The Transportation Practice Group of ALFA International has published the Transportation Update for about seventeen years. Please note that in addition to this issue of the Transportation Update we have an archive of many recent issues on the ALFA website at ALFA Transportation Update archives.

If your first contact with the Transportation Update is through our website, you can be added to our email distribution list by contacting us through Katherine Garcia (kgarcia@alfainternational.com). Please add the Transportation Update to the subject line, and we will email the current issue and each subsequent issue to you as it is published. If you want to receive the Transportation Update in hard copy format, contact an ALFA attorney listed at the end of this newsletter, and they can provide this service for you.

Our primary method of distribution of the Transportation Update is by email. Electronic publication allows us to include hyperlinks for the use of our readers. We encourage you to use the hyperlinks feature and our section headings to quickly get to the information that is most interesting to you. The section headings are as follows: ALFA Member Publications and Speaking Engagements; Cases, Regulations, and Statutes; Verdicts and Settlements; Practice Tips; and Articles.

Under the Cases, Regulations, and Statutes section of the Transportation Update, we report to you about developments in the statutory, regulatory, and common law around the country that are of general interest to the trucking community.

The Verdicts and Settlements section addresses the results of litigation affecting the trucking industry. We encourage you to report to us about any verdict or settlement that you think is of interest to the trucking community. You may report all such results to the editors of the Update or to Michael K. Sheehy. Michael can be reached as follows: msheehy@plunketcooney.com.

The Practice Tips section of the Update features articles which address matters of practical interest to those who manage litigation for motor carriers and those who represent them. The essays in this section generally have widespread application throughout the country. In this issue, we have My Driver’s Name is “Jesus”, 3 Must-Do’s to Defend Spanish-Speaking Truck Drivers in Litigation by Cynthia Huerta, The Tort of Spoliation and Trucking Litigation by Marty Diamond.

All hyperlinks are in blue. Hyperlinks can be activated by placing the cursor on them and left clicking with the mouse. Links in the contents go to specific points in the newsletter; links to websites take you to the website; and links to email addresses open an email addressed to that person.

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EDITORS’ NOTEPAD (CONT.)

and M. Scott Owen, a book review: Beware “Rules of the Road”, Recent Liability Tactics of the Plaintiffs’ Bar by Peter Doody, and Potential Sources of Electronically Stored Information in a Truck Accident Case by Curtis N. Stambaugh

Articles provide in depth analysis of issues, developments, and concerns that are relevant to the transportation industry. In this issue, we have Allocation of Financial Responsibility Among Insurers Based on the MCS 90 Endorsement by Dennis B. Keene and Recent Cases Involving Spoliation, Sanctions, Sanctions, Sanctions by Will Fulton and Laura Berger.

The Directory of Member Firms at the end of the newsletter offers a current list of all the individuals who are active in the ALFA Transportation Practice Group by firm at the end of the Transportation Update for a number of years. In this issue we have included for the first time a photo of each attorney on the list so that you can see that individual before your call them if you use the list in this way.

We welcome comments, suggestions for improvement, and topics which you would like for us to address in future issues. It is our goal to provide timely relevant information to members of the trucking community. Our editors can be contacted as follows:

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FUTURE EVENTS

Every year, the Transportation Practice Group of ALFA International presents a multi-day seminar for members of the Trucking Industry. The 2009 Transportation Seminar will be held in Coronado (San Diego), California at the Hotel del Coronado from May 6, 2009 to May 8, 2009. Their official web site of the hotel is http://www.hoteldel.com/.

Both beach lovers and golf lovers will be delighted with this wonderful facility. Our Program Chair for the 2009 seminar is Peter Doody of Higgs, Fletcher & Mack, LLP, San Diego, California, who can be reached at (619) 236-1551 and doody@higgslaw.com.

Our 2009 program is titled “Practical Solutions for Issues Affecting the Trucking Industry.” The topics that will likely be covered are as follows: 1) How to Deal Effectively with the Case of a Disappearing Driver; 2) State of the Art Technology and How to Preserve and Protect ESI; 3) Keeping a Close Eye on How the Plaintiff’s Bar is Targeting the Trucking Industry; 4) Strategies to Protect Work Product and Post-Accident Review Following a Trucking Accident; 5) Insurance Issues Surrounding the Catastrophic Accident; and 6) Case Valuation and Resolution Strategies. If you have a topic that you would like to suggest, please contact Peter Doody by email or phone.

Our Chairman of the Transportation Practice Group for 2008-09 is Paul T. Yarbrough of Butt Thornton & Baehr PC, Albuquerque, New Mexico, who can be reached at (505) 884-0777 and ptyarbrough@btblaw.com. Our Vice Chair is Danny M. Needham of Mullin Hoard & Brown, LLP, Amarillo, Texas, who can be reached at (806) 372-5050 and dmneedham@mhba.com. Please contact any of these individuals or the editors with any suggestions for the program.

For more information, please also consider contacting Katie Garcia, the practice group and event coordinator at kgarcia@alfainternational.com and (312) 642-2215.
ALFA MEMBER PUBLICATIONS AND SPEAKING ENGAGEMENTS

Our ALFA attorneys are putting together an excellent program that we encourage you to attend from May 6 – 8, 2009 at the Hotel del Coronado in San Diego. Peter Doody is the Program Chair. The brochure is now available and Katherine A. Garcia at ALFA International would be happy to send it to you. She can be reached at kgarcia@alfainternational.com.

On March 26-27 Peter Doody is speaking on a panel regarding ECM download data at the Association of Southern California Defense Counsel annual meeting in Los Angeles. Finally he is also speaking at the Transportation Lawyers Association annual meeting on FMCSA regulation and its impact on casualty litigation and damages, this meeting is in La Costa CA. on April 28-30th. Will Fulton is presenting a biomechanist on direct examination in “Presenting the Biomechanical Witness” at the Kentucky Defense Counsel/Kentucky Justice Association Trial Practical Skills Seminar on the Seat Belt Defense on April 17 and 24, 2009 in Lexington and Louisville, KY respectively.

The American Trucking Association will hold its annual Forum for Motor Carrier General Counsels at the Pan Pacific Vancouver Hotel in Vancouver, B.C. on August 26-29, 2009. (http://www2.panpacific.com/index.html) Several ALFA Transportation Lawyers will be speaking on the program and ALFA will be sponsoring a portion of the event. We will have more information on this event in our next newsletter. Please hold the date.

OF SPECIAL NOTE IN THIS ISSUE: ALFA’S GO TEAM HOTLINE

The ALFA Transportation Practice Group now presents a new service for its transportation clients, THE ALFA GO TEAM HOTLINE. ALFA knows that its transportation clients must often confront time-sensitive emergencies. The ALFA GO TEAM HOTLINE is designed to offer ALFA clients immediate legal and other support services, 24 hours a day and 7 days a week.

Here’s how the service works. An ALFA client needing immediate legal support calls the ALFA GO TEAM HOTLINE at 1-866-540-ALFA (2532), an ALFA operator will provide location-specific contact information about experienced transportation lawyers, accident reconstructionists, and other transportation industry experts. When you contact the ALFA GO TEAM HOTLINE, you are connected to a full-service emergency response team, when you need it. Contact your ALFA lawyer today for more details about the ALFA GO TEAM HOTLINE. But remember that number, 1-866-540-ALFA (2532).

FUTURE ISSUES OF TRANSPORTATION UPDATE

The Spring issue of Transportation Update will be published in April 2009.

DISCLAIMER

The ALFA International Transportation Update does not create an attorney-client relationship between the reader and any attorney nor does it render legal advice on any specific matter. No reader should act or refrain from acting on the basis of any statement in the ALFA International Transportation Update without seeking advice from qualified legal counsel on the particular facts and circumstances involved. Readers are responsible for obtaining such advice from their own legal counsel.
"FREE" TRAINING MATERIAL FROM THE FEDERAL GOVERNMENT

The Federal Railroad Administration (FRA) released in January 2009 an educational video for truck drivers designed to promote safety at highway-rail grade crossings. The video reviews the legal responsibilities of drivers as they approach and travel over highway-rail grade crossings and is available in both English and Spanish. The video is downloadable from the website listed below and should be of interest to your safety and training personnel. We expect the Plaintiffs' bar and "transportation safety" experts hired exclusively by Plaintiffs will now assert in crossing cases that your company had a poor safety program if your driver had not seen this material prior to the accident. [http://www.fra.dot.gov/us/content/2109](http://www.fra.dot.gov/us/content/2109)

CASES, REGULATIONS, & STATUTES

- ALL JURISDICTIONS - FEDERAL

  Tenth Circuit holds that Truck Driver Employment Reports Are Not Subject to the Fair Credit Reporting Act.

USIS Commercial Services Inc. ("USIS") compiles records of the employment histories of commercial truck drivers and makes these records available to trucking companies (for a fee) who wish to perform a background investigation before hiring new drivers. The records contain comments regarding the quality of a driver's work and reasons for leaving the company. The records are submitted by the driver's previous employer.

Plaintiffs, individual truck drivers, sued USIS, contending that the employment records were consumer reports subject to the federal Fair Credit Reporting Act ("FCRA"). Although the FCRA does encompass consumer reports used for employment purposes, it specifically excludes reports prepared by an employer concerning direct interactions with its employees. The United States District Court for the District of Colorado held that the USIS employment records fell within this exception and therefore were not subject to the requirements of the FCRA. The United States Court of Appeals for the Tenth Circuit affirmed. Full text of opinion .

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- NORTH CAROLINA

  North Carolina Court of Appeals Holds Responsibility for Proper Loading and Securing of Cargo a Question of Fact for the Jury.

The North Carolina Court of Appeals recently considered whether the duty to ensure cargo is properly loaded and secured rests with the carrier or shipper in Hensley v. National Freight Transp., Inc., ___ N.C. App. ___, 668 S.E.2d 349 (2008). In Hensley, the motor carrier's driver drove a flatbed truck to the shipper's facility where he supervised the shipper's forklift operator loading the truck. The cargo consisted of four pallets of zirconium wire coil, with three pallets containing a single coil and a fourth pallet containing four coils stacked on top of one another. The driver instructed the shipper's forklift operator on where to place the pallets on the
truck and, unhappy with the pallet containing 4 coils, instructed the forklift operator to remove the pallet and band the coils. The driver then directed the forklift operator to replace the coils and the driver secured the coils with additional straps. The driver then inspected the load and signed a bill of lading indicating the truck had been “loaded and braced in accordance with the truck drivers’ instructions.”

Three days later, while the truck was being driven by another driver, one of the coils fell off the truck and onto the road. A motorcycle traveling behind the truck was unable to avoid the coil and the decedent, a passenger on the motorcycle, was ejected onto the road and struck by an oncoming truck. The decedent died as a result of the injuries sustained in the accident.

The issue before the Court of Appeals was whether the shipper was entitled to summary judgment in light of the driver’s supervision of the loading and securing of the cargo. Noting North Carolina’s adoption of the Federal Motor Carrier Safety Regulations applicable to the loading and securing of cargo, the court looked first to the applicable federal regulations, stating that while such regulations are not dispositive, they are “indicative of the proper allocation of duty as between a common carrier and a shipper for the proper loading of goods.’” Rector v. General Motors Corp., 963 F.2d 144, 147 (6th Cir. 1992); 49 C.F.R. 392.9(a)(1) (2007). The applicable federal regulation states that “[a] driver may not operate a commercial motor vehicle unless . . . [t] he commercial motor vehicle’s cargo is properly distributed and adequately secured[,]” and places an affirmative duty upon the driver “to ensure the truck’s cargo is properly distributed and adequately secured before he operates the vehicle.” 49 C.F.R. 392.9(a)(1), (b)(1). The court also looked to federal precedent holding motor carriers have the primary duty to ensure the safe loading of property with the exception that a shipper who assumes the responsibility of loading is liable for “defects which are latent and concealed and cannot be discerned by ordinary observation by the agents of the carrier . . . .’” U.S. v. Savage Truck Line, 209 F.2d 442, 445-46 (4th Cir. 1953); Franklin Stainless Corp. v. Marlo Transport Corp., 748 F.2d 865, 868 (4th Cir. 1984). Where a shipper’s improper loading is apparent, the carrier will be liable notwithstanding the negligence of the shipper. Franklin Stainless Corp., 748 F.2d at 868.

