Forbes Business American Airlines named Ms. Colwin one of the six most influential women in America. The list included dignitaries such as former U.S. Secretary of State Madeline Albright. The Long Island Business News recognized her as one of New York"s rising "young stars" under the age of 40. Notre Dame Law School also presented Ms. Colwin with the prestigious Graciela Olivarez Award for outstanding achievement as a leading Hispanic lawyer of the highest ethical and moral standards.

Widely regarded as one of the top national legal analysts on the Fox News Network, she appears to discuss critical legal issues and high profile cases.

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**Elizabeth F. Lorell** is a partner in the Employment and Insurance Practice groups of the New Jersey office of Gordon & Rees, LLP. Ms. Lorell defends employers and their senior personnel in employment litigation and professionals in malpractice actions. Ms. Lorell also has been, and continues to be, involved in the forefront of major insurance coverage litigation, exemplified by the now nationally famous Love Canal environmental coverage case. The complex and sophisticated challenges presented to Ms. Lorell on a regular basis require her to be on the leading edge of developments in her practice areas.

Ms. Lorell is admitted to practice in New Jersey, New York and Colorado. She is currently the Vice-Chair of the FDCC Employment Practices and Workplace Liability Section as well as Co-Chair of the Electronic Discovery Project and Vice Chair of the ADR Masters Committee. Ms. Lorell is also a member of the New Jersey Federal Bar Association and the New Jersey, New York and Colorado Bar Associations. In 2009 and 2010, Ms. Lorell was selected as a New Jersey Super Lawyer in the area of employment and insurance litigation.

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## TABLE OF CONTENTS

## INTRODUCTION

MySpace. Facebook. Friendster. Blogs. AboveTheLaw.com. You won‟t find these terms in the latest edition of Black‟s Law Dictionary. But they are appearing with greater frequency in legal memoranda and briefs, law journal articles and court opinions.

The explosive growth of social networking sites and computer-based platforms people use to express their opinions and to communicate with each other is reshaping the legal landscape in dramatic ways. Lawyers and clients venturing onto this terrain are confronting legal issues of first impression in the federal and state courts.

Indeed, the absence of settled precedent in "cyberlaw" presents significant challenges to a wide variety of clients, whether they are school districts or Fortune 500 companies. Underscoring cyberlaw‟s unpredictability is the inherent difficulty in applying decades-old legal precedent to emerging technologies. Two cases from two federal district courts in the Third Circuit starkly illustrate this clash; they are discussed in Part I of this paper. We also discuss in Part I a case involving efforts to invoke the justice system to punish an online prank that went too far, and a case in which a local prosecutor sought to indict a group teenagers for the act popularly known as "sexting."

In Part II, we identify other cyberspace-based platforms similar to MySpace.com, and discuss how they can bring unwanted attention to your law firm, your clients, or your company.

Finally, in Part III, we propose a set of "best practices" to help you navigate the pitfalls that so often dot the terrain in cyberspace. As part of this "best practices" approach, we attach to this paper provide a handy reference guide defining some of the lingo of cyberspace.

## PART I
## Cases Involving Cyber Law

A. *MySpace Mayhem – Protected Speech or Punishable Offense?*

It all started with a computer, an Internet connection, and an idea. Justin Layshock, a high school senior from Western Pennsylvania, wasn"t particularly fond of his principal, Mr. Trosch. So he decided to play a prank on Mr. Trosch. On or about December 10, 2005, he logged on to his grandmother"s computer, and signed onto MySpace.com ("MySpace").[2] The Court described MySpace.com as "a very popular Internet site where users can share photos, journals, personal interests and the like with other users of the Internet."[3] On MySpace, Layshock created a "parody profile" of Mr. Trosch.[4] "No school resources were used to create the profile but for a photograph of [Mr. Trosch] that [Layshock] copied from the school"s website[.]"[5] The "parody profile" depicted Mr. Trosch answering a number of "non-sensical answers to silly questions[.]"[6]

For example,

> In response to the question „in the past month have you smoked?," the profile says „big blunt." In response to a question regarding alcohol use, the profile says „big keg behind my desk." In response to the question, „ever been beaten up?," the profile says „big fag." The answer to the question „in the past month have you gone on a date?" is „big hard-on." The profile also refers to [Mr.] Trosch as a „big steroid freak" and „big whore." The profile also reflected that [Mr.] Trosch was „too drunk to remember" the date of his birthday.[7]

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2 *Layshock v. Hermitage School District*, 496 F. Supp.2d 587, 590-591 (W.D. Pa. 2007), *aff'd* 593 F.3d 249 (3d Cir. 2010), *reh'g en banc granted, op. vacated* (April 9, 2010).

3 *Id.* at 591.

4 *Id.*

5 *Id.*

6 *Id.*

7 *Id.*

Word of Layshock"s prank spread quickly through the school. In fact, Mr. Trosch learned of the unflattering MySpace profile from his daughter, also a student at Layshock"s school.[8]

Discipline was swift. On December 21, 2005, Layshock and his mother were summoned to a meeting with the school district"s superintendent and Mr. Trosch"s co-principal, where Layshock admitted his involvement in the prank.[9] He was immediately suspended from school, and was ultimately prohibited from attending his high school graduation ceremony.[10]

On January 27, 2006, Layshock filed a lawsuit against the school, in which he alleged that the punishment meted out by the school violated his First Amendment right to engage in free speech.[11] He also alleged that the school"s disciplinary policies and rules were unconstitutionally vague and/or overbroad.[12]

At the district court, both parties moved for summary judgment.[13] The Court framed its task as "balanc[ing] the freedom of expression of a student with the right and responsibility of a public school to maintain an environment conducive to learning."

This was not the first federal court to confront the thorny issue of student free speech. In fact, the United States Supreme Court faced a similar question more than 30 years ago in *Tinker v. Des Moines Independent Community School District*.[14] In *Tinker*, the Supreme Court held that school officials have a right to prescribe and control conduct in schools consistent with fundamental constitutional safeguards.[15] Yet the Court also rather famously observed that "[i]t

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8 *Id.*
9 *Id.* at 593.
10 *Id.* at 593-94.
11 *Id.* at 594.
12 *Id.*
13 *Id.* at 590.
14 393 U.S. 503 (1969).
15 *Id.* at 503.

can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[16]

More recently, the Supreme Court revisited the *Tinker* issue in 2007 in *Morse v. Federick*.[17] In *Morse*, the Supreme Court rejected a First Amendment challenge brought by a student who was disciplined by his school for unfurling a banner which proclaimed "Bong HiTS 4 Jesus."[18]

*Layshock*, however, marked the first time a court was asked to consider a First Amendment challenge to a disciplinary measure as a result of a phony MySpace profile. Here, the Court reviewed both *Tinker*, *Morse*, and its progeny, and concluded that as an initial matter, the school had to "establish that it had the authority to punish the student."[19]

The Court then determined that the school ***had not*** established that authority. Critical to the Court's decision granting partial summary judgment in favor of *Layshock* was the fact that the school had "not established a sufficient nexus between [his] speech and a substantial disruption of the school environment."[20] Unlike *Morse*, where the conduct occurred just shortly after the students were dismissed from class to view the running of the Olympic torch, the conduct in *Layshock* occurred off-campus, *i.e.*, at the student's grandmother's house, where he logged onto her computer and created the phony MySpace profile.[21] This off-campus conduct created "gaps in the causation link between [Layshock's] speech and a substantial disruption of the school environment."[22] Thus, the Court held that the discipline imposed on Layshock

16 *Id.*
17 --- U.S. ---, 127 S.Ct. 2618 (2007).
18 *Id.*
19 *Layshock*, 496 F. Supp.2d at 600.
20 *Id.*
21 *Id.*
22 *Id.*

violated his First Amendment free speech rights, and he was therefore entitled to a trial on damages.[23]

Particularly interesting in the Court‟s analysis is the notion that the conduct occurred off-campus. Although it is true that Layshock logged onto the website at his grandmother‟s house, the record before the Court also revealed that many other students knew about the impostor profile because they, too, had viewed the MySpace profile from their home computers. Indeed, the wide dissemination of the impostor profile – potentially to the millions of individuals with access to MySpace, including the other students at Layshock‟s school who viewed the MySpace page about Mr. Trosch – appears to cast doubt on the theory that Layshock‟s conduct was confined to a single personal computer with insufficient links to the school. Although the apparent takeaway from *Layshock* is that the *situs* of the conduct is dispositive, another district court within the Third Circuit took a contrary view.

The facts of *Layshock* and *Snyder v. Blue Mountain School District*[24] are essentially indistinguishable. Like the student in *Layshock*, the student in *Snyder* created an impostor MySpace profile of her high school principal, "which indicated, *inter alia*, that he is a pedophile and a sex addict."[25] Although the profile did not identify the principal by name, "it identified him as a principal and included his picture which had been taken from the school districts‟ website."[26]

As in *Layshock*, the discipline in *Snyder* was swift. The student received a ten-day suspension from school. And like the student in *Layshock*, she brought a lawsuit against the

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[23] *Id.* at 601.

[24] No. 3:-7cv585, 2008 WL 4279517 (M.D. Pa. Sept. 11, 2008), *aff'd* 593 F.3d 286 (3d Cir. 2010), *reh'g en banc granted, op. vacated* (April 9, 2010).

[25] *Id.* at *1.

[26] *Id.*

school, also alleging that the school"s disciplinary action violated her First Amendment right to free speech.[27]

In its analysis of the parties" respective motions for summary judgment, the Court examined *Tinker*, *Morse*, and several other cases balancing the free speech rights of public school students with the right of school administrators to maintain an educational environment free from distraction. Here, however, the Court focused on the content of the MySpace profile, rather than where it was created. The Court noted that the profane language contained in the impostor profile greatly diminished its First Amendment protection, and that, based on *Morse*, the "school can validly restrict speech that is vulgar and lewd … and promotes unlawful behavior."[28]

The Court was not persuaded by the students" argument – met with success in *Layshock* – that she cannot be "punished for the website at school although she created it off campus."[29] The Court noted that there was a strong connection between the off-campus conduct, the creation of the impostor profile, and its "on-campus effect."[30] Indeed,

> [t]he website addresses the principal of the school. Its intended audience is students at the school. A paper copy of the website was brought into school, and the website was discussed in school. The picture on the profile was appropriated from the school district"s website.[31]

The foregoing indicia of an on-campus connection was critical to the Court"s decision dismissing the complaint, and it is perhaps what distinguishes it from *Layshock*. However, the similarities are striking enough to raise serious questions about the applicability of law developed in the pre-Internet age to issues that arise in cyberspace.

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27 *Id.* at *3.
28 *Id.* at *6.
29 *Id.* (Footnote omitted).
30 *Id.* at *7.
31 *Id.*

Both decisions were affirmed on appeal to the Third Circuit.[32] However, once the conflict between the rulings in *Layshock* and *Snyder* became apparent, the Third Circuit vacated the decisions and ordered *en banc* rehearings. It will certainly be interesting to see how the Third Circuit reconciles these conflicting decisions, and whether its future *en banc* ruling will provide some much-needed clarity in this complicated realm of cyberlaw.

B. *A MySpace Prank That Went Too Far*

While the fallout from the pranks involved in *Layshock* and *Snyder* can largely be characterized as hurt feelings and bruised egos, few would dispute that a MySpace prank in Missouri had devastating consequences.

There, prosecutors charged that Lori Drew,

> with the help of her daughter and a family friend who worked for Ms. Drew, had created a phony identity and MySpace account for a teenage boy, „Josh Evans," on a computer in Ms. Drew"s home in suburban St. Louis. According to evidence at the trial, Ms. Drew then used the account to conduct an online courtship with Megan Meier, an emotionally disturbed 13-year-old girl who had once been a friend of her daughter.[33]

When Drew abruptly ended the "relationship," Meier committed suicide.[34] Local authorities declined to prosecute, but federal prosecutors indicted Drew in Los Angeles, where MySpace maintains its servers, and she was convicted on charges of computer fraud.[35] That conviction was later vacated.[36]

Some have commented that the inability to convict Drew for her role in the hoax suggests a need to modify criminal statutes to prosecute crimes in the digital age, and once again shows

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[32] *See Layshock v. Hermitage School Dist.*, 593 F.3d 249 (3d Cir. 2010); *see also J.S. ex rel. Snyder v. Blue Mountain School Dist.*, 593 F.3d 286 (3d Cir. 2010).

[33] Rebecca Cathcart, *Conviction Is Tossed Out In MySpace Suicide Case*, N.Y. Times July 3, 2009, at A4

[34] *Id.*

[35] *Id.*

[36] *Id.*

how the advancement of technology has spawned new and complex issues of liability in cyberspace.

*C. Sexting*: *Felony or Foolishness?*

In what may be the first Court of Appeals case to ever define the term "sexting," the Third Circuit recently affirmed a ruling enjoining a district attorney in Pennsylvania from indicting a group of teenagers who used their cell phones to exchange nude or semi-nude photographs.[37]

The facts of *Miller* are as follows. In October 2008, school officials in Tunkhannock, Pennsylvania, "discovered photographs of semi-nude and nude teenage girls, many of whom were enrolled in their district, on several students' cell phones."[38]

School officials seized the phones and turned them over to the local district attorney, who launched an investigation. Believing that a crime had been committed, the District Attorney ("DA") sent a letter to the parents of between 16 and 20 students "threatening to bring charges against those who did not participate in what has been referred to as an 'education program[.]'"[39] The program was designed to last six to nine and was to focus on education and counseling.[40]

One of the photographs depicted two teenagers "wearing white, opaque bras."[41] Another showed a teenager "wrapped in a white, opaque towel, just below her breasts, appearing as if she just had emerged from the shower."[42]

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37 *Miller v. Mitchell*, 598 F.3d 139 (3d Cir. 2010).
38 *Id.* at 143 (footnote omitted).
39 *Id.* at 144.
40 *Id.*
41 *Id*.
42 *Id*.