Despite the fact the driver supervised the loading of the truck, instructed the shipper’s workers on where to put the coils, directed the shipper’s workers to remove some of the coils, requested that the removed coils be banded before being placed back on the truck per his direction, and inspected the load before signing a bill of lading indicating the truck was loaded and braced in accordance with his instructions, the Court of Appeals, in a 2 to 1 decision, held a genuine issue of material fact existed as to whether the shipper had a duty to ensure the cargo was properly loaded and secured. The Court of Appeals based its holding on the driver’s testimony that the shipper’s forklift operator informed the driver the coils were stacked on top of each other because “that’s the way they wanted them shipped[.]” and the driver’s testimony that although he requested the coils be banded, he could not tell the shipper’s workers how to band the coils. The Court of Appeals held this testimony served as evidence that the shipper maintained the ultimate responsibility in determining how the coils would be packaged and shipped and therefore a genuine issue of material fact remained as to which party bore the responsibility for the loading of the truck. The court dismissed the shipper’s argument that any improper loading was apparent in a footnote holding whether the improper loading was apparent was a question for the trier of fact. Thus, the court concluded there was sufficient evidence for the jury to determine the duty to ensure the cargo was properly loaded and secured rested with the shipper.

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Pennsylvania Passes Anti-Idling Law

On October 9, 2008, Governor Ed Rendell signed into law the Diesel-Powered Motor Vehicle Idling Act. The new law is also very broad in its reach, and several of its provisions are applicable to nearly every business in the Commonwealth.

The Anti-Idling Law applies to any diesel-powered motor vehicle with a gross weight of 10,001 pounds or more. The 10,001 pound weight class is the most inclusive level of regulation of commercial vehicles that is used in Pennsylvania law or regulations. The law prohibits such vehicles from idling for more than a total of 5 minutes in a continuous 60 minute period when they are engaged in commerce. Significantly, the new law applies not only to owners and operators of such vehicles, but also to “owners and operators of locations at which . . . [such vehicles] load, unload or park.”

There are multiple exceptions and several exemptions from the law. The law does not apply to motor homes, implements of husbandry, farm equipment or farm vehicles. The exemptions include, among other things:

1. Vehicles forced to remain motionless because of on-highway traffic, an official control device or signal, or at the direction of a law enforcement official;

2. Bus, school bus, or school vehicles idling for no more than 15 minutes in a continuous 60 minute period to provide heat and air conditioning to non-driver passengers;

3. Occupied vehicles with a sleeper berth idling for purposes of heat or air conditioning when the temperature is below 40o or above 75o during a rest or sleep period. (Note that this exemption expires on May 1, 2010); and,

4. Vehicles actively engaged in solid waste collection or the collection of source-separated recyclable materials.

Enforcement of the law includes the possibility of conviction for a summary offense, with fines ranging from $150 to $300 plus costs. Additionally, the Pennsylvania Department of Environmental Protection may issue a penalty of $1,000 per day for each violation.

Of major significance is a provision in the law that requires an owner or operator of a location where vehicles subject to the act load or unload, or a location that provides 15 or more parking spaces for vehicles subject to the act, to erect and maintain a permanent sign to inform drivers that idling is restricted by law in the Commonwealth. In January, 2009, PennDOT published specifications for the sign, which can be found on their website at ftp://ftp.dot.state.pa.us/public/PubsForms/Publications/PUB%20236M/r7_100.pdf

The statute does not apply to vehicles running a qualifying auxiliary power unit (“APU”). The law is clearly designed to encourage the installation of APU’s. In a February 6, 2009 statement, John Hanger, the Secretary of the Department of Environmental Protection (“DEP”), stated that “[t]here are affordable alternatives to idling, and I encourage all vehicle operators to take advantage of them.” DEP administers the Small Business Advantage Grant program that may provide funding toward the installation of an APU. For more information on the grant program, see the DEP website at www.depweb.state.pa.us and use the keyword “SBAdvantage.”

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SOUTH CAROLINA

Default Judgment Upheld Where Meritorious Defense Not Pled

A recent South Carolina opinion provides the transportation industry’s claims handlers and attorneys with important guidance on how to handle the surreptitious entry of default against carriers when settlement negotiations are ongoing. This lesson comes at the cost of a sobering outcome in McClurg v. Deaton, Opinion No. 4458, Filed November 20 (South Carolina Court of Appeals).

Plaintiff Ann McClurg submitted a claim against New Prime and its driver, Harrell Deaton, for personal injuries sustained in a motor vehicle accident involving McClurg’s tractor trailer and McClurg’s personal vehicle. The accident occurred on August 5th, 2002, and after a brief period of investigation New Prime’s liability carrier, began settlement negotiations with Plaintiff’s counsel. Shortly thereafter, Deaton left New Prime’s employ.

On April 23, 2004, the insurance carrier received a proposed settlement package from plaintiff’s counsel; subsequently, on June 28, 2004, plaintiff’s counsel sent the insurance carrier a letter requesting settlement within the next week and stated, “If I haven’t heard from you by that time, I will file suit and serve the Defendant and send you a courtesy copy of the pleadings.” On October 6, 2004, counsel sent the insurance carrier another letter, enclosing a copy of a complaint he prepared in the matter and indicating his intent to “proceed to litigation” if the matter was not soon settled. The draft complaint named only Ann McClurg as a plaintiff and New Prime as a defendant, and alleged New Prime was vicariously liable for Deaton’s actions and was also liable for its negligent hiring, retention, and training of Deaton. On October 18, 2004, the insurance carrier contacted counsel, who agreed to delay filing suit while the insurance carrier reviewed the settlement demand. Between November 2004 and June 2005, the insurance carrier and counsel exchanged telephone messages in regard to settlement, but did not reach a final agreement on the matter.

What the insurance carrier did not know was that plaintiff’s counsel had filed a summons and complaint on April 27, 2005, naming only Deaton as a defendant. Plaintiff had obtained service on Deaton, in Texas, via certified mail, but only after considerable difficulty in locating him. Upon Deaton’s failure to appear, default was entered against him. Notice of a damages hearing was sent to Deaton, but he again failed to respond or to appear. In September 2005, judgment was entered against Deaton in favor of Ann McClurg in the amount of $750,000 and in favor of Steve McClurg in the amount of $50,000 for a total judgment of $800,000.

Shortly after plaintiff obtained this substantial judgment against Deaton, the insurance carrier contacted counsel’s office to determine the status of the settlement negotiations. After counsel’s staff would not divulge any information, the insurance carrier contacted New Prime to confirm New Prime had not been served with a summons and complaint in the matter. On October 7, 2005, the insurance carrier received by certified mail a copy of the default judgment entered against Deaton. After the services of several private investigators were engaged, Deaton was finally located on January 23, 2006. On that date, Deaton executed an affidavit denying he was served with a copy of the summons and complaint, or received notice of the entry of default or the default judgment hearing, and stating he did not notify New Prime or the insurance carrier of the above because he never received notice. Thus, it was undisputed that neither the insurance carrier nor New Prime was aware a complaint had been filed in the matter until October 7, 2005, when the insurance carrier received a copy of the default judgment entered against Deaton. Notably, on May 11, 2005, after the summons and complaint were already filed by counsel and sent by the Department to Deaton at the first address, counsel continued the path of negotiation with the insurance carrier, sending the insurance carrier an additional medical report concerning the underlying cause of action.

Deaton moved to set aside the default judgment pursuant to Rules 60(b)(1) and 60(b)(3) of the South Carolina Rules of Civil
Procedure. New Prime filed a motion to intervene and likewise moved to set aside the judgment pursuant to Rules 60(b)(1) and 60(b)(3). The trial court granted New Prime’s motion to intervene, but denied both New Prime’s and Deaton’s motions to set aside the default judgment, and both Defendants appealed.

The Court of Appeals provided an exhaustive review of the pertinent case law relating to whether an insurer is entitled to have a default set aside when it has engaged in good faith negotiations only to have a default judgment sprung upon it due its not having been informed that the insured has been served. Reassuringly, the Court recognized and admonished plaintiff’s counsel’s chicanery:

Based on counsel’s conduct and actions, it was reasonable for [the insurance carrier] and New Prime to believe that any suit filed would include New Prime as a defendant or, at the very least, that counsel would provide [the insurance carrier] a copy of any pleadings in the matter when filed. Thus, at a minimum, the facts show New Prime was taken by surprise when counsel filed the action solely against Deaton and failed to inform [the insurance carrier] or New Prime of this action, thereby meeting the surprise or excusable neglect requirement under Rule 60(b)(1). Additionally, given this history of contact and negotiations between counsel and [the insurance carrier], most notably the representations made by counsel to [the insurance carrier], the conduct of the McClurgs’ counsel in failing to simply notify [the insurance carrier] of the complaint filed against Deaton raises serious concerns for this court and quite possibly satisfies the misrepresentation and misconduct envisioned by Rule 60(b)(3). Accordingly, we believe the trial court committed error in finding the evidence did not, at least, support relief based on mistake, inadvertence, surprise or excusable neglect.

Less comforting, however, is that the Court nevertheless denied New Prime’s appeal, holding that New Prime had failed to present evidence that it enjoyed a meritorious defense, such showing being necessary for a defendant to be relieved of default under Rule 60(b). The Court noted that the meritorious defense burden is more than a formality:

It is clear...that a meritorious defense is more than merely a factor to consider under certain 60(b) grounds for setting aside default judgments. In particular, our courts have held that in order to obtain relief from a default judgment under Rule 60(b)(1) or 60(b)(3), not only must the movant make a proper showing he is entitled to relief based upon one of the specified grounds, he must also make a prima facie showing of a meritorious defense...A party making a motion under Rule 60(b) has the burden of presenting evidence proving the facts essential to entitle him to relief. Bowers v. Bowers, 304 S.C. 65, 67, 403 S.E.2d 127, 129 (Ct. App. 1991).

New Prime’s specific problem was that at the hearing on its motion—which evidently focused, almost entirely, on the surprise/excusable neglect/misconduct issues—New Prime had failed to present any evidence of a meritorious defense. So concerned were the parties with decrying the conduct of plaintiff’s counsel, on the one hand, and defending it, on the other, that they did not reach this absolutely necessary component of the analysis. On this basis, the Court of Appeals affirmed the trial court’s denial of the motion to set aside the default.

New Prime attempted to argue that it had presented evidence of a meritorious defense on the amount of damages, by directing the appellate court’s attention to the insurance carrier’s affidavit indicating that the plaintiff had made a pre-suit settlement demand of $170,000. Yet the court was not swayed, noting that the affidavit had been presented not to show a defense on the amount of damages, but simply to prove that at the time plaintiff surreptitiously filed suit negotiations had been ongoing.

The lesson for the industry is clear: in instances where plaintiff’s counsel’s creativity has exceeded what those on the defense side consider appropriate—in the context of
obtaining a default or in any other scenario—it is imperative that sight of the applicable analytical ball not be lost. Certainly the circumstances of this default judgment were distasteful, but the showing that an appellate court will need to see does not change based on the degree of outrage experienced by the defendant.

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**TENNESSEE**

**Tennessee Court of Appeals Affirms Trial Court’s Dismissal for Lack of Personal Jurisdiction**


*Exel* arises out of a contractual dispute between Exel Transportation Services, Inc. (“Exel”) and Pinnacle Speakers (“Pinnacle”). *Exel*, 2008 Tenn. App. Lexis 735 at *1. Exel, a Delaware corporation with its primary place of business in Memphis, Tennessee, contacted Pinnacle, a New York corporation with its primary place of business in Plainview, New York, in December 2002 in order to discuss providing transportation services for Pinnacle. *Id.* Pinnacle ultimately reached an agreement for services with Exel and submitted a credit application to Exel’s credit department in Memphis, Tennessee. *Id.* at *3. The application was approved, and Exel provided transportation services pursuant to the credit arrangement until January 2005. *Id.*

In February of 2005, Pinnacle became delinquent in its payments to Excel. Along those lines, an account manager in Exel’s Memphis office, Gale McDonald (“McDonald”), placed a telephone call to Pinnacle’s New York office and was connected with the vice president, Marc Rothenberg (“Rothenberg”). *Id.* Subsequently, Rothenberg, at his own request, entered into negotiations with the chief financial officer of Exel, Andrew Hadland (“Hadland”), concerning the settlement of Pinnacle’s debt. *Id.* at *4. Hadland and Rothenberg negotiated via e-mail, facsimile, and telephone from their respective offices in Memphis, Tennessee and Plainview, New York. After reaching an agreement with Pinnacle, Hadland returned the matter to McDonald, so that a letter defining the terms of the agreement could be drafted and sent to Rothenberg. *Id.*

In April 2005, McDonald sent a letter to Rothenberg stating the terms of their agreement. Upon receipt and review of the letter, Rothenberg made changes and returned the same to McDonald. Ultimately, McDonald executed the letter agreement as altered by Rothenberg. *Id.* at *4-5.

Subsequent to execution of the agreement, Exel discovered that additional amounts were owed by Pinnacle. *Id.* at *5. Exel sought recission or reformation of the agreement by filing a lawsuit in the Chancery Court of Shelby County Tennessee. *Id.* at *6.

Pinnacle sought and obtained dismissal of the matter in Chancery Court for lack of personal jurisdiction. Pinnacle’s motion to dismiss was granted after the court reviewed affidavits on behalf of both parties. The trial court stated as follows:

This cause came to be heard upon the Motion of the Defendant [Pinnacle],
Response of the Plaintiff [Exel], Defendant’s Reply to Plaintiff’s Response, Plaintiff’s Sur Reply, briefs of the attorneys, and exhibits filed herein, the case authorities cited and the entire record, from all of which it appears to the Court that the Defendant did not purposefully avail itself of the privilege of conducting business in this state. The Court further finds that the quality, nature and extent of the Defendant’s contacts with this state are not sufficient to subject the Defendant to in personam jurisdiction in this state.

Id. at *6-9.

Following the Chancery Court’s decision, Exel brought an appeal before the Court of Appeals of Tennessee. On appeal, Exel argued that there were sufficient grounds for both general and specific jurisdiction. In support of its position, Exel stated the following:

(1) Pinnacle sought the letter agreement with Exel, located in Tennessee; (2) Pinnacle negotiated the letter agreement with Exel in Tennessee; (3) Pinnacle changed the letter agreement to add the mistaken term; and (4) Pinnacle sent the changed letter to be signed by Exel in Tennessee.

Id. at *10.

The Tennessee Court of Appeals noted that personal jurisdiction in the present case is controlled by Tennessee’s Long Arm Statute, which has been interpreted to have “expanded the jurisdiction of Tennessee courts to the full limit allowed by due process.” Id. at *11-12, (quoting Masada Inv. Corp. v. Allen, 697 S.W.2d 332, 334 (Tenn. 1985) (citing Shelby Mut. Ins. Co. v. Moore, 645 S.W.2d 242, 245 (Tenn. Ct. App. 1981))). Accordingly, the Court’s analysis was based primarily on the Fourteenth Amendment to the United States Constitution. See id. at *12; see also Riggs v. Burson, 941 S.W.2d 44, 51 (Tenn. 1997). In reaching its decision, the Court discussed the basic principles of personal jurisdiction as defined in Int’l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) and its progeny, followed by a more detailed discussion of general and specific jurisdiction as applied to the instant case. Exel, 2008 Tenn. App. Lexis 735 at *13-22.

The Court first analyzed whether there were facts sufficient to exercise general jurisdiction. Id. at 17. In determining that Pinnacle’s contacts with Tennessee were not sufficient to justify general jurisdiction, the Court focused on Pinnacle’s contacts with Tennessee prior to the execution of the letter agreement. Id. Despite the fact that Pinnacle’s credit application was sent to Exel’s Memphis office and Pinnacle speakers were available for purchase via authorized dealers in Tennessee, the Tennessee Court of Appeals concluded as follows:

...Pinnacle’s contacts with Exel’s Memphis office prior to the negotiations leading up to the letter agreement at issue, were neither continuous nor systematic. Therefore, it would be improper to exercise general jurisdiction over Pinnacle to adjudicate a cause of action that did not arise out of these attenuated contacts.

Id. at *17-18

Specific jurisdiction was also inappropriate in Exel according to the Tennessee Court of Appeals’ analysis, which was guided by the Tennessee Supreme Courts opinion in J.I. Case Corp. v. Williams, 832 S.W.2d 530, 532 (Tenn. 1992). Exel at *18. J.I. Case Corp. offers three factors that should be considered when making a determination about specific jurisdiction: “(1) the quantity of the contacts, (2) their nature and quality, and (3) the source and connection of the cause of action with those contacts.” J.I. Case Corp., 832 S.W.2d at 532.

The Court of Appeals focused on the fact that “the negotiations were initiated by Exel, and the only aspect of them that took place in Tennessee occurred on Exel’s end.” Id. at *20. Furthermore, the agreement did not contain any sort of forum selection clause or an indication as to the forum in which the agreement was reached. Id.

The Court of Appeals went on to distinguish the facts in Exel from William W. Bond, Jr. & Assocs., Inc. v. Montego Bay Dev. Corp., 405 F. Supp. 256 (W.D. Tenn. 1975), which was cited by Exel because jurisdiction over the foreign defendants was found to
comport with due process. *Id.* at *20-22. In *Bond*, the plaintiff was a Tennessee corporation that entered into a contract for services with Maryland defendants. *Bond*, 405 F. Supp. at 257. Unlike Pinnacle, the defendants in *Bond* actually solicited the business of the plaintiff, a Tennessee corporation. *Exel*, 2008 Tenn. App. Lexis 735 at *21. Also, the Court pointed out that the written agreement in *Bond* clearly stated that “it was negotiated in Tennessee, and that it was to be construed in accordance with Tennessee law.” Such was not the case in the agreement between Exel and Pinnacle. *Id.* at *22.

The Court of Appeals affirmed the trial court in the instant case, stating:

From the affidavits submitted by the parties, we cannot say that, in negotiating and executing the letter agreement, Pinnacle directed its activities at Tennessee such that it should reasonably anticipate being “haled into court” in Tennessee. *Masada*, 697 S.W.2d at 334. Under these circumstances, we find no error in the trial court’s decision to decline to exercise jurisdiction over Pinnacle.

*Id.*

**CONCLUSIONS**

*Exel* seems to indicate that in Tennessee, when a local entity is negotiating a contract with a foreign defendant that has few contacts with the state, the parties should give significant consideration to the use of a forum selection clause. Such would particularly be the case for a Tennessee entity entering into an unsolicited business arrangement with a foreign corporation.

Recently, in the case of *Eskin v. Bartee*, the Tennessee Supreme Court opened the door for claims of negligent infliction of emotional distress by family members who observe an injured loved one shortly after an injury-producing accident. In an opinion which tracks the law of many other jurisdictions, the court created new guidelines for evaluating bystander claims. Defendants beware – a new class of plaintiffs has been created and your potential exposure just went up.

The *Eskin* case arises out of unfortunate facts wherein young Brendan Eskin was struck by a mini-van as he stood in the “pick–up” line at his elementary school awaiting his ride home. Brendan’s mother and brother, Logan, arrived at the scene shortly after the accident. Although they did not observe the events of the accident, they found Brendan lying on the pavement in a pool of blood. According to Mrs. Eskin, her son was not being attended to and he appeared to be lifeless.

Brendan sustained permanent brain damage as a result of being struck by the automobile. Both Mrs. Eskin and Logan filed suit against the driver of the mini-van claiming they had been “emotionally traumatized by the event” and they had suffered “fright, serious shock, and serious emotional injuries” including loss of enjoyment.
of life and expenses for medical, psychological, and pharmaceutical services. The Eskin’s uninsured motorist carrier opposed the claim relying on Tennessee precedent requiring “contemporaneous” viewing of the accident itself in order for a third party to recover for the tort of negligent infliction of emotional distress.

In analyzing the issues presented in Eskin, the Tennessee court conducted a comprehensive multi-jurisdictional review of the history of the law associated with bystander distress. The court recognized that virtually all states (excluding only Arkansas and New Mexico) recognize the tort of negligent infliction of emotional distress, and a majority of states permit recovery by bystanders who witness the negligent infliction of physical injury to another person.

When the tort of negligent infliction of emotional distress was initially recognized in Tennessee nearly 90 years ago, the court expressed concern about the potential for meritless claims and limited recovery to those persons who suffered some physical manifestation of the trauma. However, exceptions to the “physical manifestation” rule were quickly granted and, in the last half century, the safeguards designed to prevent meritless claims have been systematically eroded by Tennessee courts.

For example, in 1978 the Tennessee Supreme Court opened the door for recovery by any close relative who visually or audibly witnesses an accident in which one near and dear is injured. Thereafter, the court then adopted a general negligence approach allowing recovery by bystanders who are actually in the “zone of danger” and suffer “serious or severe” emotional distress. However, when faced with a complaint by a son who was not in the zone of danger but witnessed an automobile strike and kill his mother, the court expanded the “zone of danger” concept, reasoning that close family members should be entitled to recover even if they are not in harm’s path.

Recently, the court further extended the scope of protection by allowing a mail carrier to recover for negligent infliction of emotional distress when she watched a homeowner shoot his wife and then commit suicide while delivering mail on her route. In that case, the court allowed recovery even though the plaintiff was not in the “zone of danger” and did not have any sort of personal relationship with the victim of physical injury.

Given this steady and consistent expansion of the class of individuals entitled to recover for bystander distress, the court’s decision in Eskin is not surprising. Once again, the initial legal concept has been eroded in order to further expand the class of legitimate plaintiffs.

Now the court will allow a bystander to recover even if he did not witness the injury-producing event, provided that he can show: (1) the actual or apparent death or serious physical injury of another caused by a third party’s negligence; (2) the existence of a close and intimate personal relationship between the bystander and the deceased or injured person; (3) the bystander’s observation of the actual or apparent death or serious physical injury at the scene of the accident before the scene has been materially altered; and (4) the resulting serious or severe emotional injury to the bystander caused by the observation of the death or injury. However, the court has pointedly reserved the right to allow additional recovery for bystanders who witness the injury producing event even if they do not demonstrate a close or intimate personal relationship with the deceased or injured person.

The latest erosion to the law regarding bystander recovery for emotional distress is best stated in the words of the Tennessee court:

[W]e have determined that it is appropriate and fair to permit recovery of damages for the negligent infliction of emotional distress by plaintiffs who have a close personal relationship with an injured party and who arrive at the scene of the accident while the scene is in essentially the same condition it was in immediately after the accident.

And so it continues . . . the expansion of the law to include another class of potential plaintiffs. From this point forward, when evaluating a
horrible accident, look not only at the immediate injuries of the obvious parties, but consider also the bystanders as they arrive upon the scene. Their claims are now recognized under the law. They are real and they may prove to be costly!