Most of the parents objected to the program, and the threat of criminal charges. They filed temporary restraining order (TRO) enjoining the DA from initiating criminal charges for the photographs. The TRO was granted, and the DA appealed.[43]

In an extensive opinion, the Third Circuit held that a future prosecution would be a retaliatory act in violation of a parents' Fourteenth Amendment right to parental autonomy and a student's First Amendment right against compelled speech.[44] To that end, the Court held that the DA cannot assume the role of a parent and "impose on their children his ideas of morality and gender roles."[45] As to the students' First Amendment claim, the Court held that the "sexting" at issue was essentially a moral – and not legal – matter over which the DA lacked authority.[46]

The Third Circuit's decision is yet another example of how government officials have grappled with new and expanding modes of expression that involve issues of sex, morality and expression. It may also serve to alert parents of teenagers to monitor their children's cell phone usage.

## PART II
## Cyber Websites and Why Law Firms Need to be Wary

### *A. An Online Battle Royale*

Although MySpace serves as the starting point for our discussion of some of the legal issues in cyberlaw, it is certainly not the only source of "cybercontroversy." Take, for example, the AboveTheLaw.com website. That site permits readers to anonymously post comments about all things legal. In fact, some users frequently post negative comments about specific law firms, while others leak internal firm memo's that are subsequently published on the AboveTheLaw.com website. While it is true that law firm's are much different than public

[43] *Id.* at 145.
[44] *Id.* at 150.
[45] *Id.* at 151.
[46] *Id.* at 152.

schools, it seems reasonable to ask whether a First Amendment defense could be invoked by a government attorney who posts comments about issues of public concern on the AboveTheLaw.com website. Or whether a website like AboveTheLaw.com could be held liable for disseminating a firm"s internal memo.

Of course, not all postings on websites like AboveTheLaw.com involve issues of public concern. And not all posters have altruistic motives. Take, for example, the case of Aaron Brett Charney. He sued the prominent law firm of Sullivan & Cromwell LLP in New York State court, and his sex discrimination complaint was displayed prominently on AboveTheLaw.com. The complaint, which is still available for download on AboveTheLaw.com, alleges, among other things, that a Sullivan & Cromwell partner threw a document at Charney"s feet and remarked: "bend over and pick it up – I"m sure you like that[.]"[47]

What AboveTheLaw.com managed to do in this instance is take a rather acrimonious dispute between two parties and publish it to a much larger audience. Now consider the impact. Current and potential clients may become aware of the dispute and develop reservations about the firm. Sullivan and Cromwell employees may become aware of the firm"s "dirty laundry" simply by logging on to AboveTheLaw.com. And plaintiffs like Charney may use the unwanted exposure as a leverage point in settlement discussions.

Sullivan and Cromwell hasn"t been the only firm to find itself in the cyberspace spotlight. One attorney became so incensed with his former employer, Levinson Axelrod, P.A., a New Jersey-based personal injury law firm, that he created a website named – what else – www.levinsonaxelrodreallysucks.com.

The site was created and is maintained by Edward Heyburn, a former Levinson Axelrod associate. His strong negative feelings about the firm, and his ongoing legal battles with

47 *Charney v. Sullivan & Cromwell LLP*, Index No. 07100625 (Sup. Ct. N.Y. Co. 2007)

Levinson Axelrod, are well-documented on the website. In fact, in May 2010, the United States District Court of the District of New Jersey granted in part and denied in part a motion by Heyburn to dismiss a lawsuit filed by Levinson Axelrod.[48] The lawsuit seeks damages for "cybersquatting, trademark infringement, false designation of origin, trademark dilution, trafficking in counterfeit marks, and fraud."[49] The opinion noted that a prior court order directed Heyburn to shut down the website he previously used to sling mud at Levinson Axelrod: www.levinsonaxelrod.net.[50]

In its May 3 decision, the Court held that all but one of Levinson Axelrod's claims against Heyburn could move forward. The only cause of action dismissed from the lawsuit was a claim predicated on the New Jersey Consumer Fraud Act, which, as a matter of law, does not apply to attorneys.[51]

While it appears that the firm's efforts to shut down the prior website – www.levinsonaxelrod.net – were largely successful, it is also evident that the firm has failed to quash the dissent still emanating from www.levinsonaxelrodreallysucks.com. In fact, the associate's quest to smear his former firm has gained traction. In November 2009, *The AmLaw Daily* posted an article on the Internet chronicling the back-and-forth between Levinson Axelrod and its web-based rival.[52] The article notes that the website's operator "calls one Levinson partner „a used cars salesman with a law degree" and opines that another „looks like death.""[53] It is thus clear that efforts to contain the damage generated by these sorts of websites may often

48 *See Axelrod v. Heyburn*, Civ. No. 09-5627, 2010 WL 1816245 (D.N.J. May 3, 2010).
49 *Id.*
50 *Id.* at * 1.
51 *Id.* at *4.
52 http://amlawdaily.typepad.com/amlawdaily/2009/11/jerseyfirms.html
53 *Id.*

backfire. Perhaps one would conclude that in this situation, Levinson Axelrod faced a Hobson"s choice.

In addition to the websites discussed here, there are a host of others dedicated to dissecting the legal profession. They include: The *Wall Street Journal* law blog (www.blogs.wsj.com/law); www.judged.com (billed as "insider source for real, unfiltered intelligence on law firms around the world"); and www.ratethecourts.com (where visitors can post comments about judges under the cloak of anonymity). We urge our readers to look at these websites to see how much of the previously uncirculated private opinion has now been opened for millions to get at the click of the button.

## PART III
## Best Practices

So how can you avoid having your internal memorandum be shared with the world via sites like AboveTheLaw.com, and what can be done to avoid the types of discontent that spawn websites such as www.levinsonaxelrodreallysucks.com?

First, keep in mind that anything you publish, whether in print or in e-mail, can easily be shared. If written communication – such as an internal memorandum – is necessary to effectively manage your operation, require each recipient to agree to maintain its confidentiality.

Second, follow the Golden Rule. Broadcasting abrasive e-mails late at night and early in the morning can foment unhappiness and lay the groundwork for an extensive cyberbattle.

Third, create and disseminate a comprehensive Internet usage policy that expressly prohibits anyone from posting information about your firm on any websites. You can also install software that blocks access to sites like AboveTheLaw.com.

Of course, this is not an exhaustive list of steps you can take to avoid the situations discussed in this paper, and you will have to tailor your decisions to the needs of your firm or

your business. Moreover, we suggest that you learn the lingo of cyberspace. To that end, we have included a list of the "Top 50 Popular Text Terms Used in Business," and the "Top 50 Acronyms Parents Need to Know, both courtesy of www.netlingo.com. *See*, Exhibits 1 and 2, respectively.[54]

## CONCLUSION

The advent of cyberspace presents a complex set of challenges for attorneys, their firms, their clients as well as for schools, parents and children. In the absence of legislative enactments and legal decisions, we caution that all of us, in order to protect our colleagues and families from cyber disaster, need to find creative and safe ways to navigate the unfamiliar – and constantly shifting – terrain of cyberspace.

[54] Also see Exhibit 3, which is a fairly comprehensive "List of Internet Acronyms & Text Message Jargon", from www.netlingo.com.

## Exhibit 1

### Top 50 Popular Text Terms Used in Business

1. **AFAIC** - As Far As I'm Concerned
2. **ASAP** - As Soon As Possible
3. **BHAG** - Big Hairy Audacious Goal
4. **BOHICA** - Bend Over Here It Comes Again
5. **CLM** - Career Limiting Move
6. **CYA** - Cover Your Ass -or- See Ya
7. **DD** - Due Diligence
8. **DQYDJ** - Don't Quit Your Day Job
9. **DRIB** - Don't Read If Busy
10. **EOD** - End Of Day -or- End Of Discussion
11. **EOM** - End Of Message
12. **EOT** - End Of Thread (meaning: end of discussion)
13. **ESO** - Equipment Smarter than Operator
14. **FRED** - F***ing Ridiculous Electronic Device
15. **FUBAR** - F***ed Up Beyond All Recognition (or Repair)
16. **FYI** - For Your Information
17. **GMTA** - Great Minds Think Alike
18. **HIOOC** - Help, I'm Out Of Coffee
19. **IAITS** - It's All In The Subject
20. **IANAL** - I Am Not A Lawyer
21. **KISS** - Keep It Simple Stupid
22. **LOPSOD** - Long On Promises, Short On Delivery
23. **MOTD** - Message Of The Day
24. **MTFBWY** - May The Force Be With You
25. **MYOB** - Mind Your Own Business
26. **NRN** - No Reply Necessary
27. **NSFW** - Not Safe For Work
28. **NWR** - Not Work Related
29. **OTP** - On The Phone
30. **P&C** - Private & Confidential
31. **PDOMA** - Pulled Directly Out Of My Ass
32. **PEBCAK** - Problem Exists Between Chair And Keyboard
33. **PITA** - Pain In The Ass
34. **QQ** - Quick Question -or- Cry More
35. **RFD** - Request For Discussion
36. **RFP** - Request For Proposal
37. **SBUG** - Small Bald Unaudacious Goal
38. **SME** - Subject Matter Expert
39. **SNAFU** - Situation Normal, All F***ed Up
40. **SSDD** - Same Sh** Different Day
41. **STD** - Seal The Deal -or- Sexually Transmitted Disease
42. **SWAG** - Scientific Wild Ass Guess -or- SoftWare And Giveaways
43. **TBA** - To Be Advised
44. **TBD** - To Be Determined
45. **TWIMC** - To Whom It May Concern
46. **TIA** - Thanks In Advance
47. **WIIFM** - What's In It For Me
48. **WOMBAT** - Waste Of Money, Brains And Time
49. **WTG** - Way To Go
50. **YW** - You're Welcome

*** Information was obtained from Netlingo.com on May 17, 2010**

## Exhibit 2

### Top 50 Acronyms Parents Need to Know

1. **8** - Oral sex
2. **1337** - Elite -or- leet -or- L337
3. **143** - I love you
4. **182** - I hate you
5. **1174** - Nude club
6. **420** - Marijuana
7. **459** - I love you
8. **ADR** - Address
9. **AEAP** - As Early As Possible
10. **ALAP** - As Late As Possible
11. **ASL** - Age/Sex/Location
12. **CD9** - Code 9 - it means parents are around
13. **C-P** - Sleepy
14. **F2F** - Face-to-Face
15. **GNOC** - Get Naked On Cam
16. **GYPO** - Get Your Pants Off
17. **HAK** - Hugs And Kisses
18. **ILU** - I Love You
19. **IWSN** - I Want Sex Now
20. **J/O** - Jerking Off
21. **KOTL** - Kiss On The Lips
22. **KFY -or- K4Y** - Kiss For You
23. **KPC** - Keeping Parents Clueless
24. **LMIRL** - Let's Meet In Real Life
25. **MOOS** - Member Of The Opposite Sex
26. **MOSS** - Member(s) Of The Same Sex
27. **MorF** - Male or Female
28. **MOS** - Mom Over Shoulder
29. **MPFB** - My Personal F*** Buddy
30. **NALOPKT** - Not A Lot Of People Know That
31. **NIFOC** - Nude In Front Of The Computer
32. **NMU** - Not Much, You?
33. **P911** - Parent Alert
34. **PAL** - Parents Are Listening
35. **PAW** - Parents Are Watching
36. **PIR** - Parent In Room
37. **POS** - Parent Over Shoulder -or- Piece Of Sh**
38. **pron** - porn
39. **Q2C** - Quick To Cum
40. **RU/18** - Are You Over 18?
41. **RUMORF** - Are You Male OR Female?
42. **RUH** - Are You Horny?
43. **S2R** - Send To Receive
44. **SorG** - Straight or Gay
45. **TDTM** - Talk Dirty To Me
46. **WTF** - What The F***
47. **WUF** - Where You From
48. **WYCM** - Will You Call Me?
49. **WYRN** - What's Your Real Name?
50. **zerg** - To gang up on someone

*** Information was obtained from Netlingo.com on May 17, 2010**

## Exhibit 3

### Text & Chat Acronyms

1. !I have a comment
2. *$Starbucks
3. ,!!!!talk to the hand
4. 02Your (or my) two cents worth, also seen as m.02
5. 10Qthank you
6. 1174Nude club
7. 121One to one
8. 1337Elite -or- leet -or- L337
9. 143I love you
10. 14AA41One for All and All for One
11. 182I hate you
12. 190 hand
13. 20Location
14. 2B or not 2BTo Be Or Not To Be
15. 2b@To Be At
16. 2BZ4UQTToo Busy For You Cutey
17. 2G2B4GToo Good To Be Forgotten
18. 2G2BTToo Good To Be True
19. 2moroTomorrow
20. 2niteTonight
21. 2U2To You Too
22. 404I haven't a clue
23. 411Information
24. 420Marijuana
25. 459I love you
26. 4COLFor Crying Out Loud
27. 4EAEForEver And Ever
28. 4evaforever
29. 4everForever
30. 4NRForeigner
31. 4QF*** You
32. 511Too much information
33. 5FS5 Finger Salute
34. 8Oral sex
35. 831I Love You
36. 86Out of, over, to get rid of, or kicked out
37. 9Parent is watching
38. 99Parent is no longer watching
39. ::poof::i'm gone
40. <3heart
41. ?I have a question
42. ?^hook up?
43. @TEOTDAt The End Of The Day
44. A/S/L/PAge/Sex/Location/Picture
45. A3Anyplace, Anywhere, Anytime
46. AAAAAAmerican Association Against Acronym Abuse
47. AAFAs A Friend -or- Always And Forever
48. AAKAsleep At Keyboard
49. AAMOFAs A Matter Of Fact
50. AAMOIAs A Matter Of Interest
51. AARAt Any Rate
52. AAR8At Any Rate
53. AASAlive And Smiling
54. AATKAlways At The Keyboard
55. AAYFAs Always, Your Friend
56. ABAss Backwards
57. ab/abtabout

58. ABITHIWTITBA Bird In The Hand Is Worth Two In The Bush
59. ABT2About To
60. ACDAlt Control Delete
61. ACEAccess Control Entry
62. ACKAcknowledgement
63. ACORNA Completely Obsessive Really Nutty person
64. ADADAnother Day Another Dollar
65. ADBBAll Done Bye Bye
66. addyaddress
67. ADIHAnother Day In Hell
68. ADIPAnother Day In Paradise
69. ADNAdvanced Digital Network -or- Any Day Now
70. ADRAddress
71. ADVDAdvised
72. AEAPAs Early As Possible
73. AFAGAYA Friend As Good As You
74. AFAHMASPA Fool And His Money Are Soon Parted
75. AFAICAs Far As I'm Concerned
76. AFAICSAs Far As I Can See
77. AFAICTAs Far As I Can Tell
78. AFAIKAs Far As I Know
79. AFAIRAs Far As I Remember
80. AFAIUAs Far As I Understand
81. AFAIUIAs Far As I Understand It
82. AFAPAs Far As Possible
83. AFAYCAs Far As You're Concerned
84. AFCAway From Computer
85. AFDNAny F***ing Day Now
86. AFGOAnother F***ing Growth Opportunity
87. AFIAAs Far As I Am Aware
88. AFINIAFIA Friend In Need Is A Friend Indeed
89. AFJApril Fools Joke
90. AFKAway From Keyboard -or- A Free Kill
91. AFPOEA Fresh Pair Of Eyes
92. AFTAbout F***ing Time
93. AFZAcronym Free Zone
94. AGBAlmost Good Bridge
95. AGKWEAnd God Knows What Else
96. AIAMUAnd I'm A Monkey's Uncle
97. aightall right
98. AIHAs It Happens
99. AIMBAs I Mentioned Before
100. AIMPAlways In My Prayers
101. AISBAs I Said Before
102. AISEAs I Said Earlier
103. AISIAs I See It
104. AITRAdult In The Room
105. AKA or a.k.a.Also Known As
106. ALAPAs Late As Possible
107. alconAll Concerned
108. ALOLActually Laughing Out Loud
109. ALOTBSOLAlways Look On The Bright Side Of Life
110. ALTGAct Locally, Think Globally
111. AMAPAs Many As Possible -or- As Much As Possible
112. AMBWAll My Best Wishes
113. AMFAdios Mother F***er
114. AMLAll My Love
115. AMRMTYFTSAll My Roommates Thank You For The Show
116. ANFAWFOSAnd Now For A Word From Our Sponsor
117. ANFSCDAnd Now For Something Completely Different

118. ANGBAlmost Nearly Good Bridge
119. AOASAll Of A Sudden
120. AOBAbuse Of Bandwidth
121. AONApropos Of Nothing
122. APApple Pie
123. ASApe Sh** -or- Another Subject
124. ASAFPAs Soon As F***ing Possible
125. ASAMOFAs A Matter Of Fact
126. ASAPAs Soon As Possible
127. ASAYGTAs Soon As You Get This
128. ASLAge/Sex/Location
129. ASLMHAge/Sex/Location/Music/Hobbies
130. ATABAin't That A Bitch
131. ATCAny Two Cards
132. ATMAt The Moment -or- Asynchronous Transfer Mode -or- Automated Teller Machine
133. ATSLAlong The Same Line
134. ATSTAt The Same Time
135. ATWAll The Web -or- Around The Web -or- All The Way
136. ATWDAgree That We Disagree
137. AWCAfter While, Crocodile
138. AWGTHTGTTAAre We Going To Have To Go Through This Again
139. AWHFYAre We Having Fun Yet?
140. AWLTPAvoiding Work Like The Plague
141. AWNIACAll We Need Is Another Chair
142. AWOLAbsent Without Leave
143. AWTTWA Word To The Wise
144. AYCAren't You Clever -or- Aren't You Cheeky
145. AYCEAll You Can Eat
146. AYKAs You Know
147. AYORAt Your Own Risk
148. AYSOSAre You Stupid Or Something
149. AYTMTBAnd You're Telling Me This Because
150. AYVAre You Vertical?
151. B&FBack and Forth
152. B/CBecause
153. B4Before
154. B4NBye For Now
155. B4UBefore You
156. B4YKIBefore You Know It
157. BABYBeing Annoyed By You
158. BACBad Ass Chick
159. BAGBusting A Gut -or- Big Ass Grin
160. BAKBack At Keyboard
161. BAMFBad Ass Mother F***er
162. bananacode word for penis
163. BARBBuy Abroad but Rent in Britain
164. BAUBusiness As Usual
165. BBBe Back
166. BB4NBye Bye for Now
167. BBAMFICBig Bad Ass Mother F***er In Charge
168. BBBBye Bye Babe -or- Boring Beyond Belief
169. BBBGBye Bye Be Good
170. BBFBBMBody By Fisher, Brains By Mattel
171. BBFNBye Bye for Now
172. BBIABBe Back In A Bit
173. BBIAFBe Back In A Few
174. BBIASBe Back In A Sec
175. BBIAWBe Back In A While

176. BBLBe Back Later
177. BBMFICBig Bad Mother F***er In Charge
178. BBRBurnt Beyond Repair
179. BBSBe Back Soon -or Bulletin Board Service
180. BBSDBe Back Soon Darling
181. BBSLBe Back Sooner or Later
182. BBTBe Back Tomorrow
183. BBWBig Beautiful Woman
184. BCBecause
185. BCBGBon Chic Bon Genre -or- Belle Cu Belle Geulle
186. BCBSBig Company, Big School
187. BCNUBe Seeing You
188. bcozbecause
189. BDBig Deal -or- Baby Dance -or- Brain Drain
190. BDBI5MBusy Daydreaming Back In 5 Minutes
191. BDCBig Dumb Company -or- Big Dot Com
192. BDNBig Damn Number
193. BEGBig Evil Grin
194. beosNudge
195. BFBoyfriend -or- Best Friend
196. BFDBig F***ing Deal
197. BFEBum F*** Egypt
198. BFFBest Friends Forever
199. BFFNBest Friends For Now
200. BFFTTEBest Friends Forever Til The End
201. BFNBye For Now
202. BFRBig F***ing Rock
203. BGBe Good
204. BHAGBig Hairy Audacious Goal
205. BHGBig Hearted Guy -or- Big Hearted Girl
206. BHIMBGOBloody Hell, I Must Be Getting Old
207. BHOFBald Headed Old Fart
208. BIBusiness Intelligence
209. BI5Back In Five
210. BIBIBye Bye
211. BIBOBeer In, Beer Out
212. BIFBasis In Fact -or- Before I Forget
213. BILBrother-In-Law -or- Boss Is Listening
214. BIOBring It On
215. BIOIYABreak It Off In Your Ass
216. BIONBelieve It Or Not
217. BIOYEBlow It Out Your Ear
218. BIOYIOPBlow It Out Your I/O Port
219. BIOYNBlow it Out Your Nose
220. BITCHBasically In The Clear Homey
221. BITDBack In The Day
222. BITFOBBring It The F*** On, Bitch
223. BJBlow Job
224. BKABetter Known As
225. BLBelly Laughing
226. BLBBLBBack Like Bull, Brain Like Bird
227. BlkbryBlackberry
228. BMByte Me
229. BMFBad Mother F***er
230. BMGWLBusting My Gut With Laughter
231. BMOCBig Man On Campus
232. BMOFBite Me Old Fart
233. BMOTAByte Me On The Ass
234. BNDNBeen Nowhere Done Nothing

235. BNFBig Name Fan
236. BOBug Off -or- Body Odor
237. BOBBattery Operated Boyfriend
238. BOBFOCBody Off Baywatch, Face Off Crimewatch
239. BOCTAAEBut Of Course There Are Always Exceptions
240. BOFHBastard Operator From Hell
241. BOHICABend Over Here It Comes Again
242. BONBelieve it Or Not
243. bookit means cool
244. BOTECBack Of The Envelope Calculation
245. BOTOHBut On The Other Hand
246. BPLMBig Person Little Mind
247. BRBathroom
248. BRBBe Right Back
249. BRICBrazil, Russia, India, China
250. BRTBe Right There
251. BSBig Smile -or- Bull Sh** -or- Brain Strain
252. BSAAWBig Smile And A Wink
253. BSBD&NEBook Smart, Brain Dead & No Experience
254. BSEGBig Sh** Eating Grin
255. BSFBut Seriously, Folks
256. BSODBlue Screen of Death
257. BTByte This
258. BTABut Then Again -or- Before The Attacks
259. BTDBored To Death
260. BTDTBeen There Done That
261. BTDTGTSBeen There, Done That, Got The T-shirt
262. BTFOBack The F*** Off -or- Bend The F*** Over
263. BTHOOMBeats The Heck Out Of Me
264. BTNBetter Than Nothing
265. BTOIYABe There Or It's Your Ass
266. BTSOOMBeats The Sh** Out Of Me
267. BTTTBack To The Top -or- Bump To The Top
268. BTWBy The Way
269. BTWBOBe There With Bells On
270. BTWITIAILWUBy The Way I Think I Am In Love With You
271. buhbyebye
272. BWBest Wishes
273. BWDIKBut What Do I Know
274. BWLBursting With Laughter
275. BWOBlack, White or Other
276. BWTMBut Wait, There's More
277. BYKTBut You Knew That
278. BYOABring Your Own Advil
279. BYOBBring Your Own Bottle -or- Bring Your Own Beer
280. BYOWBuild Your Own Website -or- Bring Your Own Wine
281. BZBusy
282. c yasee ya
283. C&GChuckly and Grin
284. C-PSleepy
285. C-TCity
286. C/PCross Post
287. C/SChange of Subject
288. C4NCiao For Now
289. CAACCool As A Cucumber
290. CASCrack A Smile
291. CBChat Brat -or- Coffee Break -or Call Back
292. CBBCan't Be Bothered

293. CBFCan't Be F***ed
294. CBJCovered Blow Job
295. CD9Code 9 - it means parents are around
296. CFCoffee Freak
297. CFVCall For Vote
298. CHAClick Here Asshole
299. CIAOGoodbye (in Italian)
300. CICOCoffee In, Coffee Out
301. CICYHWCan I Copy Your Home Work
302. CIDConsider It Done -or- Crying In Disgrace
303. CILCheck In Later
304. CLMCareer Limiting Move
305. CMCall Me
306. CMAPCover My Ass Partner
307. CMFCount My Fingers
308. CMIWCorrect Me if I'm Wrong
309. CMUCrack Me Up
310. CNPContinued in Next Post
311. COBClose Of Business
312. COBRASCome On By Right After School
313. CODChange Of Dressing
314. Cof$Church of Scientology
315. CofSChurch of Scientology
316. COSChange Of Subject
317. CRAFTCan't Remember A F***ing Thing
318. CRAPCheap Redundant Assorted Products
319. CRATCan't Remember A Thing
320. CRAWSCan't Remember Anything Worth A Sh**
321. CRBCome Right Back
322. CRBTCrying Real Big Tears
323. CRDCaucasian Rhythm Disorder -or- Deficiency
324. CRDTCHCKCredit Check
325. CRSCan't Remember Sh**
326. CRTLACan't Remember the Three-Letter Acronym
327. CSCareer Suicide
328. CSACool Sweet Awesome
329. CSLCan't Stop Laughing
330. CSNChuckle, Snicker, Grin
331. CTCan't Talk
332. CTACall To Action
333. CTCCare To Chat -or- Contact -or- Choking The Chicken
334. CTMQChuckle To Myself Quietly
335. CTOCheck This Out
336. CUSee You -or- Cracking Up
337. CUATUSee You Around The Universe
338. CUL8RSee You Later
339. CULASee You Later Alligator
340. CUNSSee You In School
341. CUOLSee You OnLine
342. CUWTACatch Up With The Acronyms
343. CUZBecause
344. CWOTComplete Waste Of Time
345. CWYLChat With You Later
346. CXCancelled
347. CYCalm Yourself
348. CYACover Your Ass -or- See Ya
349. CYECheck your Email
350. CYLSee You Later
351. CYMCheck Your Mail
352. CYOSee You Online
353. CYTSee You Tomorrow