VERDICTS, APPEALS AND SETTLEMENTS

MISSOURI

Defense Verdict

December, 2008, Eldon, Missouri. Swift driver Mr. Destry Strange was charged with careless driving, a Class A Misdemeanor, when he was involved in an accident while driving his tractor home after dropping his trailer. He was traveling under the speed limit at night, on a two lane highway. It was raining at the time. He lost control of the tractor, crossed over the center line, and struck an oncoming pickup truck with an extended cab. Tragically, the 11 year old child in the left rear was killed. The pickup was driven by an off duty State Trooper, and the child was his daughter. At the time of the accident, the driver told police that he lost control of his vehicle due to oil on the road. The Missouri Highway Department inspected the road that evening and found nothing wrong with the road. Photographs taken the day after the accident by the driver, and two days after the accident by a defense reconstruction expert, all showed that the area where the driver lost control was a chip and seal patch that has lost most of its gravel, and was mainly tar. Oil could be seen in the tar as it was photographed following the accident. After a highly emotional trial, the jury returned a verdict finding the driver not guilty. The case was handled by the Kansas City ALFA International Member James R. Jarrow of the Baker Sterchi Cowden and Rice, LLC firm.
NEW YORK

New York’s Appellate Division, Second Department, has affirmed a jury verdict in favor of Schneider National Carriers, in an intersection collision involving one of its tractor trailers. The case was tried by Harold L. Schwab and the appeal was written by Harry Steinberg and Steven Prystowsky and was argued by Harry Steinberg. Plaintiff claimed that as he pulled out into a T-intersection with the traffic signal in his favor, his car was hit in the right rear quarter-panel. Schneider National’s driver testified that the signal was in his favor and that as soon as he saw plaintiff’s vehicle, he applied his brakes but was unable to stop. After hearing the testimony of plaintiff, Schneider National’s driver testified that the signal was in his favor and that as soon as he saw plaintiff’s vehicle, he applied his brakes but was unable to stop. After hearing the testimony of plaintiff, Schneider National’s driver and accident reconstructionist experts for both sides, the jury found that Schneider National’s driver was negligent, but that his negligence was not a proximate cause of the accident. On appeal, plaintiff argued that the trial court erred in (a) giving an “emergency charge” in defendant’s favor based upon the defendant’s testimony that plaintiff suddenly pulled out of the intersection and (b) allowing into evidence photographs of an exemplar of the tractor trailer based upon Schneider National’s driver’s testimony that the photographs accurately depicted the tractor trailer he was driving. The Appellate Division rejected both arguments concluding that (a) even if the “emergency charge” was given in error, any such error was harmless since the jury found that the defendant was negligent and (b) the testimony of Schneider National’s driver that the photographs accurately depicted the tractor trailer was sufficient to support their admission even though the driver was not present when the photographs were taken, the photographer was not called as a witness and the vehicle depicted was an exemplar tractor trailer. Shalot v. Schneider National Carriers, Inc. A.D.3d N.Y.S.2d 2008 WL 5376523 (2nd Dep’t 2008).

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PRACTICE TIPS

My Truck Driver’s Name is “Jesus”: 3 Must-Do’s to Defend Spanish-Speaking Truck Drivers in Litigation

Hispanics have responded to America’s increasing demand for long haul truck drivers. According to the Bureau of Labor Statistics, in 2007 there was an estimated 1.6 million tractor-trailer truck drivers in America. Twenty-three percent (23%) are Hispanic. According to the U.S. Census Bureau, today there are 44.3 million Hispanics in the U.S. By 2020, the Hispanic population is projected to increase to 66.3 million. As Hispanic truckers increasingly become part of the trucking industry, and involved in litigation, defense attorneys are faced with unique challenges. In litigation, defense counsel must take additional steps to properly defend a Spanish-speaking truck driver. For purposes of this article, we will call him, “Jesus” [pronounced Heh-Soos]. As everyone knows, “Jesus” is a popular Spanish male name. Plaintiff lawyers like to attack Spanish-speaking truckers for being unable to speak English. This is done for two reasons:

1) To prejudice the jury against the driver and trucking company and

2) To prove that the driver does not meet the requirements set by the Federal Motor Carrier Safety Regulations to drive a commercial vehicle.

1- Bureau of Labor Statistics
Also, plaintiff lawyers use the driver’s language deficiency to establish negligent hiring, retention, supervision and training against the trucking company. They typically argue that the trucking company is liable for negligent hiring and retention if it hires a non-English speaker. They argue that “Jesus’” inability to speak English disqualifies him from operating a commercial vehicle since he does not meet the minimum language requirements set by the FMCSR. Further, plaintiff lawyers typically argue that a trucking company is liable for negligent training and supervision if it provided safety training in English to a Spanish-speaker. They argue that the training was a sham because “Jesus” did not understand a word of it.

The Plaintiff attorney’s plan is to diminish or destroy the credibility of the driver and/or trucking company such that the driver will have no credibility relating to his accident fact testimony and so that the jury will award enhanced damages and possibly exemplary damages.

In cases where there already tends to be a bias against trucking companies and truck drivers, plaintiff lawyers feed on the bias against non-English speakers.

The following are three important steps to prepare “Jesus” for litigation and to help make him a better witness.

**ONE: ESTABLISH ABILITY TO SPEAK, READ AND WRITE ENGLISH**

Let’s face it – some jurors will have a bias against persons living in the U.S. who cannot speak English. Some judges do too. I once represented a Spanish-speaking truck driver in a suit filed in a small Texas county. Plaintiff filed a motion to compel because I objected to his request to my trucking company client to produce any and all training materials ever prepared by the trucking company. The main part of the hearing went something like this:

**Judge (with disapproval):**

How do you pronounce his name? Dee...Dee?

**Me:**

Your honor, his name is Jesus Dieguez [Dee-eh-gez].

**Judge:**

Well, does he speak English? I’d be interested to know if these training materials your client supposedly showed him were in English or in Spanish. Get these training materials to plaintiff counsel within 30 days.

The Federal Motor Carrier Safety Regulations do not require that a truck driver be fluent in English. However, the FMCSR do state that a person is qualified to drive a motor vehicle if he/she:

- Can read and speak the English language sufficiently to converse with the general public, to understand highway traffic signs and signals in the English language, to respond to official inquiries, and to make entries on reports and records.²

In litigation, if “Jesus” admits that he does not speak, read or write English, his response can have dire legal consequences. Once that admission is made, defense counsel is put on the defensive on this issue. A jury may likely believe plaintiff’s allegation that “Jesus” is not a qualified driver, and that the trucking company was negligent in hiring a driver whose English language skills failed to comply with the FMCSR. A jury may also find the trucking company liable for negligent retention, training and supervision.

I have had many a trucker timidly confess to me that he does not speak, read or write English. Naturally, we then conduct the attorney-client meetings in Spanish. However, the following is a typical dialogue that demonstrates to me, and more importantly, to the trucker, that he can speak, read and write English much more than he gives himself credit.

**Q:** How do you get notice of a load?

**A:** Through dispatch.

**Q:** Does the dispatcher speak Spanish?

**A:** No, English.

**Q:** Do you understand the information you’re given by dispatch?

**A:** Usually, yes, and if there is something I don’t understand, I’ll ask.

**Q:** Are you an over-the-road driver?

**A:** Yes.

**Q:** Can you read the road signs in small towns and cities throughout the various states where you drive?

**A:** Yes.

² Federal Motor Carrier Safety Regulations section 391.11
Q: Do you fill out a log book?
A: Yes.

Q: Do you fill it out in Spanish?
A: No, English. But it’s not difficult.

Q: Have you ever had to talk to a police or DOT officer?
A: Yes, of course.

Q: Do you talk to them in Spanish?
A: Well, I prefer Spanish but when I need to I will talk to them in English.

Thorough witness preparation increases “Jesus”’ chance of performing well during a cross examination on language ability. More often than not, defense counsel can assist “Jesus” overcome his timidity so that he can show a jury that he does, indeed, sufficiently speak, read and write English. However, only “Jesus” can refute plaintiff counsel’s presumption that he does not meet the minimum language requirements to be a commercial truck driver. It is defense counsel’s responsibility to meet with “Jesus” as often as necessary and to arm “Jesus” with the confidence and skills to give testimony. “Jesus” must be prepared to discuss not only his language ability, but also topics on company practices and training.

During litigation, it is critically important to establish that “Jesus” can sufficiently speak, read and write English. It makes him a better witness, demonstrates that the safety training provided to him in English was not a sham.

**TWO: HELP THE INTERPRETER HELP “JESUS”**

Imagine that you have been subpoenaed to appear for a deposition someplace outside of the United States, and no one speaks English. Given the seriousness of the proceeding, you decide that to best understand the questions asked of you, that it would be immensely helpful to have an English translation. You appear for the deposition, and your interpreter is British, or better yet Jamaican. Both speak “English” but their accent, and word usage will be different than your American-English.

The same is true for Spanish. People from different Spanish-speaking countries speak differently. The slang is different. The accent is usually different. Words can vary in meaning.

I recommend defense counsel become aware of and make a list of interpreters whose Spanish transcends regions. When it is time to present “Jesus” for deposition, it will be immensely helpful to know where the interpreter is from in order to identify accents or differences in syntax that may arise. I always ask the interpreter where he or she learned to speak Spanish, and advise the translator where “Jesus” is from so that he/she will know to use words commonly used from “Jesus’” home country. When possible, arrange to have an interpreter from “Jesus’” country of origin.

During deposition and trial, the quality of the translation is critical. Poor communication between the interpreter and “Jesus” only makes “Jesus” look bad. Quite candidly, it can make “Jesus” look dumb.

The use of an interpreter during “Jesus’” deposition or at trial does not automatically negate his ability to sufficiently speak English. Spanish is simply his first language, and the one he understands best. An interpreter will facilitate “Jesus’” full and complete comprehension in a very important legal proceeding.

Before the start of the deposition, it is a good idea for defense counsel to ask the translator if he/she is familiar with trucking lingo. It is also a good idea to make a list of terms that are expected to come up so that the interpreter can have a handle on the terminology before the deposition starts. I have corrected interpreters who used the same Spanish term for “tractor” and “trailer” – imagine what a difference that made in the deposition.

In certain cases, if defense counsel does not speak Spanish, it is advisable to hire your own interpreter to attend “Jesus’” deposition with defense counsel. I have been in many depositions where the interpreter incorrectly translated “Jesus’” testimony, or omitted testimony. Once I had to suspend the deposition because the interpreter’s inaccurate translations were compromising my client’s testimony.

When an interpreter makes a mistake in the translation, a jury will not know it was the interpreter’s error. More than likely, a jury will believe that
“Jesus” cannot express himself intelligently. Defense counsel needs to be aware of inaccurate translations so that the proper objection can be made and more importantly, so the record is accurate. Your own interpreter can advise defense counsel when there has been an error in the translation so it can be corrected during the deposition. It is often very problematic to try to do so days after the deposition has been taken.

Choosing a good interpreter is critical to “Jesus’” ability to perform well in a deposition or at trial. Doing this helps “Jesus’” understanding, and enables him to make a better witness appearance.

THREE: “JESUS’” CITIZENSHIP STATUS

I was in a deposition, in a multi-party case, where an attorney was badgering a trucker over citizenship. The trucker’s attorney did not object, and under the pressure, the trucker confessed that he was not in this country legally. Later, I learned that the trucker had been contacted by the I.N.S., and he was going to be deported.

The Federal Motor Carrier Safety Regulations do not require that an individual be a U.S. citizen to be a truck driver. Nonetheless, plaintiff lawyers love to ask the question during a deposition. I instruct all drivers not to answer questions on citizenship. It is critically important to discuss this topic with “Jesus” at the start of litigation. The deposition is not the place to discover that “Jesus” is not documented.

SUMMARY

Plaintiff attorneys aim to show that “Jesus” is not qualified to drive a commercial truck on American highways. Plaintiff attorneys also aim to show that a trucking company that hires a non-English speaker, i.e. an unqualified driver, to operate a big rig, puts other people’s lives in danger. Plaintiff lawyers do this to inflame a jury and to obtain an award for exemplary damages.

Defense counsel can mitigate the bias against “Jesus.” Thorough witness preparation, with an emphasis on showing that “Jesus” meets the minimum language requirements under the Federal Motor Carrier Safety Regulations, is critical. Defense counsel must also make an ally of “Jesus’” interpreter. Lastly, defense counsel should mitigate the possibility of citizenship bias against “Jesus” by not allowing him to answer questions on citizenship. By accomplishing this, defense counsel will greatly improve “Jesus’” chances of success during litigation.