354. D&MDeep & Meaningful
355. d/cdisconnected
356. d00ddude, also seen as dood
357. dathere
358. DAMHIKTDon't Ask Me How I Know That
359. DARFCDucking And Running For Cover
360. DBADoing Business As
361. DBABAIDon't Be A Bitch About It
362. DBDDon't Be Dumb
363. DBEYRDon't Believe Everything You Read
364. DDDue Diligence
365. DDSOSDifferent Day, Same Old Sh**
366. defDefinitely
367. DEGTDon't Even Go There
368. demthem
369. desethese
370. DETIDon't Even Think It
371. dewddude
372. deythey
373. DFDear Friend
374. DFLADisenhanced Four-Letter Acronym (that is, a TLA)
375. DGADon't Go Anywhere
376. DGTDon't Go There
377. DGTGDon't Go There Girlfriend
378. DGYFDamn Girl You're Fine
379. DHDear Husband
380. DHYBDon't Hold Your Breath
381. DIAFDie In A Fire
382. DICDrunk In Charge
383. DIKUDo I Know You?
384. DILLIGADDo I Look Like I Give A Damn
385. DILLIGASDo I Look Like I Give A Sh**
386. DINKDouble Incomes, No Kids
387. DIRFTDo It Right the First Time
388. DISTODid I Say That Outloud?
389. DITRDancing In The Rain
390. dittosame here
391. DITYIDDid I Tell You I'm Distressed
392. DIYDo It Yourself
393. DKDCDon't Know Don't Care
394. DLDown Low -or- Download -or- Dead Link
395. DLTBBBDon't Let The Bed Bugs Bite
396. DLTMDon't Lie To Me
397. DMIDon't Mention It
398. DNBL8Do Not Be Late
399. DNCDoes Not Compute
400. DNDDo Not Disturb
401. DOCDrug Of Choice
402. DOEDepends On Experience
403. DOEIGoodbye (in Dutch)
404. DORDDepartment Of Redundancy Department
405. DPDomestic Partner
406. dpsDamage Per Second
407. DPUPDon't Poop Your Pants
408. DQMOTDon't Quote Me On This
409. DQYDJDon't Quit Your Day Job
410. DRBDirty Rat Bastard
411. DRIBDon't Read If Busy
412. DSTR8Damn Straight
413. DTCDeep Throaty Chuckle

414. DTRTDo The Right Thing
415. DUIDriving Under the Influence
416. DUMDo You Masturbate?
417. DUNADon't Use No Acronyms
418. dunnoi don't know
419. DURSDamn You Are Sexy
420. DUSLDo You Scream Loud?
421. DUSTDid You See That?
422. DWBDon't Write Back
423. DWBHDon't Worry Be Happy
424. DWIDriving While Intoxicated
425. DWPKOTLDeep Wet Passionate Kiss On The Lips
426. DWSDriving While Stupid
427. DWWWISurfing the World Wide Web while intoxicated
428. DWYMDoes What You Mean
429. DYFMDude You Fascinate Me
430. DYHABDo You Have A Boyfriend?
431. DYHAGDo You Have A Girlfriend
432. DYJHIWDon't You Just Hate It When...
433. DYLIDo You Love It?
434. DYOFDWDo Your Own F***ing Dirty Work
435. DYSTSOTTDid You See The Size Of That Thing
436. E123Easy as One, Two, Three
437. E2HOEach to His/Her Own
438. EAKEating at Keyboard
439. EAPFSEverything About Pittsburgh F***ing Sucks
440. EEElectronic Emission
441. effinF***ing
442. EFTElectronic Funds Transfer
443. EGEvil Grin
444. ELEvil Laugh
445. EMExcuse Me
446. EMAE-Mail Address
447. EMFBIExcuse Me For Butting In
448. EMFJIExcuse Me For Jumping In
449. EMIExcuse My Ignorance
450. EMLEmail Me Later
451. EMRTWEvil Monkey's Rule The World
452. EMSGE-Mail Message
453. EODEnd Of Day -or- End Of Discussion
454. EOLEnd Of Life
455. EOMEnd Of Message
456. EOTEnd Of Thread (meaning: end of discussion)
457. ESADEat Sh** And Die
458. ESADYFAEat Sh** And Die You F***ing Asshole
459. ESEMEDEvery Second Every Minute Every Day
460. ESHExperience, Strength, and Hope
461. ESMFEat Sh** Mother F***er
462. ESOEquipment Smarter than Operator
463. ETAEstimated Time of Arrival -or- Edited To Add
464. ETLAETLA Extended Three-Letter Acronym (that is, an FLA)
465. every1everyone
466. EVRE1Every One
467. EWIE-mailing While Intoxicated
468. EZEasy
469. F2FFace-to-Face
470. FABFeatures Attributes Benefits
471. FAHF***ing A Hot
472. FAPF***ing A Pissed

473. FAQLFrequently Asked Questions List
474. FASBFast Ass Son Bitchii
475. FAWCFor Anyone Who Cares
476. FAWOMFTFrequently Argued Waste Of My F***ing Time
477. FBF*** Buddy
478. FBIF***ing Brilliant Idea -or- Female Body Inspector
479. FBKSFailure Between Keyboard and Seat
480. FBOCDFacebook Obsessive Compulsive Disorder
481. FCFSFirst Come, First Served
482. FCOLFor Crying Out Loud
483. FDGBFall Down Go Boom
484. FEFatal Error
485. FFFriends Forever
486. FF&PNFresh Fields and Pastures New
487. FFSFor F*** Sake
488. FGDAIFuhgedaboudit -or- Forget About It
489. FIFF*** I'm Funny
490. FIGSFrench, Italian, German, Spanish
491. FIIKF*** If I Know
492. FILFather-In-Law
493. FILFFather I'd Like to F***
494. FILTHFailed In London, Try Hong Kong
495. FINEF***ed up, Insecure, Neurotic, Emotional
496. FISHFirst in, Still Here
497. FITBFill In The Blanks
498. FLAFour Letter Acronym
499. FLUIDF***ing Look it Up, I Did
500. FMLTWIAF*** Me Like The Whore I Am
501. FMTYEWTKFar More Than You Ever Wanted To Know
502. FMUTAF*** Me Up The Ass
503. FNGF***ing New Guy
504. FOF*** Off
505. FOADF*** Off And Die
506. FOAFFriend Of A Friend
507. FOAGF*** Off And Google
508. FOCFree of Charge
509. FOFLFalling on Floor Laughing
510. FOGCFear Of Getting Caught
511. FOLFond of Leather
512. FOMCFell Off My Chair
513. FOMCLFalling Off My Chair Laughing
514. FORDFound On Road Dead -or- Fixed Or Repaired Daily -or- F***ed Over Rebuilt Dodge
515. FOSFull Of Sh**
516. FOUOFor Official Use Only
517. FREDF***ing Ridiculous Electronic Device
518. FSFor Sale
519. FSBOFor Sale By Owner
520. FSRFor Some Reason
521. FSUF*** Sh** Up
522. FTASBFaster Than A Speeding Bullet
523. FTBOMHFrom The Bottom Of My Heart
524. FTEFull Time Employee
525. FTFF*** That's Funny -or- Face To Face
526. FTFOIFor The Fun Of It -or- For The F*** Of It
527. FTLFaster Than Light

528. FTLOGFor The Love Of God
529. FTNF*** That Noise
530. FTRFor The Record
531. FTRFF*** That's Really Funny
532. FTTBFor The Time Being
533. FTWFor The Win -or- F*** The World
534. FU2F*** You Too
535. FUBARF***ed Up Beyond All Recognition (or Repair)
536. FUBBF***ed Up Beyond Belief
537. FUDFear, Uncertainty, and Disinformation
538. FUJIMOF*** You Jack I'm Movin' On
539. FUMF***ed Up Mess
540. FURTBFilled Up and Ready To Burst
541. FWBFriends With Benefits
542. FWDForward
543. FWIWFor What It's Worth
544. FWOTF***ing Waste Of Time
545. FYAFor Your Amusement
546. FYEFor Your Edification
547. FYEOFor Your Eyes Only
548. FYFFrom Your Friend
549. FYIFor Your Information
550. FYIFVF*** You I'm Fully Vested
551. FYLTGEFrom Your Lips To Gods Ears
552. FYMFor Your Misinformation
553. FYSBIGTBABNFasten Your Seat Belts It's Going To Be A Bumpy Night
554. GGuess -or- Grin -or- Giggle
555. G1Good One
556. G2GGot to Go
557. G2GLYSGot To Go Love Ya So
558. G4IGo For It
559. G4NGood For Nothing
560. GAGo Ahead
561. GABGetting A Beer
562. GAFYKGet Away From Your Keyboard
563. GAGFIGives A Gay First Impression
564. GALGet A Life
565. GALGALGive A Little Get A Little
566. GALHERGet A Load of Her
567. GALHIMGet A Load of Him
568. GANBGetting Another Beer
569. GAPGot A Pic? -or- Gay Ass People
570. GASGot A Second?
571. gawdgod
572. GBGood Bridge
573. GBGGreat Big Grin
574. GBHGreat Big Hug
575. GBTWGet Back To Work
576. GCGood Crib
577. GD&RGrinning, Ducking and Running
578. GD&RFGrinning, Ducking and Running Fast
579. GDIGod Damn It -or- God Damn Independent
580. GDWGrin, Duck and Wave
581. GFGirlfriend
582. GFFGo F***ing Figure
583. GFIGo For It
584. GFNGone For Now
585. GFONGood For One Night
586. GFRGrim File Reaper
587. GFTDGone For The Day

588. GFYGood For You -or- Go F*** Yourself -or- Go Find Yourself
589. GFYMFGo F*** Yourself Mother F***er
590. GGGood Game -or- Gotta Go -or- Giggling
591. GGAGood Game All
592. GGGGGod, God, God, God
593. GGNGotta Go Now
594. GGOHGotta Get Out of Here
595. GGPGotta Go Pee
596. GHMGod Help Me
597. GIGoogle It
598. GICGift In Crib
599. GIDKGee I Don't Know
600. GIGOGarbage In, Garbage Out
601. GILFGrandmother I'd Like to F***
602. GIWISTGee, I Wish I'd Said That
603. GJGood Job
604. GJPGood Job Partner
605. GLGood Luck -or- Get Lost
606. GLAGood Luck All
607. GLBGood Looking Boy
608. GLBTGay, Lesbian, Bisexual, Transgender
609. GLGGood Looking Girl
610. GLGHGood Luck and Good Hunting
611. GLYASDIGod Loves You And So Do I
612. GMGood Morning -or- Good Move
613. GMABGive Me A Break
614. GMAFBGive Me A F***ing Break
615. GMTAGreat Minds Think Alike
616. GMTFTGreat Minds Think For Themselves
617. GNGood Night
618. GNBLFYGot Nothing But Love For You
619. GNOCGet Naked On Cam
620. GNSDGood Night Sweet Dreams
621. GOIGet Over It
622. GOKGod Only Knows
623. GOLGiggling Out Loud
624. GOOD jobGet Out Of Debt job
625. GOSGay Or Straight
626. GOWIGet On With It
627. GOYHHGet Off Your High Horse
628. GR&DGrinning Running And Ducking
629. GR2BRGood Riddance To Bad Rubbish
630. GR8Great
631. GRASGenerally Recognized As Safe
632. gratzCongratulations
633. grrlzgirls, also seen as grrl
634. GRRRGrowling
635. GSOASGo Sit On A Snake
636. GSOHGood Sense Of Humor
637. GSYJDWURMNKHGood Seeing You, Just Don't Wear Your Monkey Hat
638. GTGood Try
639. GTFOGet The F*** Out
640. GTFOOHGet The F*** Out Of Here
641. GTGGot To Go
642. GTGBGot To Go, Bye
643. GTGPGot To Go Pee
644. GTHGo To Hell
645. GTKGood To Know
646. GTMGiggle To Myself
647. GTRMGoing To Read Mail
648. GTSYGlad To See You

649. GUDGeographically UnDesirable
650. guvmentgovernment, also seen as guvmint, gumint
651. GWIGet With It
652. GWSGet Well Soon
653. GYHOOYAGet Your Head Out Of Your Ass
654. GYPOGet Your Pants Off
655. H&KHugs and Kisses
656. h/oHold On
657. h/pHold Please
658. H4UHot For You
659. H4XX0RHacker -or- To Be Hacked
660. H9Husband in room
661. HADVDHave Advised
662. hag1have a good one
663. HAGDHave a Great Day
664. HAGNHave A Good Night
665. HAGOHave A Good One
666. HAKHugs And Kisses
667. HANDHave a Nice Day
668. HARHit And Run
669. HAWTLWHello And Welcome To Last Week
670. HBHurry Back
671. HBASTDHitting Bottom And Starting To Dig
672. HBBHip Beyond Belief
673. HBIBHot But Inappropriate Boy
674. HBICHead Bitch In Charge
675. HBUHow Bout You?
676. HCCHoly Computer Crap
677. HDHold
678. HFHello Friend -or- Have Fun -or- Have Faith
679. HHISHanging Head In Shame
680. HHO1/2KHa Ha, Only Half Kidding
681. HHOJHa-Ha, Only Joking
682. HHOKHa Ha, Only Kidding
683. HHOSHa-Ha, Only Serious
684. HHTYAYHappy Holidays To You And Yours
685. Hi 5HIgh Five
686. HIGHow's It Going
687. HIHHope It Helps
688. HIOOCHelp, I'm Out Of Coffee
689. HITAKSHang In There And Keep Smiling
690. HMFICHead MOFO In Charge
691. HNTIHow Nice That/This Is
692. HNTWHow Nice That Was
693. HNYHappy New Year
694. HOHang On -or- Hold On
695. HOHAHOllywood HAcker
696. HOICHold On, I'm Coming
697. HOYEWHanging On Your Every Word
698. HPHigher Power
699. HPPOHighest Paid Person in Office
700. HSIKHow Should I Know
701. HTHi There
702. HTBHang The Bastards
703. HTHHope This (or That) Helps
704. HTNOTHHit The Nail On The Head
705. HUHook Up
706. HUAHeads Up Ace -or- Head Up Ass
707. HUDHow You Doing?
708. HUGZHugs
709. huhwhat
710. HUYAHead Up Your Ass
711. HWGAHere We Go Again

712. I 1-D-RI Wonder
713. I <3 UI Love You
714. i h8 iti hate it
715. I&IIntercourse & Inebriation
716. I-D-LIdeal
717. IACIn Any Case -or- I Am Confused -or- If Anyone Cares
718. IAEIn Any Event
719. IAITSIt's All In The Subject
720. IANACI Am Not A Crook
721. IANADBIPOOTVI Am Not A Doctor But I Play One On TV
722. IANAEI Am Not An Expert
723. IANALI Am Not A Lawyer
724. IANNNGCI Am Not Nurturing the Next Generation of Casualties
725. IASAP4UI Always Say A Prayer For You
726. IATI Am Tired
727. IAWI Agree With -or- In Accordance With
728. IAYMI Am Your Master
729. IBGYBGI'll Be Gone, You'll Be Gone
730. IBIWISII'll Believe It When I See It
731. IBKIdiot Behind Keyboard
732. IBRBI'll Be Right Back
733. IBTIn Between Technology
734. IBTCItty Bitty Titty Committee
735. IBTDI Beg To Differ
736. IBTLIn Before The Lock
737. ICIndependant Contractor -or- In Character -or- I See
738. ICBWI Could Be Wrong
739. ICBWICBMIt Could Be Worse, It Could Be Me
740. ICWI Can't Wait
741. ICYCIn Case You're Curious -or- In Case You Care
742. ID10TIdiot
743. IDCI Don't Care
744. IDGADI Don't Give A Damn
745. IDGAFI Don't Give A F***
746. IDGARAI Don't Give A Rats Ass
747. IDGII Don't Get It -or- I Don't Get Involved
748. IDKI Don't Know
749. IDK, my BFF JillI Don't Know, my Best Friend Forever Jill
750. IDKYI Don't Know You
751. IDMIt Does Not Matter
752. IDRKI Don't Really Know
753. IDSTI Didn't Say That
754. IDTAI Did That Already
755. IDTSI Don't Think So
756. IEFIt's Esther's Fault
757. IF/IBIn the Front -or- In the Back
758. IFABI Found A Bug
759. IFUI F***ed Up
760. IGGPI Gotta Go Pee
761. IGTPI Get The Point
762. IGWSIt Goes Without Saying
763. IGWSTIt Goes Without Saying That
764. IGYHTBTI Guess You Had To Be There
765. IHAI Hate Acronyms
766. IHAIMI Have Another Instant Message
767. IHNOI Have No Opinion
768. IHTFPI Have Truly Found Paradise -or- I Hate This F***ing Place
769. IHUI Hear You
770. IIABDFIIf It Ain't Broke, Don't Fix It

771. IIOIntel Inside, Idiot Outside
772. IIMADIf It Makes An(y) Difference
773. IINMIf I'm Not Mistaken
774. IIRIf I Remember -or- If I Recall
775. IIRCIf I Remember Correctly -or- If I Recall Correctly
776. IITIs It Tight?
777. IITLYTOIf It's Too Loud You're Too Old
778. IITYWIMWYBMADIf I Tell You What It Means Will You Buy Me A Drink
779. IITYWYBMADIf I Tell You Will You Buy Me A Drink
780. IIWMIf It Were Me
781. IJPMPI Just Pissed My Pants
782. IJWTKI Just Want To Know
783. IJWTSI Just Want To Say
784. IKALOPLTI Know A Lot Of People Like That
785. IKWYMI Know What You Mean
786. IKYABWAII Know You Are But What Am I?
787. ILAI Love Acronyms
788. ILF/MDI Love Female/Male Dominance
789. ILICISCOMKI Laughed, I Cried, I Spat/Spilt Coffee/Crumbs/Coke On My Keyboard
790. ILMJI Love My Job
791. ILUI Love You
792. ILUAAFI Love You As A Friend
793. ILYI Love You
794. IMInstant Messaging -or- Immediate Message
795. IM2BZ2PI aM Too Busy To (even) Pee
796. IMAI Might Add
797. IMAOIn My Arrogant Opinion
798. IMCOIn My Considered Opinion
799. IMEIn My Experience
800. IMEZRUI Am Easy, Are You?
801. IMHEIUOIn My High Exalted Informed Unassailable Opinion
802. IMHOIn My Humble Opinion
803. IMNERHOIn My Never Even Remotely Humble Opinion
804. IMNSHOIn My Not So Humble Opinion
805. IMOIn My Opinion
806. IMOOIn My Own Opinion
807. IMPOVIn My Point Of View
808. IMRUI Am, Are You?
809. IMSI Am Sorry
810. INBDIt's No Big Deal
811. INMPIt's Not My Problem
812. INNWIf Not Now, When
813. INPOIn No Particular Order
814. INUCOSMIt's No Use Crying Over Spilt Milk
815. IOHI'm Outta Here
816. IONIndex Of Names
817. IONOI Don't Know
818. IOUI Owe You
819. IOUDInside, Outside, Upside Down
820. IOWIn Other Words
821. IPNI'm Posting Naked
822. IRLIn Real Life
823. ISAGNI See A Great Need
824. ISHInsert Sarcasm Here
825. ISOIn Search Of
826. ISSI Said So -or- I'm So Sure
827. ISSYGTII'm So Sure You Get The Idea

828. ISTMIt Seems To Me
829. ISTRI Seem To Remember
830. ISWCIf Stupid Were a Crime
831. ISWYMI See What You Mean
832. ISYALSI'll Send You A Letter Soon
833. ITAI Totally Agree
834. ITFAIn The Final Analysis
835. ITIGBSI Think I'm Going To Be Sick
836. ITMIn The Money
837. ITMAIt's That Man Again
838. ITSIntense Text Sex
839. ITSFWIIf The Shoe Fits Wear It
840. IUMIf You Must
841. IWALUI Will Always Love You
842. IWBAPTAKYAIYSTAI Will Buy A Plane Ticket And Kick Your Ass If You Say That Again
843. IWBNIIt Would Be Nice If
844. IWFUI Wanna F*** You
845. IWIWUI Wish I Was You
846. IWSNI Want Sex Now
847. IYAOYASIf You Ain't Ordinance You Ain't Sh**
848. IYDIn Your Dreams
849. IYDMMAIf You Don't Mind My Asking
850. IYFEGInsert Your Favorite Ethnic Group
851. IYKWIMIf You Know What I Mean
852. IYKWIMAITYDIf You Know What I Mean And I Think You Do
853. IYOIn Your Opinion
854. IYQI Like You
855. IYSSIf You Say So
856. IYSWIMIf You See What I Mean
857. J/CJust Checking
858. J/JJust Joking
859. J/KJust Kidding
860. J/OJerking Off
861. J/PJust Playing
862. J/WJust Wondering
863. J2LYKJust To Let You Know
864. J4FJust For Fun
865. J4GJust For Grins
866. J4T or JFTJust For Today
867. J5MJust Five Minutes
868. JADJust Another day
869. JAFOJust Another F***ing Onlooker
870. JAFSJust A F***ing Salesman
871. JAMJust A Minute
872. JASJust A Second
873. JCJust Curious -or- Just Chilling -or- Jesus Christ
874. JDIJust Do It
875. JDMJJust Doing My Job
876. JEOMKJust Ejaculated On My Keyboard
877. JFHJust F*** Her
878. JFIJust For Information
879. JHOJust Helping Out
880. JHOMJust Helping out My (Mafia, Mob, Neighbors, etc.)
881. JHOMFJust Helping Out My Friend(s)
882. JICJust In Case
883. JKJust Kidding
884. JM2CJust My 2 Cents
885. JMOJust My Opinion
886. JOOTTJust One Of Those Things
887. JPJust Playing
888. JSUJust Shut Up

889. JSYKJust So You Know
890. JTJust Teasing
891. JTLYKJust To Let You Know
892. JTOLJust Thinking Out Loud
893. JTOUJust Thinking Of You
894. JUADLAMJumping Up And Down Like A Monkey
895. JWJust Wondering
896. KOK
897. KBKick Butt
898. KBDKeyboard
899. kewlit means cool
900. KFY -or- K4YKiss For You
901. KHYFKnow How You Feel
902. KIAKilled In Action
903. KIBOKnowledge In, Bullsh** Out
904. KIPPERSKids In Parents' Pockets Eroding Retirement Savings
905. KIRKeep It Real
906. KISSKeep It Simple Stupid
907. KITKeep In Touch
908. kittycode word for vagina
909. KKKiss Kiss
910. KMAKiss My Ass
911. KMFHAKiss My Fat Hairy Ass
912. KMPKeep Me Posted
913. KMRIAKiss My Royal Irish Arse
914. KMSLAKiss My Shiny Little Ass
915. KMUFKiss Me You Fool
916. KMWAKiss My White Ass
917. KOKKnock
918. KOTCKiss On The Cheek
919. KOTLKiss On The Lips
920. KPCKeeping Parents Clueless
921. KSKill Stealer
922. KUTGWKeep Up The Good Work
923. KWIMKnow What I Mean?
924. KWSTAKiss With Serious Tongue Action
925. KYBCKeep Your Bum Clean
926. KYFCKeep Your Fingers Crossed
927. KYNCKeep Your Nose Clean
928. KYPOKeep Your Pants On
929. LLaugh
930. L8RLater
931. L?^Let's hook up
932. LABATYDLife's A Bitch And Then You Die
933. LAQLame Ass Quote
934. LB?W/CLike Bondage? Whips or Chains
935. LBR and LGRLittle Boy's Room and Little Girl's Room
936. LBUG or LBIGLaughing Because You're Gay -or- Laughing Because I'm Gay
937. LDLong Distance -or- Later Dude
938. LDIMEDILLIGAFLook Deeply Into My Eyes, Does It Look Like I Give A F***
939. LDRLong Distance Relationship
940. LDTTWALet's Do The Time Warp Again
941. LFLet's F***
942. LFTILooking Forward To It
943. LGMASLord Give Me A Sign
944. LH6Letâ€™s Have Sex
945. LHMLord Have Mercy
946. LHOLaughing Head Off
947. LHOSLets Have Online Sex
948. LHSOLet's Have Sex Online
949. LHULet's Hook Up

950. LIFOLast In, First Out
951. LISLaughing In Silence
952. LJBFLet's Just Be Friends
953. LKITRLittle Kid In The Room
954. LLOMLike Leno on Meth
955. LLTALots and Lots of Thunderous Applause
956. LMAOLaughing My Ass Off
957. LMFAOLaughing My F***ing Ass Off
958. LMHOLaughing My Head Off
959. LMIRLLet's Meet In Real Life
960. LMKLet Me Know
961. LMSOLaughing My Socks Off
962. LMTCLeft a Message To Contact
963. LMTCBLeft Message To Call Back
964. LOLLaughing Out Loud -or- Lots of Love
965. LOLALaugh Out Loud Again
966. LOLZLots Of Laughs
967. LOMBARDLots Of Money But A Right Dick
968. LOMLLove Of My Life
969. LONHLights On, Nobody Home
970. LOOLLaughing Outrageously Out Loud
971. LOPSODLong On Promises, Short On Delivery
972. LORELearn Once, Repeat Everywhere
973. LOULaughing Over You
974. LPOSLazy Piece Of Sh**
975. LRFLittle Rubber Feet
976. LSHITIPALLaughing So Hard I Think I Peed A Little
977. LSHMBHLaughing So Hard My Belly Hurts
978. LSVLanguage, Sex, Violence
979. LTHTTLaughing Too Hard To Type
980. LTICLaughing 'Til I Cry
981. LTIOLaughing Til I Orgasm
982. LTMLaughing To Myself
983. LTNSLong Time No See
984. LTNTLong Time, No Type
985. LTRLong Term Relationship
986. LTSLaughing to Self
987. LTTICLook The Teacher Is Coming
988. LULULocally Undesireable Land Use
989. LUMTPLove You More Than Pie
990. luserloser
991. LUSMLove You So Much
992. LWRLaunch When Ready
993. LYLove You
994. LY4ELove You Forever
995. LYALove You All
996. LYBLove You Babe
997. LYCYLBBLove You, See You Later, Bye Bye
998. LYKYAMYLove You, Kiss You, Already Miss You
999. LYLLove You Lots
1000. LYLABLove You Like a Brother
1001. LYLASLove You Like A Sister
1002. LYLBLove You Later Bye
1003. LYMILove You, Mean It
1004. LYWAMHLove You With All My Heart
1005. M2NYMe Too, Not Yet
1006. M4CMeet for Coffee
1007. m4wmen for women
1008. M8 or M8sMate -or- Mates
1009. MAMature Audience