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INTENTIONAL SPOLIATION OF EVIDENCE

New Mexico crafted a separate damage claim for the most egregious form of spoliation – intentional spoliation of evidence. Coleman v. Eddy Potash, Inc., 120 N.M. 645, 905 P.2d 185 (1995). Under this theory of spoliation, the existence of a lawsuit is not necessary. Rather, the tort may be successfully proved by a showing that the spoliating party had knowledge of the probability of a lawsuit at the time the evidence was destroyed. Coleman, 120 N.M. at 640, 905 P.2d at 189. Also, to prove intent...
on the part of the spoliator, a showing of malice on the part of the spoliator is necessary. After all, New Mexico adopted the tort to remedy egregious culpability in the form of malicious intent to harm. Torres v. El Paso Electric Co., 1999-NMSC-29, ¶ 50, 127 N.M. 729, 987 P.2d 386 (1999).

NEGLIGENCE OR NON-INTENTIONAL SPOLIATION OF EVIDENCE

To remedy less egregious acts of spoliation, New Mexico courts may craft an adverse inference jury instruction or impose other discovery sanctions. The New Mexico Supreme Court has determined that, where the elements of the tort of intentional spoliation are not met, a more appropriate remedy may be an adverse evidentiary inference. Torres, 1999-NMSC-29 at ¶ 53, 127 N.M. 729, 987 P.2d 386. In determining whether or not to give an adverse evidentiary inference jury instruction, New Mexico courts consider: (1) whether the act of spoliation was intentional (as opposed to unintentional loss or accidental destruction of evidence); (2) whether the spoliator knew of the reasonable possibility of a lawsuit involving the spoliated evidence; (3) whether the party requesting the instruction acted with due diligence with respect to the spoliated evidence; and (4) whether the evidence would have been relevant to a material issue in the case. Id.

In addition to an adverse evidentiary inference for negligent or non-intentional acts of spoliation, New Mexico courts may instead chose to levy sanctions pursuant to New Mexico Rule of Civil Procedure 1-037. The New Mexico Supreme Court has characterized the doctrine of spoliation of evidence as a flexible doctrine that is both a substantive rule of law and a rule of evidence or procedure. Thus, its application is to be determined based on the attendant facts and circumstances of each case. Torres, 1999-NMSC-29, ¶ 54. Consequently, the New Mexico appellate courts have held that, in exercising a court’s inherent power to sanction a party for destruction of evidence, the court may choose any of the remedies available under New Mexico’s Rule 1-037 NMRA, which governs discovery sanctions. These remedies include: (1) an order that designated facts be taken as established; (2) an order that the spoliating party is prohibited from supporting or opposing designated claims or defenses or from introducing designated evidence; (3) an order striking out pleadings or parts of pleadings, dismissing the action, or entering a default judgment; or (4) an order treating the destruction of the evidence as contempt of court. See, Restaurant Management Co., 1999-NMCA-101, 127 N.M. 708, 986 P.2d 504.

PRACTICAL CONSIDERATIONS FOR TRANSPORTATION AND TRUCKING PRACTITIONERS AND MOTOR CARRIERS

While New Mexico has not yet had occasion to decide or consider a spoliation claim in the context of trucking and transportation litigation, we may be able to get a sense of the arguments that can be made against the imposition of sanctions by considering New Mexico’s application of the tort of spoliation and various Federal Motor Carrier Safety Regulations (“FMCSR”). For example, under FMCSR § 395.8(k), a motor carrier is only required to maintain driver logs for a period of six months after receipt. Id. Therefore, where a motor carrier did not have notice of a pending lawsuit, yet destroyed driver logs after the six month time period in accordance with the FMCSR and/or company policy, a credible argument may be made that a claim for damages, adverse inference instruction, or other discovery sanction should not be allowed. Similar arguments may be made for other types of records/evidence based upon the FMCSR, internal company policy, and/or other considerations. See generally, FMCSR § 382.401 (alcohol/drug testing records retention); FMCSR § 396.3 (inspection, maintenance and repair retention); FMCSR § 382.401 (retention of records); and FMCSR §§ 379.3; 379.13; Appendix A (Records required to be retained and retention time periods).

Furthermore, even if a motor carrier was on notice of a potential lawsuit and still destroyed evidence negligently in accordance with the FMCSR and/or company policy, an argument may be made that the destruction was innocent, and therefore, the court should not award damages, but instead should impose a lesser sanction, i.e. the destruction was not intentional. See, Ordoñez v. M.W. McCurdy & Co., Inc., 984 S.W. 2d 264, 273-274 (Tex. Ct. App. 1998).

When confronting a spoliation claim or developing company policies, it is important to remember that although New
Mexico courts consider many variables before imposing sanctions pursuant to a claim for spoliation, the availability of or severity of a given sanction ultimately appears to revolve around the actions of the spoliator and the inability of the non-spoliating party to proceed with their case.

Potential Sources Of Electronically Stored Information In A Truck Accident Case

I. IN THE TRUCK / WITH THE DRIVER
1. ECM Unit from truck
2. Freight/load/shipping records
3. Personal email to/from driver
4. Load/trip email to/from driver
5. Company-wide email to/from driver
6. Company to driver email
7. PDA / Handheld devices
8. Driver / passenger cell phone
9. RFI tags on freight
10. Digital photos / videos
11. Driver laptop

II. IN COMPANY ELECTRONIC RESOURCES
1. Dispatch records
2. Freight/load/shipping records
3. Personal email to/from driver
4. Load/trip email to/from driver
5. Company-wide email to/from driver
6. Company to driver e-mail
7. Internal company email
8. Driver training materials and records
9. Driver logs and supporting data
10. Driver qualification file
11. Satellite tracking / communication
12. Fuel records
13. Toll Pass Records (i.e. EZ Pass)
14. Company credit card records
15. PDA / Handheld devices
16. Driver cell phone
17. Driver calling card records
18. Land line phone records
19. RFI tags on freight
20. Accident investigation files and communication

III. IN THE CUSTODY OF THIRD PARTIES
1. Satellite tracking / communication
2. Fuel records
3. Toll Pass Records (i.e. EZ Pass)
4. Company credit card records
5. PDA / Handheld devices
6. Driver / passenger cell phone
7. Driver calling card records
8. Land line phone records
9. RFI tags on freight
10. Accident investigation files and communication
11. Digital photos / videos
12. Vehicle service records
13. Scale / weight records

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Martin Diamond
Beware “Rules Of The Road”
Recent Liability Tactics Of The Plaintiff’s Bar

Nationally recognized plaintiff’s counsel Rick Friedman has recently co-authored a book entitled “Rules Of The Road, A Plaintiff Lawyer’s Guide to Proving Liability.” The text divulges the plaintiff bar’s strategy, tactics and techniques to prove liability against a corporate defendant. Although the book does not specifically target the trucking industry, the techniques discussed unfortunately fit particularly well in the context of a trucking case.

The “Rules of the Road” and its strategy have generated considerable following amongst the plaintiff bar. Mr. Friedman is highly regarded by his plaintiff peers and often emulated. His verdicts total over $300 million, and he is a member of the Inner Circle of Advocates, an invitation-only plaintiff’s group that limits its membership to 100 of the leading plaintiff’s lawyers in the country. Mr. Friedman is an author of several other plaintiff trial books, and a sought-after lecturer at plaintiff lawyer conferences. “Rules of the Road” is touted by plaintiff damage specialist, David Ball Ph.D., and the Association of Trial Lawyers of America (“ATLA”).

The purpose of this article is to discuss the “Rules of the Road” and to suggest how the defense lawyer can successfully counter the tactics and stratagem outlined in the book when preparing the trucking company safety manager and driver for deposition and trial testimony. The trucking defense lawyer can thus expect to see dog-eared copies of “Rules of the Road” in plaintiff counsel’s brief case and experience the tactics espoused in the book used against him and his trucking clients. Thus, to be prepared for those tactics one has to first have an understanding of the underlying premise of the book.

The foundation of “Rules of the Road” is plaintiff attorneys lose otherwise meritorious cases because of insidious enemies known as complexity, confusion and ambiguity. On the other hand, the friend of the plaintiff trial lawyer is simplicity and clarity. According to Mr. Friedman, the successful defense trial lawyer has made a career of purposefully confusing the jury and transforming a seemingly simple accident case into a fog bank of complexity and ambiguity. The word “reasonable” which is the standard in any negligence case is so overused and ill-defined during the life of a trial that it becomes invisible to the jury. The vagueness of “reasonableness,” according to “Rules of the Road,” plays right into the hand of the obtrusive defense lawyer.

“Rules of the Road” combats this “reasonableness” problem by instructing the plaintiff’s lawyer to utilize statutes, standards and principles applicable to the corporation’s industry to define reasonable conduct. In order to be effective the rule has to be either endorsed by the corporate defendant or uncontroverted. For instance, the fleet manager of a trucking company would have to agree that public safety is of primary importance to his company. The plaintiff’s attorney is encouraged to broadly research an industry looking for potential rules which could be used to pour content into the notion of “reasonable conduct.” This search includes statutes, trade publications, and internal policy.

The applicability of “Rules of the Road” is particularly troublesome for the trucking defendant and defense counsel since the Federal Motor Carrier Safety Administration (“FMCSA”) provides a treasure trove of rules and regulations addressing trucking safety and conduct. Additionally, publications by industry leaders such as J.J. Keller provide a virtual nuts-and-bolts instruction manual on how to organize and manage a trucking fleet safety program. Defense counsel should now anticipate in deposition of the trucking company safety officer that plaintiff’s counsel will have a firm grasp on FMCSA regulations and will have reviewed relevant industry publications.

As instructed by the text, once plaintiff’s counsel is armed with the rules of the road of a particular case, it is time to take the deposition of the corporate individual who has been designated person most knowledgeable. “Rules of the Road” outlines the deposition strategy. First, always go over the industry rules with the corporate deponent before talking about the facts of the case. Then, get the corporate representative to endorse the rules when talking about the
basic principles of the industry. Not until plaintiff’s counsel has
those principles nailed down will he or she move onto the specific
facts of the case. “Rules of the Road” advises the plaintiff attorney
that it is far easier getting the corporate witness to agree to broad principles
applicable to the industry at the beginning of the deposition
than later when the deposition becomes more fact-specific and
adversarial.

Once the rules are established, then the next step is to corner
or box-in the corporate witness and have them admit certain
rules were breached or violated. In the alternative, to at least
have the witness make specific factual statements to seal off
any escape hatches for later testimony.

If the corporate witness has the temerity to challenge or
prove difficult to plaintiff’s counsel, “Rules of the Road” then instructs counsel to
shift deposition strategy and “polarize” the witness. Polarization is a tactic whereby
plaintiff’s counsel will attempt to force the witness to take an
extreme position. The idea being that by taking such an extreme
position the witness will lose credibility with the jury.
The overall theme of the book is that good liability cases
are lost because the defense successfully is able to confuse the jury and obfuscate the
issues. The standard of “reasonable conduct” as phrased is an enemy of the
plaintiff lawyer since it is vague and amorphous. The aim of
“Rules of the Road” is to pour
life into the phrase “reasonable
conduct” by utilizing relevant statutes, and incontrovertible industry principles. This goal
begins and ends with the deposition and trial testimony of the corporate representative, or in
the context of the trucking case, with the fleet safety manager. The author of “Rules of the Road”
crows that he is not leaking any trial secrets to the defense bar since he believes there is no
effective defense to the rules of the road technique.

**COMBATING THE “RULES OF THE ROAD” PLAINTIFF’S APPROACH**

First, when presenting the trucking client for deposition the defense attorney has to develop a tuned
ear for overly broad questions by plaintiff’s counsel regarding anything to do with trucking safety, the underlying purpose of FMCSA, or trucking fatality statistics. In
preparing the trucking witness for deposition, it is best for defense counsel to outline for the client the plaintiff’s counsel’s anticipated overall strategy and how to be ready for the rules of the road type of questions. The trucking
witness has to be cautioned not to fall too easily into agreement with plaintiff’s counsel’s broad
brush statements concerning safety or industry standards. If it seems to be a deposition being
taken by a sophisticated plaintiff’s counsel utilizing the rules of the road techniques, defense counsel has to be trigger-ready with the appropriate objections regarding speculation or legal testimony from a lay witness. Defense counsel must be able to
recite appropriate authority if the deposition question has digressed to the level where counsel has to
instruct the witness not to answer
a particular question. Always remember to make your record.