1010. MAYAMost Advanced Yet Accessible
1011. MBMessage Board
1012. MBNMust Be Nice
1013. MBRFNMust Be Real F***ing Nice
1014. MDDoctor of Medicine -or- Managing Director
1015. MEGOMy Eyes Glaze Over
1016. mehWho cares, whatever
1017. MFMy Friend
1018. MFDMulti-Function Device
1019. MfGMit freundlichen Gruessen
1020. MFICMother F***er In Charge
1021. MFWICMo Fo Who's In Charge
1022. MHBFYMy Heart Bleeds For You
1023. mhhmuh huh -or- yeah
1024. MHOTYMy Hat's Off To You
1025. MIAMissing In Action
1026. MIHAPMay I Have Your Attention Please
1027. MILMother-In-Law
1028. MILFMother I'd Like to F***
1029. MIRLMeet In Real Life
1030. MITINMore Info Than I Needed
1031. MKOPMy Kind Of Place
1032. MLAMultiple Letter Acronym
1033. MLASMy Lips Are Sealed
1034. mlmgiving the digital middle finger
1035. MMMarket Maker
1036. MMHA2UMy Most Humble Apologies To You
1037. mmkmmm ok
1038. MMLMade Me Laugh
1039. MMYTMail Me Your Thoughts
1040. MOMove On
1041. MOFMatter Of Fact
1042. MOFOMother F***er
1043. MOMPLOne Moment Please
1044. MOOMud, Object-Oriented -or- Matter Of Opinion
1045. MOOSMember Of The Opposite Sex
1046. MOPMOment Please
1047. MorFMale or Female
1048. MOSMom Over Shoulder
1049. MOSSMember(s) Of The Same Sex
1050. MOTASMember Of The Appropriate Sex
1051. MOTDMessage Of The Day
1052. MOTOSMember(s) Of The Opposite Sex
1053. MOTSSMember(s) Of The Same Sex
1054. MPFBMy Personal F*** Buddy
1055. MRAMoving Right Along
1056. MRPHMail the Right Place for Help
1057. MSGMessage
1058. MSMDMonkey See Monkey Do
1059. MSNUWMini-Skirt No UnderWear
1060. MSTMMakes Sense To Me
1061. MTBFMean Time Before Failure
1062. MTFMore To Follow
1063. MTFBWYMay The Force Be With You
1064. MTLAMy True Love Always
1065. MTSBWYMay The Schwartz Be With You
1066. MUAH or MWAHThe sound of a kiss
1067. MUBARMessed up Beyond All Recognition
1068. MUSLMissing You Sh** Loads
1069. MUSMMiss You So Much
1070. MVAMotor Vehicle Accident

1071. MVA no PIMotor Vehicle Accident with no Personal Injury
1072. MVA w/PIMotor Vehicle Accident with Personal Injury
1073. MWBRLMore Will Be Revealed Later
1074. MYLMind Your Language
1075. MYOBMind Your Own Business
1076. NNo
1077. N-A-Y-LIn A While
1078. N/ANot Applicable -or- Not Affiliated
1079. N/MNothing Much
1080. N/TNo Text
1081. N1Nice One
1082. N2MNot To Mention -or- Not Too Much
1083. N2MJCHBUNot Too Much Just Chillin, How Bout You?
1084. NABNot A Blonde
1085. NADTNot A Damn Thing
1086. NAGBNearly Almost A Good Bridge
1087. NAKNursing At Keyboard
1088. NALOPKTNot A Lot Of People Know That
1089. NASCARNon-Athletic Sport Centered Around Rednecks
1090. natchNaturally
1091. NATONo Action, Talk Only
1092. NAVYNever Again Volunteer Yourself
1093. NAZName, Address, Zip (also means Nasdaq)
1094. NBNota Bene
1095. NB4TNot Before Time
1096. NBDNo Big Deal
1097. NBFABNot Bad For A Beginner
1098. NBFABSNot Bad For A Bot Stopper
1099. NBGNo Bloody Good
1100. NBIFNo Basis In Fact
1101. NBLFYNothing But Love For You
1102. NBSNo Bull Sh**
1103. NCNice Crib
1104. NCGNew College Graduate
1105. NDNo Date
1106. NDNIndian
1107. neAny
1108. ne-wayzanyways
1109. ne1Anyone
1110. ne14kfcanyone for KFC?
1111. ne1eranyone here?
1112. Ne2HNeed To Have
1113. NEETNot currently Engaged in Employment, Education, or Training
1114. NESECAny Second
1115. NEVNeighborhood Electric Vehicle
1116. NEWSNorth, East, West, South
1117. NFBSKNot For British School Kids
1118. NFCNot Favorably Considered -or- No F***ing Chance
1119. NFFNo F***ing Fair
1120. NFGNot F***ing Good
1121. NFINo F***ing Idea
1122. NFSNeed For Sex -or- Network File System
1123. NFWNo F***ing Way -or- No Feasible Way
1124. NGNew Game
1125. NGBNearly Good Bridge
1126. NHNice Hand
1127. NHOHNever Heard Of Him/Her
1128. NI4NIAn Eye For Any Eye
1129. NICENonsense In Crappy Existence

1130. NIFOCNude In Front Of The Computer
1131. NIGYYSOBNow I've Got You, You Son Of a B*tch
1132. NIHNot Invented Here
1133. NIMNo Internal Message
1134. NIMBYNot In My Back Yard
1135. NIMJDNot In My Job Description
1136. NIMQNot In My Queue
1137. NIMYNever In A Million Years
1138. NINONothing In, Nothing Out -or- No Input, No Output
1139. NISMNeed I Say More
1140. NITLNot In This Lifetime
1141. NIYWFDNot In Your Wildest F***ing Dreams
1142. NLLNice Little Lady
1143. NMNever Mind -or- Nothing Much -or- Nice Move
1144. nm, unot much, you?
1145. NMEEnemy
1146. NMHNot Much Here
1147. NMHJCNot Much Here, Just Chilling
1148. NMPNot My Problem
1149. NMTENow More Than Ever
1150. NMUNot Much, You?
1151. NNNot Now -or- Need
1152. NNCIMINTFZNot Now Chief, I'm In The F ***in' Zone
1153. NNRNeed Not Respond
1154. NNWWNudge, Nudge, Wink, Wink
1155. NONot Online
1156. no prawno problem
1157. NOANot Online Anymore
1158. NOFINo OFfence Intended
1159. NOSNew Old Stock
1160. NOYNot Online Yet
1161. NOYBNone Of Your Business
1162. NPNo Problem -or- Nosy Parents
1163. NQANo Questions Asked
1164. NQOCDNot Quite Our Class Dear
1165. NRNice Roll
1166. NRGEnergy
1167. NRNNo Reply Necessary
1168. NSNice Set
1169. NSANo Strings Attached
1170. NSFWNot Safe For Work
1171. NSSNo Sh** Sherlock
1172. NSTLCNeed Some Tender Loving Care
1173. NTANot This Again
1174. nthnothing
1175. NTIMNot That It Matters
1176. NTIMMNot That It Matters Much
1177. NTKNice To Know
1178. NTMNot That Much
1179. NTMUNice To Meet You
1180. NTTAWWTNot That There's Anything Wrong With That
1181. NTWNot To Worry
1182. NTYMINow That You Mention It
1183. NUBNew person to a site or game
1184. NUFFEnough Said
1185. NVMNeVer Mind
1186. NVNGNothing Ventured, Nothing Gained
1187. NWNo Way
1188. NWALNerd Without A Life
1189. NWOTNew WithOut Tags
1190. NWRNot Work Related
1191. NWTNew With Tags
1192. NYCNot Your Concern

1193. NYCFSNew York City Finger Salute
1194. OOpponent -or- Over
1195. OAOOver And Out
1196. OATUSOn A Totally Unrelated Subject
1197. OAUSOn An Unrelated Subject
1198. OBObligatory
1199. OBEOvercome By Events
1200. OBOOr Best Offer
1201. OBTWOh By The Way
1202. OBXOld Battle Axe
1203. OCOriginal Character -or- Own Character
1204. OCDObsessive Compulsive Disorder
1205. ODTAAOne Damn Thing After Another
1206. OICOh, I See
1207. OICU812Oh I See, You Ate One Too
1208. OKAll Correct
1209. OLOld Lady
1210. OLLOnLine Love
1211. OLNOnLine Netiquette
1212. OLOOnly Laughed Once
1213. OMOld Man
1214. OMBOh My Buddha
1215. OMDBOver My Dead Body
1216. OMFGOh My F***ing God
1217. OMGOh My God
1218. OMIKOpen Mouth, Insert Keyboard
1219. OMLOh My Lord
1220. OMWOn My Way
1221. ONIDOh No I Didn't
1222. ONNAOh No, Not Again
1223. ONNTAOh No, Not This Again
1224. ONUDOh No You Didn't
1225. OOOver and Out
1226. OOAKOne Of A Kind
1227. OOCOut Of Character -or- Out Of Control
1228. OOFOut Of Facility
1229. OOIOut Of Interest
1230. OOOOut Of Office
1231. OOSOut Of Stock
1232. OOTBOut Of The Box -or- Out Of The Blue
1233. OOTCObligatory On Topic Comment
1234. OSIFOh Sh** I Forgot
1235. OSINTOTOh Sh** I Never Thought Of That
1236. OSTOn Second Thought
1237. OTOff Topic
1238. OTASOICOwing To A Slight Oversight In Construction
1239. OTCOver The Counter
1240. OTFOff The Floor -or- On The phone (Fone)
1241. OTHOff The Hook
1242. OTLOut To Lunch
1243. OTOHOn The Other Hand
1244. OTPOn The Phone
1245. OTSOn The Scene -or- On The Spot -or- Off The Shelf
1246. OTTOver The Top
1247. OTTOMHOff The Top Of My Head
1248. OTWOff The Wall
1249. OUSUOh, You Shut Up
1250. OWTTEOr Words To That Effect
1251. OZAustralia
1252. PPartner
1253. P&CPrivate & Confidential
1254. P-ZAPizza

1255. P2C2EProcess Too Complicated Too Explain
1256. P2U4URAQTPPeace To You For You Are A Cutie Pie
1257. P911Parent Alert
1258. PAParent Alert
1259. PALParents Are Listening
1260. PANSPretty Awesome New Stuff
1261. PAWParents Are Watching
1262. PBPotty Break
1263. PBBParent Behind Back
1264. PBEMPlay By EMail
1265. PBIABPay Back Is A Bitch
1266. PBJPeanut Butter and Jelly -or- Pretty Boy Jock
1267. PCPersonal Computer -or- Politically Correct
1268. PCMPlease Call Me
1269. PCMCIAPeople Can't Memorize Computer Industry Acronyms
1270. PDPublic Domain
1271. PDAPersonal Digital Assistant -or- Public Display of Affection
1272. PDOMAPulled Directly Out Of My Ass
1273. PDQPretty Darn Quick
1274. PDSPlease Don't Shout
1275. PEBCACProblem Exists Between Chair And Computer
1276. PEBCAKProblem Exists Between Chair And Keyboard
1277. PEEPPeople Engaged and Empowered for Peace
1278. peepspeople
1279. PFAPulled From Ass -or- Please Find Attached
1280. PFCPretty F***ing Cold
1281. phatPretty Hot And Tempting
1282. PHBPointy Haired Boss
1283. PHSPointy Haired Stupidvisor
1284. PIAPSPig In A Pant Suit
1285. PIBKACProblem Is Between Keyboard And Chair
1286. PICNICProblem In Chair, Not In Computer
1287. PIFPaid In Full
1288. PIMPPeeing In My Pants
1289. PIMPLPeeing In My Pants Laughing
1290. PINPerson In Need
1291. PIRParent In Room
1292. PITAPain In The Ass
1293. PITMEMBOAMPeace In The Middle East My Brother Of Another Mother
1294. pixpictures -or- photos
1295. PLOPeace, Love, Out
1296. PLOKTAPress Lots Of Keys To Abort
1297. PLOSParents Looking Over Shoulder
1298. PLSPlease
1299. PLZPlease
1300. PMPersonal Message -or- Private Message
1301. PMBIPardon My Butting In
1302. PMFPardon My French -or- Pure Freaking Magic
1303. PMFJIPardon Me For Jumping In
1304. PMIGBOMPut Mind In Gear Before Opening Mouth
1305. PMJIPardon My Jumping In
1306. PMLPissing Myself Laughing
1307. PMPPeeing My Pants
1308. PMSLPissed MySelf Laughing
1309. PNATMBCPay No Attention To Man Behind the Curtain

1310. PNATTMBTCPay No Attention To The Man Behind The Curtain
1311. PNCAHPlease, No Cursing Allowed Here
1312. PNDPossibly Not Definitely -or- Personal Navigation Device
1313. POPiss Off
1314. POAHFPut On A Happy Face
1315. POAKPassed Out At Keyboard
1316. POMSParent Over My Shoulder
1317. PONAPerson Of No Account
1318. POPPhoto On Profile -or- Point of Purchase -or- Point Of Presence -or- Post Office Protocol
1319. POSParent Over Shoulder -or- Piece Of Sh**
1320. POSCPiece Of Sh** Computer
1321. POSSLQPersons of the Opposite Sex Sharing Living Quarters
1322. POTATOPerson Over Thirty Acting Twenty One
1323. POTSPlain Old Telephone System -or- Pat On The Shoulder
1324. POTUSPresident of the United States
1325. POVPoint Of View
1326. PPPeople
1327. PPLPay-Per-Lead -or- People
1328. pronporn
1329. PRWParents Are Watching
1330. PSPost Script
1331. PSAPublic Service Announcement
1332. PSOProduct Superior to Operator
1333. PTHPrime Tanning Hours
1334. PTMMPlease Tell Me More
1335. PTPPardon The Pun
1336. PTPOPPat The Pissed Off Primate
1337. PUThat Stinks
1338. putercomputer
1339. PVPPlayer Versus Player
1340. pwpassword
1341. PWASPrayer Wheels Are Spinning
1342. PWCBPerson Will Call Back
1343. pwnown
1344. pwntowned
1345. PWPPlot, What Plot?
1346. QQueue -or- Question
1347. Q2CQuick To Cum
1348. QCQuality Control
1349. QFTQuoted For Truth -or- Quit F***ing Talking
1350. QLQuit Laughing
1351. QLSReply
1352. QOTDQuote Of The Day
1353. QQQuick Question -or- Cry More
1354. QSQuit Scrolling
1355. QTCutie
1356. QYBQuit Your Bitching
1357. rare
1358. r u da?Are You There?
1359. r u goinare you going?
1360. R U there?Are you there?
1361. R&DResearch & Development
1362. R&RRest & Relaxation
1363. RAEBNCRead And Enjoyed, But No Comment
1364. RATRemotely Activated Trojan
1365. RB@YaRight Back at Ya
1366. RBAYRight Back At You
1367. RBTLRead Between The Lines
1368. RCRemote Control
1369. RCIRectal Cranial Inversion
1370. RERegards -or- Reply -or- Hello Again