Once it becomes apparent to plaintiff’s counsel that this will not be a deposition straight
out of the “Rules of the Road” handbook, expect counsel to then attempt to “polarize”
your client. By adopting this approach plaintiff’s counsel will try to steer the trucking company witness into taking extreme positions. For instance, if plaintiff’s counsel cannot get the trucking witness to agree to counsel’s pet theory regarding truck safety, then counsel will
take the opposite tack and attempt to have the deponent admit that public safety is not
a concern for that particular trucking company. Coach your witness to expect extreme
polarizing type questions and how to best respond to them in the context of the issues of
your case. Never allow plaintiff’s counsel to back your witness
into conceding to a polarizing statement. This would play havoc with every stage of the
case should it go to trial.

The other way to defeat the rules of the road strategy is to undercut the faulty premise upon
which the book is based. That it is defense counsel’s strategy to cloud the issues, and make
the simple complex. The book serves as a prism of plaintiff counsel’s perspective of the
defense bar. Mr. Friedman is somehow under the mistaken impression that it is the end-game of the defense attorney to confuse the jury. Nothing could be further off the mark. Any defense trial lawyer would educate Mr. Friedman that we strive for simplicity, not
complexity, when trying our cases. Thus, an effective approach is to reinforce our straightforward themes and clear message to the jury.

Today, thanks to e-mail list serves and web access to plaintiff attorney organizations such as ATLA and its local chapters, the plaintiff’s bar is far more sophisticated and united than in days past. As defense attorneys we experience the different waves of theories and fashions promoted by the plaintiff’s bar. When Gerry Spence’s books first came out we all heard slightly different renditions in closing argument about how society spends so much money repairing buildings, thus it is only morally right to do the same for an injured plaintiff. When “David Ball on Damages” was published plaintiff attorneys began to craft their closings to empower a jury to help the injured plaintiff and family instead of simply asking for obscene sums of money. Thus, based on experience we fully expect to see more and more plaintiff attorneys utilizing the techniques set forth in “Rules of the Road.”

This book gives plaintiff’s counsel a paint by numbers approach on how to find industry rules and how to best use them effectively against the defense. The problem is that the trucking industry is a particularly ripe target for a plaintiff’s attorney being guided by this book given the hundreds of regulations promulgated by the FMCSA and its easy web access. If the multitude of regulations becomes too complex for plaintiff’s counsel, he or she simply has to pick up a copy of a well written manual by an industry leader such as J.J. Keller.

The best way to counter these methods is to learn and then anticipate them. Experienced field generals always have a good idea what is going on in the enemy’s camp. Trucking defense lawyers should make the investment and purchase and read this book until it is dog-eared. This way we can best prepare our trucking clients for deposition and trial.

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ARTICLES

A precursor to the following article first appeared as an invited chapter in the ABA publication Truck Accident Litigation, Second Edition 2006. It has been rewritten and updated by the author for publication here. It is used by permission of the author and the ABA. Truck Accident Litigation, Second Edition 2006, a trade paperback book can be purchased through the ABA on their website. The book is highly recommended. http://www.abanet.org

-The Editors

Allocation of Financial Responsibility Among Insurers Based on the MCS-90 Endorsement

Many interstate trucking company lease some or all of their truck tractors and equipment from independent owner-operators. In many cases where the owner of the truck is not its driver, the lessor also provides the driver. These lease arrangements are governed by federal regulatory requirements found at Part 376 of Title 49, Code of Federal Regulations. The regulatory requirements followed Congress’s amendments to the Interstate Commerce Act that clarified which party would be held liable when a leased commercial vehicle is involved in an accident. See

1 The Interstate Commerce Commission (“ICC”) retained jurisdiction over interstate carriers through the Motor Carrier Act of 1980, which amended the Interstate Commerce Commission Act of 1935. However, the ICC’s authority was transferred to the Department of Transportation when the ICC was disbanded by the ICC Termination Act of 1995.

2 Motor carriers can also satisfy this financial responsibility requirement by any of these three means does not require the carrier to have an MCS-90 endorsement.


The ICC amendments and related federal regulations are intended to protect the public by requiring commercial motor vehicle leases to contain terms within the lease that establish financial responsibility criteria. One way carriers can satisfy the financial responsibility aspect of the federal regulations is by having minimum limits of insurance coverage and including a Form MCS-90 as an endorsement to the motor carrier’s insurance policy. (See 49 C.F.R § 387.15.)

The relevant portions of the MCS-90 endorsement provide as follows:

…In consideration of the premium stated in the policy to which this endorsement is attached, the insurer […] agrees to pay, within the limits of liability described herein, any final judgment recovered against the insured for public liability resulting from negligence in the operation, maintenance or use of motor vehicles subject to the financial responsibility requirements of sections 29 and 30 of the Motor Carrier Act of 1980 regardless of whether or not each motor vehicle is specifically described in the policy and whether or not such negligence occurs on any route or in any territory authorized to be served by the insured or elsewhere….it is understood and agreed that no condition, provision, stipulation, or limitation contained in the policy, this endorsement, or any other endorsement thereon, or violation thereof, shall relieve the company from liability or from the payment of any final judgment, within the limits of liability herein described, irrespective of the financial condition, insolvency or bankruptcy of the insured. However, all terms, conditions, and limitations in the policy to which the endorsement is attached shall remain in full force and effect as binding between the insured and [insurer].

49 C.F.R. § 387.15, Illust. 1.

The MCS-90 endorsement’s primary purpose is “to assure that injured members of the public are able to obtain judgment from negligent authorized interstate carriers.” John Deere Ins. Co. v. Nueva, 229 F.3d 853, 857 (9th Cir. 2000). “Basically, the MCS-90 makes the [motor carrier’s] insurer liable to third parties for any liability resulting from the negligent use of any motor vehicle by the insured, even if the vehicle is not covered under the insurance policy.” T.H.E. Ins. Co. v. Larsen Intermodal Servs., Inc., 242 F.3d 667, 671

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(5th Cir. 2001). However, the ultimate risk, unlike a typical insurance policy, does not shift to the insurer; rather, the insured is required to reimburse the insurer for any payments that would not have been made but for the endorsement. Wells v. Gulf Ins. Co., 484 F.3d 313, 317 (5th Cir. 2007); Canal Ins. Co. v. Underwriters at Lloyd’s London, 435 F.3d 431, 442 (3d Cir. 2006); Travelers Indem. Co. v. W. Am. Specialized Transp. Co., 317 F. Supp. 2d 693, 698-99 (W.D. La. 2004).

Although the MCS-90 obliges the insurer to pay an injured party without regard to any coverage issues, the federal regulatory framework does not control the allocation of loss between the lessee and lessor, nor between their respective insurers. Issues of loss allocation are generally left to interpretation of state contract and common law. When leased trucks are involved in motor vehicle accidents the issue of loss allocation can become a central issue in resulting litigation. This article explores the competing views adopted among the federal circuits on the allocation of loss when one or both of the lessee’s and lessor’s insurance policies contain the MCS-90 endorsement.

The Effect of the MCS-90 Endorsement

The presence of the MCS-90 endorsement in a policy makes that insurer financially obligated, even when there is another applicable insurance policy owned by the lessee. This raises the question of whether the policy the MCS-90 endorsement accompanies is the primary policy. If it is not, and there is more than one potential insurer, does the existence of the MCS-90 endorsement impact the loss allocation among the insurers?

In response to this question, the majority of federal circuits have held that the MCS-90 endorsement does not affect allocation of loss among parties and insurers. Most of the courts that have addressed this issue look to state contract and insurance law, as well as the terms of the insurance policies at issue, to govern such allocation. After all, the MCS-90 endorsement is only meant to protect the public and does not speak of loss allocation.

The United States Court of Appeals for the Seventh Circuit succinctly stated the majority view:

The purpose of the federal statute and regulations is to ensure that an I.C.C. carrier has independent financial responsibility to pay for the losses sustained by the general public arising out of its trucking operations. However, once it is clear that there are sufficient funds available to safeguard the public, the inquiry changes: “the pertinent question is whether the federal policy of assuring compensation for loss to the public prevents courts from examining the manner in which private agreements or state laws would otherwise allocate the ultimate financial burden of the injury.” Carolina Cas. Ins. Co. v. Ins. Co. of N. Am., 595 F.2d 128, 138 (3d Cir. 1979) (emphasis added). We agree with the majority view that “I.C.C. public policy factors are frequently determinative where protection of a member of the public is at stake, but those facts cannot be invoked by another insurance company which contracted to insure a specific risk and which needs no equivalent protection.” Carolina Cas. Ins. Co. v. Underwriters Ins. Co., 569 F.2d 304, 313 (5th Cir. 1978) (on appeal from N.D. Ga. and decided under Georgia law).

Travelers Ins. Co. v. Transp. Ins. Co., 787 F.2d 1133, 1140 (7th Cir. 1986). In short, the majority view holds that the MCS-90 is designed to put the public’s interest above that of the insurance companies. It is not intended to make primary the policy into which it is incorporated. Id.

Application of the Majority View by Various Federal Circuit Courts

3 In addition to the cases cited, the Seventh, Eight and Ninth Circuits have followed the majority view. For example, in Travelers Ins. Co. v. Transp. Ins. Co., supra, the Seventh Circuit steadfastly refused to allocate loss amongst insurers based on the presence of an MCS-90 attachment. In a pre-Motor Carrier Act case, the Eight Circuit focused on the purpose of the federal regulations and the language of the policy to determine that the MCS-90 does not make the policy primary as a matter of law. Wellman v. Liberty Mut. Ins. Co., 496 F.2d 131 (8th Cir. 1974). In Wellman, the court noted that an insurance company’s obligations as to another insurance company are contract based. Id., at 139. The company’s obligations to the public are based on the endorsement. Id. Similarly, in Grinnell Mut. Reins. Co. v. Empire Fire & Marine Ins. Co., 722 F.2d 1400, 1404-05 (8th Cir. 1983), the Eight Circuit cited Transamerican, supra: “[w]hile the I.C.C. regulations do require a motor carrier to maintain public liability insurance and make a carrier liable to the public for negligent acts of the vehicle’s driver whenever the carrier’s number is displayed, the regulations do not fix the liability between insureds or insurance companies.” The Ninth Circuit addressed the allocation of loss in light of an MCS-90 endorsement in a case involving an insurer’s duty to defend.
THIRD CIRCUIT

In Carolina Cas., Ins. Co. v. Ins. Co. of N. Am., 595 F.2d 128, 138 (3d Cir. 1979), the Third Circuit focused on the public policy considerations behind the MCS-90, and recognized that the insurers cannot free themselves of the federal duties to protect the public. However, the court also recognized that the federal regulations “are not so radically intrusive as to absorb lessors or their insurers of otherwise existing obligations under applicable state tort doctrines or under contracts allocating financial risk among private parties.” Id. “So long as the public interest is protected and third parties have been compensated for their injuries, federal regulations permit lessors, lessees and their insurers to allocate risk among themselves as they see fit…. [R]esponsibility among the motor carriers and their various insurers is determined by state insurance and contract law, not by federal requirements.” Maryland Cas. Co. v. City Delivery Serv., Inc., 817 F. Supp. 525, 531 (M.D. Pa. 1993); citing Transamerican Freight Lines, Inc. v. Brada Miller Freight Sys., Inc., 423 U.S. 28, 96 S. Ct. 229, 46 L. Ed. 2d 169 (1975).

FOURTH CIRCUIT

The Fourth Circuit has “adopt[ed] the majority view of [its] sister circuits that the MCS-90 endorsement does not apply to determine the allocation of loss among insurers.” Canal Ins. Co. v. Distrib. Servs., Inc., 320 F.3d 488, 493 (4th Cir. 2003). The Fourth Circuit based its reasoning on the express language of the MCS-90 endorsement. Id. 4

FIFTH CIRCUIT

A 1978 case from the Fifth Circuit, Carolina Cas. Ins. Co. v. Underwriters Ins. Co., supra, is both the benchmark case for the Fifth Circuit on this issue, as well as the leading case in the Eleventh Circuit. 5 Although this case predates the 1980 Motor Carrier Act, there is “no reason to conclude that the advent of the MCS-90 endorsement would bring about a different result from that reached in Carolina.


5 When the Eleventh Circuit Court of Appeals was formed from the split of the Fifth Circuit, the Eleventh Circuit adopted the precedent of the Fifth Circuit prior to October 1, 1981, as its own. See Bonner v. City of Prichard, 66 F.2d 1206, 1207 (11th Cir. 1981).

6 The BMC-90 is an endorsement similar to the MCS-90 and was used by the ICC prior to 1982. The ICC adopted the MCS-90 thereafter in order to join the DOT in its use of the MCS-90 at that time. See 132 MCC 948, 1982 WL 28482; 49 C.F.R. § 387.313. Moreover, a majority of courts recognize that the BMC-90 is almost identical to the MCS-90 endorsement. See, e.g., Atl. Cas. & Fire Ins. Co. v. Nat’l Am. Ins. Co., 915 F. Supp. 1218, 1222 (M.D. Fla. 1996).

Carolina Casualty v. Underwriters was a wrongful death action against the owners and lessors of a truck tractor, and the truck’s lessee and sublessee. The truck tractor’s insurer (Underwriters) filed a declaratory action against the lessee’s and sublessee’s insurer contending that the latter was the primary insurer as a matter of law by reason of the presence of a predecessor ICC-required endorsement, the BMC-90. Carolina Cas. v. Underwriters, 569 F.2d at 309. 6 The court rejected this position stating; “[e]ven if we assume arguendo that the Underwriters policy bears the ICC endorsement, and assume that…the Tenth Circuit is saying that such an endorsement makes insurance coverage primary in all circumstances and for all purposes as a matter of law, we decline to follow such a rule.” Id. 7

6 In addition to T.H.E. Ins. Co., supra (holding that state law governs the allocation of liability between insurers) and Carolina Casualty v. Underwriters, supra, other Fifth Circuit cases have followed the majority view. See, e.g., Carter v. Vangilder, 803 F.2d 189 (5th Cir. 1986) (finding that the I.C.C. endorsement was intended to protect the public, and an insurance company that contracted to cover a risk could not then shift liability); Empire Indem. Ins. Co. v. Carolina Cas. Ins. Co., 838 F.2d 1428 (5th Cir. 1988) (finding two insurers whose policies contained an I.C.C. endorsement jointly and equally liable); Canal Ins. Co. v. First Gen. Ins. Co., 859 F.2d 604 (5th
SEVENTH CIRCUIT

Applying the same rationale reached by the Fourth and Fifth Circuit Courts of Appeal, the Seventh Circuit has also recognized that the allocation of coverage among insurers is determined by state law, not federal regulations, when an MCS-90 endorsement accompanies an insurance policy. Occidental Fire & Cas. Co. of North Carolina v. Int’l. Ins. Co., 804 F.2d 983 (7th Cir. 1986). In the instant case, Occidental Fire and International Insurance jointly settled a personal injury claim on behalf of their respective insureds, the lessee and lessor of a tractor trailer. In reaching a settlement with the underlying plaintiff, each insurer reserved the right to challenge whether it would ultimately be liable for the plaintiff’s injuries. The court, in affirming a summary judgment in favor of International Insurance, held Occidental responsible for the full settlement amount despite the presence of an MCS-90 endorsement in International Insurance’s policy. The court held that a federal regulation required only assurance that sufficient resources were available for losses suffered by the general public and once that requirement was met, private agreements and state law governed upon whom the ultimate financial responsibility for losses fell. Id. at 990. Once the underlying plaintiff’s losses were satisfied through the settlement, the parties’ lease agreement and state law determined the ultimate responsibility.

The presence of an indemnity agreement in the lease rendered Occidental financially responsible. Id. at 989-90.

ELEVENTH CIRCUIT

The Eleventh Circuit addressed the issue in Empire Fire & Marine Ins. Co. v. J. Transport, Inc., 880 F.2d 1291 (11th Cir. 1989). Empire Fire began in a Kentucky district court, which held that the MCS-90 endorsement did not render the applicable policy primary and ordered both insurance companies involved to contribute to the judgment “in the same ratio as the limits of their policies bear to each other.” Id. at 1292. The endorsement holder (Empire Fire) then filed an action in federal court in Georgia seeking indemnification and reimbursement from the common carrier as well as a third party action against the second insurance company (Paxton). Empire Fire contended that Paxton was primarily liable and responsible for the entire amount. Although the Georgia district court disposed of the case on res judicata grounds, the Eleventh Circuit, in dicta, recognized the public policy concerns of the regulations. “It is clear that while ICC regulations require the carrier, or its certified insurer, to protect the public from loss due to negligent acts, the regulations do not alter or affect the obligations between the insured and the insurer, or where there is more than one insurer, the apportionment of liability between them.” Id. at 1298; citing Transamerican Freight Lines, Inc., 423 U.S. 28, 39-40 (1975), and Carolina Cas., 569 F.2d at 313.

Minority View: Loss Allocation Based on the Presence of the MCS-90 Endorsement

Although clearly a minority position, various courts (primarily within the Tenth Circuit) have held that the terms of an insurance policy containing the MCS-90 endorsement must be considered when determining the appropriate allocation of loss amongst insurers. Some courts have limited this view to only make the policy containing the MCS-90 endorsement primary when the policy, by its own terms, is primary (without reference to the endorsement). The courts adopting this view also have found that when the policy containing the MCS-90 endorsement is not the primary policy at issue, it may be deemed to be “co-primary” with other policies that are deemed primary by the very terms of the policy.

The Tenth Circuit Court of Appeals developed a trilogy of cases that support the proposition that the mere existence of the MCS-90 endorsement creates primary (or co-primary) coverage as a matter of law: Argonaut Ins. Co. v. Nat’l Indem. Co., 435 F.2d 718 (10th Cir. 1971) (holding that the effect of the endorsement was to make the driver’s insurer the primary insurer); Hagans v. Glens Falls Ins. Co., 465 F.2d 1249 (10th Cir. 1972) (holding that the ICC endorsement attached to policy made that policy primary); and Carolina Cas. Ins. Co. v. Transp. Indem. Co., 488 F.2d 790 (10th Cir. 1973) (where both insurers had ICC endorsements, the lessor’s policy, which included

Cir. 1989), modified on other grounds, 901 F.2d 45 (5th Cir. 1990) (ruling that I.C.C. endorsement protected the public and could not be used by one insurer against another).
an omnibus clause, was primary because it encompassed the driver). Collectively, these cases hold that the ICC endorsement makes the policy to which the endorsement is attached primary, as a matter of law.

In 1989, the Tenth Circuit clarified its position in light of how courts interpreted this trilogy of cases and in light of the subsequent United States Supreme Court decision of Transamerica Frt. Lines, Inc. v. Brada Miller Frt. Sys., Inc., 423 U.S. 28 (1975). In Empire Fire & Marine Ins. Co. v. Guar. Nat’l Ins. Co., 868 F.2d 357 (10th Cir. 1989), the court noted that there are three approaches to how courts have interpreted the allocation of loss in light of the ICC endorsement: (1) the endorsement makes the policy primary as a matter of law; (2) the endorsement only negates limiting provisions in the policy to which it is attached, such as an excess coverage clause, but does not establish primary liability over other policies that are also primary by their own terms; and (3) the endorsement applies only to situations in which a claim is being asserted by a shipper or a member of the public and that the endorsement does not apply when allocating liability among insurance carriers (majority view). Id. at 361. The Tenth Circuit adopted the second of these approaches, but added that “the ICC endorsement negates any inconsistent limiting provisions in the insurance policy to which it is attached, regardless of whether a shipper or a member of the public is involved in the dispute or whether the dispute is among insurance companies.” Id. at 362. The court was quick to point out that the ICC endorsement cannot “nullify the effect of other policies that are also primary by their own terms.” Id. at 363. The court saw such a nullification as a windfall for the insurer whose policy, by its very language, provides primary coverage. Id.

The Empire Fire holding appeared to place the Tenth Circuit closer in line with the majority view by taking a step back from its trilogy of cases that held that the existence of the MCS-90 endorsement made the policy primary as a matter of law. However, in Railhead Freight Sys., Inc. v. U.S. Fire Ins. Co., 924 F.2d 994, 995 (10th Cir. 1991) the court recognized that Empire Fire did not address the situation where both lessee’s and lessor’s insurance policies contain I.C.C. endorsements. Rather, the court turned its attention to Carolina Casualty v. Transport, supra, a case where the two policies at issue both contained the ICC endorsement, and held that since the lessee’s policy was primary by its own terms, the existence of the ICC endorsement in the lessor’s policy would not alter the very terms of the lessee’s policy. Railhead, 924 F.2d at 996. In so holding, the court noted that “[w]e do not reach the issue of whether an ICC endorsement contained in a lessor’s policy is effective when the truck is operating under a lessee’s ICC permit.” Id. The court found no reason to reach this issue as such a holding would not alter its determination that the lessee’s policy was primary.

In Adams v. Royal Indem. Co., 99 F.3d 964, 970 (10th Cir. 1996), the Tenth Circuit reaffirmed the approach it took in Empire Fire v. Guaranty, and held that the existence of the MCS-90 endorsement required that the court ignore certain limiting terms of the insurance policy when analyzing the allocation of loss. If the limiting language remained in the policy the court said that it would “subvert the purpose of the ICC endorsement of requiring coverage on all regulated vehicles regardless of whether or not they are listed in the policy specifically.” Adams, 99 F.3d at 970. The extent to which the Tenth Circuit’s minority view will survive future scrutiny is now the subject of debate in Carolina Cas. v. Yeates, 533 F.3d 1202 (10th Cir. 2008). In Yeates, State Farm provided motor vehicle insurance coverage to Bingham Livestock Transportation, which was the underlying defendant in an accident involving a Bingham commercial vehicle. State Farm tendered its policy limits to the Yeateses. 533 F.3d at 1203. Carolina Casualty also insured Bingham with a general liability insurance policy covering a variety of claims. That policy contained an MCS-90 endorsement. After State Farm settled with the Yeateses, Carolina Casualty filed a declaratory judgment action claiming that it was no longer liable for any additional damages arising from the accident once State Farm settled the claim. Id. The district court granted summary judgment to the

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8 The United States Supreme Court in Brada Miller held that neither federal statutes nor regulations prohibited owner-lessee and carrier-lessee from allocating ultimate liability through indemnification provisions in equipment leases so long as the lessee does not absolve itself from the duties to the public and shippers imposed upon it by the regulations.
Yeateses and relied on the holding in Empire Fire to find that the Carolina Casualty policy provided primary coverage to the Yeateses and, as amended by the MCS-90 endorsement, may be available beyond the State Farm policy limits to satisfy any final judgment. 533 F.3d 1203, 1206. The Tenth Circuit affirmed. 533 F.3d at 1203.

On October 30, 2008, the Tenth Circuit granted Carolina Casualty’s petition for rehearing en banc. 2008 U.S.Lexis 25037. The parties were ordered to “specifically discuss the merits of the position adopted by most other circuits, i.e., that an MCS-90 endorsement simply creates a surety obligation and does not otherwise alter the terms of an insurance policy to create or expand coverage.”9 With the present briefing schedule for the rehearing, a ruling by the Court could come as early as late Spring or Summer 2009. A reversal in this case would overrule Empire Fire.