1371. REHIHi Again
1372. RFDRequest For Discussion
1373. RFRReally F***ing Rich
1374. RFSReally F***ing Soon
1375. RGRRoger
1376. RHIPRank Has Its Privileges
1377. RHKRoundHouse Kick
1378. RIYLRecommended If You Like
1379. RKBARight to Keep and Bear Arms
1380. RLReal Life
1381. RLCOReal Life Conference
1382. RLFReal Life Friend
1383. RMRemake
1384. RMETTHRolling My Eyes To The Heavens
1385. RMLBRead My Lips Baby
1386. RMMAReading My Mind Again
1387. RMMMRead My Mail Man
1388. RNRight Now
1389. RNNReply Not Necessary
1390. ROFLRolling On Floor Laughing
1391. RORRaffing Out Roud (in scooby-doo dialect)
1392. ROTFLRolling On The Floor Laughing
1393. ROTFLMAORolling On The Floor Laughing My Ass Off
1394. ROTFLMFAORolling On The Floor Laughing My F***ing Ass Off
1395. ROTFLOLRolling On The Floor Laughing Out Loud
1396. ROTGLRolling On The Ground Laughing
1397. ROTGLMAORolling On The Ground Laughing My Ass Off
1398. ROTMRight On The Money
1399. RPGRole Playing Games
1400. RRQReturn Receipt reQuested
1401. RRRhaR haR haR (instead of LOL)
1402. RSNReal Soon Now
1403. RSVPRepondez S'il Vous Plait
1404. RTReal Time
1405. RTBReturning To Base (home)
1406. RTBMRead The Bloody Manual
1407. RTBSReason To Be Single
1408. RTFAQRead The FAQ
1409. RTFFRead The F***ing FAQ
1410. RTFMRead The F***ing Manual
1411. RTFQRead The F***ing Question
1412. RTHRelease The Hounds
1413. RTKReturn To Keyboard
1414. RTM or RTFMRead The Manual - or- Read The F***ing Manual
1415. RTSRead The Screen
1416. RTSMRead The Silly Manual
1417. RTSSRead The Screen Stupid
1418. RTTSDRight Thing To Say Dude
1419. RTWFQRead The Whole F***ing Question
1420. RUAre You?
1421. RU/18Are You Over 18?
1422. RUFKMAre You F***ing Kidding Me?
1423. RUHAre You Horny?
1424. RUMCYMHMDAre You on Medication Cause You Must Have Missed a Dose
1425. RUMORFAre You Male OR Female?
1426. RUNTSAre You Nuts?
1427. RUOKAre You OK?
1428. RUSAre You Serious?
1429. RUSOSAre You SOS (in trouble)?

1430. RUTAre You There?
1431. RUUP4ITAre You Up For It?
1432. RXRegards
1433. RYFMRead Your Friendly Manual
1434. RYORoll Your Own
1435. RYSRead Your Screen
1436. SSmile
1437. S2RSend To Receive
1438. S2USame To You
1439. S4BSh** for Brains
1440. S4LSpam For Life
1441. SADADSuck A Dick And Die
1442. SAHMStay At Home Mom
1443. SAIAStupid Asses In Action
1444. SAPFUSurpassing All Previous Foul Ups
1445. SBStand By
1446. SBISorry 'Bout It
1447. SBTASorry, Being Thick Again
1448. SBUGSmall Bald Unaudacious Goal
1449. SCNRSorry, Could Not Resist
1450. SDKScottie Doesn't Know -or- Software Developer's Kit
1451. secwait a second
1452. SEDSaid Enough Darling
1453. SEGSh** Eating Grin
1454. SEPSomebody Else's Problem
1455. SETESmiling Ear To Ear
1456. SEWAGScientifically Engineered Wild Ass Guess
1457. SFSurfer Friendly -or- Science Fiction
1458. SFAIAASo Far As I Am Aware
1459. SFETESmiling From Ear To Ear
1460. SFLAStupid Four Letter Acronym
1461. SFTTMStop F***ing Talking To Me
1462. SFXSound Effects -or- Stage Effects
1463. SHSh** Happens
1464. SHBShould Have Been
1465. shhhquiet
1466. SHIDSlap Head In Disgust
1467. SHMILYSee How Much I Love You
1468. SICSpelling Is Correct
1469. SICLSitting In Chair Laughing
1470. SICSSitting In Chair Snickering
1471. SIISeriously Impaired Imagination
1472. SILSister-In-Law
1473. SIPSkiing In Powder
1474. SITStay In Touch
1475. SITCOMSingle Income, Two Children, Oppressive Mortgage
1476. SITDStill In The Dark
1477. SIUPSuck It Up Pussy
1478. SIUYAShove It Up Your Ass
1479. sk8erskater
1480. sk8rskater
1481. SLSecond Life
1482. SLAPSounds Like A Plan
1483. SLAWSounds Like A Winner
1484. SLIRKSmart Little Rich Kid
1485. SLMSee Last Mail
1486. SLOMSticking Leeches On Myself
1487. SLTSomething Like That
1488. SMSenior Moment
1489. SMAIMSend Me An Instant Message
1490. SMBSuck My Balls
1491. SMESubject Matter Expert
1492. SMEMSend Me E-Mail
1493. SMHShaking My Head
1494. SMIMSend Me an Instant Message

1495. SMOPSmall Matter of Programming
1496. smtsomething
1497. SNAFUSituation Normal, All F***ed Up
1498. SNAGSensitive New Age Guy
1499. SNERTSnotty Nosed Egotistical Rotten Teenager
1500. SOSignificant Other
1501. SOBSon Of a B*tch
1502. SOBTStressed Out Big Time
1503. SODDISome Other Dude Did It
1504. SOGOPSh** Or Get Off the Pot
1505. SOHSense Of Humor
1506. SOHFSense Of Humor Failure
1507. SOISelf Owning Idiot
1508. SOIARSit On It And Rotate
1509. sokit's ok
1510. SOLSh** Out of Luck
1511. some1someone
1512. SOMYSick Of Me Yet
1513. SOOYASnake Out Of Your Ass
1514. SOPStandard Operating Procedure
1515. SorGStraight or Gay
1516. SOSSame Old Sh** -or- help
1517. SOTShort On Time
1518. SOTMGShort On Time, Must Go
1519. SOWSpeaking Of Which -or- Statement Of Work
1520. sozSorry
1521. SROStanding Room Only
1522. srslyseriously
1523. SSCSuper Sexy Cute
1524. SSDDSame Sh** Different Day
1525. SSEWBASomeday Soon, Everything Will Be Acronyms
1526. SSIASubject Says It All
1527. STBXSoon To Be Ex
1528. STBYSucks To Be You
1529. STDSeal The Deal -or- Sexually Transmitted Disease
1530. STFUShut The F*** Up
1531. STFWSearch The F***ing Web
1532. sthsomething
1533. STMSpank The Monkey
1534. STPPYNOZGTWStop Picking Your Nose, Get To Work
1535. STR8Straight
1536. STSSo To Speak
1537. STWSearch The Web
1538. STYSSpeak To You Soon
1539. SUShut Up
1540. SUACSh** Up A Creek
1541. SUAKMShut Up And Kiss Me
1542. SUFISuper Finger -or- Shut Up F***ing Imbecile
1543. SUFIDScrewing Up Face In Disgust
1544. SULSnooze You Lose
1545. supwhat's up?
1546. suxsucks
1547. SUYFShut Up You Fool
1548. SWAGScientific Wild Ass Guess -or- SoftWare And Giveaways
1549. SWAKSealed (or Sent) With A Kiss
1550. SWALBCAKWSSealed With A Lick Because A Kiss Won't Stick
1551. SWALKSealed With A Loving Kiss
1552. SWDYTSo What Do You Think?
1553. sweet<3sweetheart
1554. SWFSingle White Female
1555. SWIMSee What I Mean?
1556. SWISSee What I'm Saying
1557. SWLScreaming With Laughter

1558. SWMBOShe Who Must Be Obeyed
1559. SWUSo What's Up
1560. SYLSee You Later
1561. SYSSee You Soon
1562. SYTSee You Tomorrow
1563. s^what's up?
1564. T&CTerms & Conditions
1565. T@YLTalk At You Later
1566. TAThanks Again
1567. TABOOMATake A Bite Out Of My Ass
1568. TAFThat's All, Folks
1569. TAFNThat's All For Now
1570. TAHTake A Hike
1571. TAKSThat's A Knee Slapper
1572. TANJThere Ain't No Justice
1573. TANSTAAFLThere Ain't No Such Thing As A Free Lunch
1574. TAPTake A Pill
1575. TARFUThings Are Really F***ed Up
1576. TASTaking A Shower
1577. TAWTeachers Are Watching
1578. TBATo Be Advised
1579. TBCTo Be Continued
1580. TBDTo Be Determined
1581. TBEThick Between Ears
1582. TBHTo Be Honest
1583. TBYBTry Before You Buy
1584. TCTake Care
1585. TCBTrouble Came Back
1586. TCOYTake Care Of Yourself
1587. TDMToo Darn Many
1588. TDTMTalk Dirty To Me
1589. TEOTWAWKIThe End Of The World As We Know It
1590. TFDSThat's For Darn Sure
1591. TFHThread From Hell
1592. TFLMSThanks For Letting Me Share
1593. TFMThanks From Me
1594. TFMIUThe F***ing Manual Is Unreadable
1595. TFNThanks For Nothing -or- Til Further Notice
1596. TFSThanks For Sharing -or- Three Finger Salute
1597. TFTHAOTThanks For The Help Ahead Of Time
1598. TFTTThanks For The Thought
1599. TFXTraffic
1600. TGALThink Globally, Act Locally
1601. TGGTGThat Girl/Guy has Got To Go
1602. TGIFThank God It's Friday
1603. THX or TX or THKSThanks
1604. TIAThanks In Advance
1605. TIAILThink I Am In Love
1606. TICTongue In Cheek
1607. TIGASThink I Give A Sh**
1608. TILIITell It Like It Is
1609. TINGTESThere Is No Gravity, The Earth Sucks
1610. TINWISThat Is Not What I Said
1611. TISCThis Is So Cool
1612. TISLThis Is So Lame
1613. TISNCThis Is So Not Cool
1614. TISNFThat Is So Not Fair
1615. TISNTThat Is So Not True
1616. TKTo Come
1617. TKU4UKThank You For Your Kindness
1618. TLAThree Letter Acronym
1619. TLCTender Loving Care

1620. TLGOThe List Goes On
1621. TLITBCThat's Life In The Big City
1622. TLK2UL8RTalk To You Later
1623. TMTrust Me
1624. TMAToo Many Acronyms
1625. TMIToo Much Information
1626. TMSGOToo Much Sh** Going On
1627. TMTOWTDIThere's More Than One Way To Do It
1628. TNATemporarily Not Available
1629. TNCTongue In Cheek
1630. TNTTil Next Time
1631. TNTLTrying Not To Laugh
1632. TNXThanks
1633. to go nookleerto explode
1634. TOBALThere Oughta Be A Law
1635. TOBGThis Oughta Be Good
1636. TOMTomorrow
1637. TOPCATil Our Paths Cross Again
1638. TOTTons Of Time
1639. TOYThinking Of You
1640. TPTeam Player -or- TelePort
1641. TPCThe Phone Company
1642. TPSThat's Pretty Stupid
1643. TPTTrailor Park Trash
1644. TPTBThe Powers That Be
1645. TQMTotal Quality Management
1646. TRAMThe Rest Are Mine
1647. TRDMCTears Running Down My Cheeks
1648. tripdubtriple w
1649. trootrue
1650. TRPTelevision Rating Points
1651. TSTough Sh** -or- Totally Stinks
1652. TSIAThis Says It All
1653. TSIFThank Science It's Friday
1654. TSNFThat's So Not Fair
1655. TSOBTough Son Of a B*tch
1656. TSRTotally Stuck in RAM -or- Totally Stupid Rules
1657. TSRATwo Shakes of a Rat's Ass
1658. TTBig Tease
1659. TTATap That Ass
1660. TTBOMKTo The Best Of My Knowledge
1661. TTFNTa Ta For Now
1662. TTGTime to Go
1663. TTIOTThe Truth Is Out There
1664. TTKSFTrying To Keep a Straight Face
1665. TTMFTa Ta MOFO
1666. TTSText To Speech
1667. TTTThat's The Ticket -or- To The Top -or- Thought That Too
1668. TTTHTFALTalk To The Hand The Face Ain't Listening
1669. TTTKATime To Totally Kick Ass
1670. TTTTTo Tell The Truth
1671. TTULTalk To You Later
1672. TTYAWFNTalk To You A While From Now
1673. TTYLTalk To You Later -or- Type To You Later
1674. TTYTTalk To You Tomorrow
1675. TVM4YEMThank You Very Much For Your E-Mail
1676. TWHABThis Won't Hurt A Bit
1677. TWHEThe Walls Have Ears
1678. TWIMCTo Whom It May Concern
1679. TWITAThat's What I'm Talking About
1680. TWIWIThat Was Interesting, Wasn't It?

1681. TXSThanks
1682. TXT IMText Instant Message
1683. TXT MSGtext message
1684. TYThank You
1685. TYCLOTurn Your CAPS LOCK Off
1686. TYGThere You Go
1687. TYVMThank You Very Much
1688. uYou
1689. u upare you up?
1690. U-LYou Will
1691. U2You Too
1692. u8you ate?
1693. UBSUnique Buying State
1694. UCWAPUp a Creek Without A Paddle
1695. UDH82BMEYou'd Hate To Be Me
1696. UDMYou're the Man
1697. UG2BKYou've Got To Be Kidding
1698. UGCUser-Generated Content
1699. UNOITYou Know It
1700. unPCunPolitically Correct
1701. UNTCOYou Need To Chill Out
1702. UOKAre You OK?
1703. UPODUnder Promise Over Deliver
1704. uryou are
1705. UR2KYou Are Too Kind
1706. URAPITAYou Are A Pain In The Ass
1707. URSAIYou Are Such An Idiot
1708. URWYou Are Welcome
1709. URWSYou Are Wise
1710. URYY4MYou Are Too Wise For Me
1711. URZyours
1712. USPUnique Selling Proposition
1713. UTMYou Tell Me
1714. UVUnpleasant Visual
1715. UWIWUYou Wish I Was You
1716. VBGVery Big Grin
1717. VBSVery Big Smile
1718. VCVenture Capital
1719. VCDAVaya Con Dios, Amigo
1720. VEGVery Evil Grin
1721. VFMValue For Money
1722. VGNVegan -or- Vegitarian
1723. VIPVery Important Person
1724. VIVVery Important Visitor
1725. VMVoice Mail
1726. VRBSVirtual Reality Bull Sh**
1727. VSFVery Sad Face
1728. VWDVery Well Done
1729. VWPVery Well Played
1730. w's^what's up?
1731. W/With
1732. W/EWeekend
1733. W/OWithout
1734. w/r/twith regard to
1735. w00tWe Own the Other Team
1736. w4mwomen for men
1737. W8Wait
1738. W9Wife in room
1739. WADWithout A Doubt
1740. WAEFWhen All Else Fails
1741. WAFBWhat A F***ing Bitch
1742. WAFMWhat A F***ing Mess
1743. WAFSWarm And Fuzzies
1744. WAGWild Ass Guess
1745. WAIWhat An Idiot
1746. WAKWhat A Kiss
1747. WAMBAMWeb Application Meets Brick And Mortar

1748. WAYDWhat Are You Doing?
1749. WAYNWhere Are You Now?
1750. WBWelcome Back -or- Write Back
1751. WBSWrite Back Soon
1752. WBUWhat 'Bout You?
1753. WCWho Cares
1754. WCAWho Cares Anyway
1755. WDWell Done
1756. WDALYICWho Died And Left You In Charge?
1757. WDDDWoopie Doo Da Dey
1758. WDRWith Due Respect
1759. WDTWho Does That?
1760. WDYMWhat Do You Mean?
1761. WDYMBTWhat Do You Mean By That?
1762. WDYSWhat Did You Say?
1763. WDYTWhat Do You Think?
1764. WEWhatever
1765. WEGWicked Evil Grin
1766. WETSUWe Eat This Sh** Up
1767. WFWay Fun
1768. WFMWorks For Me
1769. WGWicked Grin
1770. WGAFFWho Gives A Flying F***
1771. WIBAMUWell, I'll Be A Monkey's Uncle
1772. WIBNIWouldn't It Be Nice If
1773. WIIFMWhat's In It For Me
1774. WIIFYWhat's In It For You
1775. WILBWorkplace Internet Leisure Browsing
1776. WILCOWill Comply
1777. WIMWoe Is Me
1778. WIPWork In Process
1779. wirldworld
1780. WISPWinning Is So Pleasureable
1781. WITWordsmith In Training
1782. WITFITSWhat In The F*** Is This Sh**
1783. WITWWhat In The World
1784. WIUWrap It Up
1785. wkewlway cool
1786. WLMIRLWould Like to Meet In Real Life
1787. WMHGBWhere Many Have Gone Before
1788. WMMOWSWash My Mouth Out With Soap
1789. WMPLWet My Pants Laughing
1790. WNOHGBWhere No One Has Gone Before
1791. WOAWork Of Art
1792. WOGWise Old Guy
1793. WOMWord Of Mouse
1794. WOMBATWaste Of Money, Brains And Time
1795. WOOFWell Off Older Folks
1796. wootWe Own the Other Team
1797. WOPWith Out Papers
1798. woditit means cool, a.k.a. word up
1799. WOTAMWaste Of Time And Money
1800. WOTDWord Of The Day
1801. WPWell Played
1802. WRTWith Regard To -or- With Respect To
1803. wruwhere are you?
1804. WRUDWhat Are You Doing?
1805. WRUDATMWhat Are You Doing At The Moment?
1806. WTWithout Thinking -or- What The -or- Who The
1807. WTBWant To Buy

1808. WTFWhat The F***
1809. WTFDYJSWhat The F*** Did You Just Say?
1810. WTFGDAWay To F***ing Go, Dumb Ass
1811. WTFHWhat The F***ing Hell
1812. WTFWYCMWhy The F*** Would You Call Me?
1813. WTGWay To Go
1814. WTGPWant To Go Private?
1815. WTHWhat The Heck
1816. WTHOWWhite Trash Headline Of the Week
1817. WTMIWay Too Much Information
1818. WTNWhat Then Now? -or- Who Then Now?
1819. WTSWant To Sell
1820. WTSDSWhere The Sun Don't Shine
1821. WTSHTFWhen The Sh** Hits The Fan
1822. WTTMWithout Thinking Too Much
1823. WUWhat's Up
1824. WUFWhere You From
1825. WUWHWish You Were Here
1826. WUWHIMAWish You Were Here In My Arms
1827. wuzwas
1828. wuz4dinaWhat's for dinner?
1829. wuzupwhat's up?
1830. WWJDWhat Would Jesus Do?
1831. WWSDWhat Would Satan Do?
1832. WWYWhere Were You?
1833. WXWeather
1834. WYCMWill You Call Me?
1835. WYDWhat You Doing?
1836. WYFMWould You F*** Me?
1837. WYGISWYPFWhat You Get Is What You Pay For
1838. WYMWhat do You Mean?
1839. wymynwomen
1840. WYPWhat's Your Problem?
1841. WYRNWhat's Your Real Name?
1842. WYSWhatever You Say
1843. WYSILOBWhat You See Is A Load of Bullocks
1844. WYSIWYGWhat You See Is What You Get
1845. WYSLPGWhat You See Looks Pretty Good
1846. WYTWhatever You Think
1847. WYWHWish You Were Here
1848. X-I-10Exciting
1849. XLNTExcellent
1850. XMEExcuse Me
1851. XOXOHugs and Kisses
1852. XQZTExquisite
1853. XTCEcstasy
1854. YWhy? -or- Yes
1855. YAYet Another
1856. YA yayaYet Another Ya-Ya (as in yo-yo)
1857. YABAYet Another Bloody Acronym
1858. YACCYet Another Calendar Company
1859. YAFIYGIYou Asked For It You Got It
1860. YAJWDYou Ain't Just Whistling Dixie
1861. YAOTMYet Another Off Topic Message
1862. YAUNYet Another Unix Nerd
1863. YBFYou've Been F***ed
1864. YBSYou'll Be Sorry

1865. YBYYeah Baby Yeah
1866. YBYSAYou Bet Your Sweet Ass
1867. YCTYour Comment To
1868. YDKMYou Don't Know Me
1869. YEPPIESYoung Experimenting Perfection Seekers
1870. YGBKYou Gotta Be Kidding
1871. YGBSMYou Gotta Be Sh**ing Me
1872. YGLTYou're Gonna Love This
1873. YGMYou've Got Mail
1874. YGTBKYou've Got To Be Kidding
1875. YGWYPFYou Get What You Pay For
1876. YHMYou Have Mail
1877. YICYours In Christ
1878. YIUYes, I Understand
1879. YIWGPYes, I Will Go Private
1880. YKWYou Know What?
1881. YKWIMYou Know What I Mean
1882. YMYour Mother
1883. YMAKYou May Already Know
1884. YMMVYour Mileage May Vary
1885. YNKYou Never Know
1886. YOYOYou're On Your Own
1887. YRYeah Right
1888. YRYOCCYou're Running on Your Own Cookoo Clock
1889. YSYou Stinker
1890. YSANYou're Such A Nerd
1891. ysdiw8why should i wait?
1892. YSICWhy Should I Care?
1893. YSKYou Should Know
1894. YSYDYeah, Sure You Do
1895. YTBYou're The Best
1896. YTRNWYeah That's Right, Now What?
1897. YTTTYou Telling The Truth?
1898. YUPPIESYoung Urban Professionals
1899. YWYou're Welcome
1900. YWIAYou're Welcome In Advance
1901. YY4UToo Wise For You
1902. YYSSWYeah Yeah Sure Sure Whatever
1903. zergTo gang up on someone
1904. ZMG or ZOMGOh My God
1905. ZZZSleeping, Bored, Tired
1906. \M/Heavy Metal Music
1907. ^5High Five
1908. ^RUP^Read Up Please
1909. ^URSUp Yours

*** Information was obtained from Netlingo.com on May 17, 2010**

# Sexting, Texting, Lies and Videotape: *Technology and Law in Canada*

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# Disclaimer

Our comments should not be viewed as a substitute for legal advice. If you require legal advice, you should hire a lawyer, who can acquire an understanding of your particular circumstances, and apply the up-to-date applicable law to your case. Our comments are to give you some background and some ideas, not legal advice and this does not constitute a complete statement of the law.

# Road Map

- Internet Defamation;
- Hyperlinking to Defamation;
- Technology, Law and the News;

# Internet Defamation

***Barrick Gold Corp. v. Lopehandia***, 2004 CanLII 12938 (ON C.A.)

Damages awarded and injunctive relief available in Internet defamation case.

***Black v. Breeden***, 2009 CanLII 14041 (ON S.C.)

Conrad Black sues for, *inter alia*, allegedly defamatory comments posted on a website. If reasonably foreseeable that web posts would be published and result in damage in Ontario, then the defendants will be connected to that jurisdiction.

# Internet Defamation

***Warman v. Fournier et al.***, 2010 ONSC 2126.

Disclosure of IP and email addresses of anonymous posters of defamatory comments on a website.

Where political discussion is promoted, defence of fair comment requires defamation to be established on a *prima facie* basis.

Balancing:

- Freedom of Expression versus Protection of Reputation.
- Disclosure versus Privacy Interests.

# Internet Defamation

***Grant v. Torstar Corp.***, 2009 SCC 61.

Statements that are "reliable and important to public debate" ought to be covered by a new defence of responsible communication in the public interest.

New defence requires the publication to be a matter of public interest and be responsible (i.e. attempt to verify allegations with regard to all relevant circumstances).

# Hyperlinking and Internet Defamation

***Crookes v. Newton***, 2009 B.C.C.A. 392. (Under Appeal).

Crookes was a target of some allegedly defamatory articles – Newton's website had hyperlinks to the articles.

Hyperlinking will not be met with a presumption of publication due to the nature of hyperlinking, whereby the reader must take positive steps (click on the link and leave the present site) in order to be able to read the materials.

# Hyperlinking and Internet Defamation

- The Defendant made no reference to the defamatory material, the nature of it, nor was it reproduced in any way. There was no invitation or encouragement to view it.
- Hyperlinking likened to a footnote in this instance, maintaining separation of the reader from the defamatory material.

# Hyperlinking and Internet Defamation

## **U.S.A. and Canada**: A Comparison

**U.S.A.**: Section 230 of the *Communications Decency Act of 1996* governs claims such as defamatory hyperlinking - "…providers and users of an 'interactive service' cannot be held liable 'as a publisher or speaker' for 'information provided by another information content provider'." This may extend to hyperlinking to defamatory material.

**Canada**: ISPs have to use an established defence to defamation to be shielded from liability if they are not assessing nor asserting any control over content.

# Technology, Law and the News

- Online predators;
- Minnesota Predator Charged Criminally for Assisted Suicide of Ottawa Student Based on Comments Made in Online Suicide Chat Room;
- Sexting.

# Technology, Law and the News

Online Predators

- Canadian online predator charged, convicted and sentenced for blackmail scheme – coerced more than 20 young female victims into performing degrading acts over the Internet.

# Technology, Law and the News

Minnesota Predator Charged Criminally for Assisted Suicide of Ottawa Student Based on Comments Made in Online Suicide Chat Room;

- 46 year-old male nurse in Minnesota encouraged Ottawa student to commit suicide in online suicide chat room.
- Charged with two counts of aiding suicide in Minnesota – second count in connection with case of a man who committed suicide under similar circumstances in England.

# Technology, Law and the News

## Sexting

- In Canada, sexting qualifies as a child pornography offence (section 163.1 of the Criminal Code) where the photographs are circulated outside of the original consensual partnership.
- Once information shared beyond sphere of those in the images, or if under the age of 16, a charge may follow.

# Technology, Law and the News

*"Where the circulation of sexual photographs is concerned, the elevation of the civil standard of foreseeability to the criminal standard of mens rea is not far fetched – particularly where photographs of teens are concerned, and where indeed the point of the circulation of the photograph is clearly to both humiliate (by sending the photographs to parents, grandparents and teachers) and to incite the bullying behaviors of peers."*

# *Concluding Thoughts*

*David A. Bertschi*