At least one other federal circuit has followed the Tenth Circuit’s rationale in Empire Fire. In Prestige Cas. Co. v. Michigan Mut. Ins. Co., 99 F.3d 1340, 1346 (6th Cir. 1996), both the lessee’s and lessor’s insurance policies contained identical limiting provisions, but only the lessee’s policy contained the MCS-90 endorsement. Id. at 1346, 1348. The Sixth Circuit, applying Michigan law, noted that the Michigan Court of Appeals had recently rejected the view that the ICC endorsement has no application among insurers (approach 3 discussed in Empire Fire), and instead adopted the approach that the MCS-90 endorsement does not establish primary liability over other policies that are primary by their own terms. Id. at 1348-49; see also Kline, supra at 455. Rather, both policies could be co-primary. After excluding the limiting terms of the lessee’s policy, as was done in Empire Fire, and since both insurers contained identical apportionment schemes, the Sixth Circuit held that liability should be apportioned on a pro rata basis. Id. at 1352.

Like the Tenth Circuit, the Sixth Circuit Court of Appeals may be moving away from the view that the existence of the MCS-90 endorsement makes the policy primary as a matter of law. In Kline v. Gulf Ins. Co., 466 F. 3d 450 (6th Cir. 2006), the court did not address the express issue pertaining to loss allocation in light of the presence of the MCS-90 endorsement. Rather, it held that merely having an MCS-90 endorsement to an excess policy, regardless of whether the endorsement was inadvertently included with the policy when issued, does not alter that insurer’s obligation and does not make the policy primary if the primary carrier or self-insurer is bankrupt. 466 F.3d at 455. The extent to which Kline will develop in the Sixth Circuit is yet to be seen.

Parties attempting to persuade courts that the minority view should be followed have also cited Integral Ins. Co. v. Lawrence Fulbright Trucking, Inc., 930 F.2d 258 (2d Cir. 1991), for that proposition.10 However, Integral merely involved the application of the MCS-90 endorsement against an insured that was vicariously liable for the acts of a truck driver. After an accident involving a leased truck, the injured plaintiffs settled with the tractor owner, trailer owner, I.C.C. carrier and the carrier’s agent for $1.94 million. Id. at 259. The settlement agreement was signed with the understanding that Integral (carrier’s insurer) would contribute an additional $750,000, if a court should eventually hold that it was obligated to indemnify the trailer owner, to whom Integral’s policy contained an MCS-90 endorsement. Id. Ultimately, the court affirmed the district court’s holding that “when a judgment is entered against the owner of a motor vehicle insured under a MCS-90 endorsement, the insurer is obligated to indemnify, even when the judgment is based on a theory of vicarious liability.” Id. at 262.

However, the Integral court does not address the issue of priority of coverage - a distinction at least one other court has noted. See Clarendon Nat’l Ins. Co. v. Ins. Co. of the West, No. CV-99-5461, 2000 U.S. Dist. LEXIS 13920, at *22. (E.D. Cal. 2000). Thus, whether the Second Circuit follows the minority view cannot be determined from Integral.

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9- The Trucking Industry Defense Association (TIDA) filed an amicus curiae brief in support of Carolina Casualty’s position and in favor of over ruling Empire Fire.

Conclusion

The majority of federal courts agree that the mere presence of an MCS-90 endorsement has no effect on the allocation of loss between insurers. This view is based largely on the public policy rationale that the purpose of the MCS-90 is only to protect the injured member of the public, not to apportion ultimate financial risk amongst insurers and carriers. Such reasoning should remain the trend so long as the loss allocation does not infringe on the financial protections afforded by federal regulation. The minority view, on the other hand, has received limited acceptance, and is currently being reconsidered by the very court that primarily developed it. Should Empire Fire be overturned in the Tenth Circuit, motor carriers and their insurers can avoid inconsistent financial consequences based on potential forum shopping and the geographic location of a given accident. Only time will tell whether a uniform solution to this issue will be achieved.

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Recent Cases Involving Electronic Discovery: Sanctions, Sanctions And More Sanctions

This article seeks to address several recent issues related to electronic discovery. Even though the Federal Rules of Civil Procedure and many courts have tackled related issues prior to recent changes in the rules on discovery of electronic documents, the task of responding to discovery requests involving electronic data can be, at the least, daunting. The cases and insight provided will hopefully outline the responsibilities of attorneys and parties if avoid the pitfalls of discovery of electronic information. It is clear from these cases that companies and their litigation counsel must work together very closely to avoid problems in discovery.

INTRODUCTION

The advanced era of electronic transcription and electronic storage of business information has vastly affected the discovery process in present litigation. What once was merely a transfer of paper documents, pictures, and videos has transcended to an era involving complex battles over “metadata” and the ability to search and retrieve documents. The highly liberal discovery practice has been “sorely tested” with the emergence and lasting importance of electronic discovery. W.E. Aubuchon Co., Inc. v. BeneFirst, LLC, 245 F.R.D. 38, 41 (D. Mass. 2007).
Discovery has always existed to “secure the just, speedy, and inexpensive determination of every action and proceeding.” FED. R. CIV. P. 1 (2008). The federal civil rules of discovery provide the way for the “parties to obtain the fullest possible knowledge of the issues and facts before trial.” Hickman v. Taylor, 329 U.S. 495, 500-01 (1947). Discovery should include all non-privileged matters that are “relevant to any party’s claim or defense.” FED. R. CIV. P. 26(b)(1) (2008). Documents must also be produced that are in the party’s “possession, custody, or control.” FED. R. CIV. P. 34(a)(1) (2008). This has not changed in the electronic age. However, with the continued development of electronically stored information, the courts and civil rules have struggled to keep up with the resulting challenges.

On December 1, 2006, an amendment was added to the Federal Rules regarding limitations on the duty to disclose electronic discovery. This amendment states:

Specific Limitations on Electronically Stored Information. A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

Rule 26(b)(1) (emphasis added). Parties must disclose information in electronic form that is “reasonably accessible” unless the production will result in undue burden or cost. The court determines whether discovery is “reasonably accessible.” W.E. Aubuchon Co., Inc., 245 F.R.D. at 42.

This demonstrates the uniqueness of electronic discovery as well as the many challenges it brings to discovery. Parties must determine what is included in electronic discovery, what form is required for the information, and the division of the costs of searching and producing electronic information. These issues are not occasional considerations because the use of electronic information has skyrocketed by all businesses including motor carriers.

The vast number of emails and electronically stored documents affects responses to discovery of many parties and attorneys. If these significant challenges are overlooked in the discovery of these documents it may lead to sanctions and fines for violation of the discovery rules. For example how can one company field the cost and manpower to search potentially millions of emails and documents stored on a backup system? This is especially difficult when the information is in a non-searchable format, such as PDF. That, of course, begets the many questions concerning backup information. How long is the information required to be stored and how? Is the metadata required to be saved and if so, in what format? Are deleted files, “residual data,” required to be stored and produced upon request even when neither “the computer user nor the computer itself is aware of its existence?” Zubulake v. UBS Warburg LLC, 217 F.R.D. 309, 313 n.19 (S.D.N.Y. 2003). The questions appear endless.

There are many additional considerations for attorneys regarding electronic documents. Attorneys have to consider not only what the client is providing to them for discovery, but they also have to take into account how the client electronically searched for that information. If the search was unreasonable, the attorney could be held responsible for not disclosing information that was not found by the client but could have been found if a proper search had been conducted. Essentially, the attorney is responsible for satisfying the discovery rules regarding both the search and the produced documents. Attorneys are now responsible for understanding a company’s computer system so we can assess whether an adequate search has been performed by the client. This will cause additional inconvenience and expense for clients.

Attorneys and clients must work together to “ensure that both understand how and where electronic documents, records and emails are maintained and to determine how best to locate, review, and produce responsive documents.” Qualcomm Inc. v. Broadcom Corp., 2008 WL
The court ultimately determined that the choices of the attorneys led to the violation of the rules of discovery. Essentially, the attorneys chose not to look in the correct locations for the correct documents, to accept the unsubstantiated assurances of an important client that its search was sufficient, to ignore the warning signs that the document search and production were inadequate, not to press Qualcomm employees for the truth, and/or to encourage employees to provide the information (or lack of information) that Qualcomm needed to assert its non-participation argument and to succeed in this lawsuit.

Further, the court noted that Qualcomm had the “ability to identify its employees and consultants who were involved…, to access and review their computers, databases and emails” to comply with the request. Id. at *11. Effectively, the Court determined information was reasonably accessible and, therefore, was properly discoverable. Qualcomm’s response to the written discovery stating that it would produce all the relevant documents further complicated the issue because Broadcom relied upon the statement and did not seek to have the information compelled. Additionally, the attorneys concealed several documents when the documents surfaced during trial.

Several courts have also addressed electronic discovery and its many pitfalls and provide the following insight. The duty to preserve documents “encompasses electronic communications and documents, such as emails, or documents created by computer.” Orrell v. Motorcarparts of Am., Inc., 2007 WL 4287750 (W.D.N.C. Dec. 5, 2007). This duty does not change even if the computer system “crashed.” Id. at *7. However, the written
discovery requesting electronic discovery can extend too far. The “wholesale production of e-mails” will not be justified without information regarding the relevancy of the emails to the allegations. Williams v. Hernandez, 221 F.R.D. 414, 416 (S.D.N.Y. 2004).

These are but a few of the many cases tackling electronic discovery sanctions. The requirements can seem immense and overwhelming given the astonishing sanctions handed down by the courts and rulings continuing and expanding the historically liberal discovery to encompass electronic documents.

THE ZUBLULAKE GUIDELINES

Electronic discovery and its parameters, however, have been guided by the series of New York cases involving Zubulake v. UBS Warburg, LLC.1 In these seven cases, the federal court addressed many issues and outlined many recommendations for parties embarking on electronic discovery. Specifically, the court addressed what information is “reasonably accessible” to be encompassed by Rule 26 and the responding party’s duty in relation to discovery that could involve an “undue burden and cost.” From these cases, attorneys can learn the requirements in this new age and address many issues prior to litigation and discovery.

In the majority of the Zubulake decisions, the court concentrated on the production of electronic data in response to the plaintiff’s request for “all documents concerning any communication by or between [the defendant’s] employees concerning Plaintiff.” Zubulake v. UBS Warburg, LLC, 217 F.R.D. 309, 312 (S.D.N.Y. 2003). The parties had agreed to produce retrieved documents if possible using the defendant’s computer system. The defendant had a backup system that essentially took a “snapshot” of all emails to and from all employees. Id. at 314. The snapshot occurred at pre-determined times and dates and the information was maintained for a specified number of days on tapes. The tapes were then recycled to record new data. Retrieving data from the backup system was costly and time-consuming. The defendant had never searched the backup system.

Set against this factual backdrop, the court first held that all relevant electronic data, deleted or otherwise, was discoverable pursuant to Rule 26. Once it determined that the information was discoverable, the court focused on the invariable question of the resulting burden and cost on the responding party. After all, electronic discovery does not merely require general document review as does traditional discovery. Rather, there are significant costs in recreating stored data and searching that data.

The court then addressed the shifting of costs to the requesting party. Typically, costs for answering discovery falls on the responding party. When the discovery seeks information of electronic information that “imposes an ‘undue burden or expense’ on the responding party,” however, the cost can be shifted to the requesting party. Id. at 318. Several steps analyzing the data must be taken when considering costs.

First, the computer system data must be identified as either accessible or inaccessible. If the data is “active online data,” “near-line data,” or “offline storage/archives,” the data is accessible. Id. at 318-319. This includes data stored on hard drives, optical disks, or removable optical disks. Id. If the data is on backup tapes or is “erased, fragmented, or damaged data,” the data is inaccessible and not readily usable. Id. Only the data that is “inaccessible-but otherwise discoverable-data” can overcome the presumption that the responding party must pay the related costs. Zubulake v. UBS Warburg, LLC, 216 F.R.D. 280, 291 (S.D.N.Y. 2003).

Second, the court can require that the responding party produce a small amount of electronic data to determine the costs associated with the discovery. Then, the court applies the following seven factor test to determine whether the cost should be shifted, in whole or in part, to the requesting party:

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1. The extent to which the request is specifically tailored to discover relevant information;
2. The availability of such information from other sources;
3. The total cost of production, compared to the amount in controversy;
4. The total cost of production, compared to the resources available to each party;
5. The relative ability of each party to control costs and its incentive to do so;
6. The importance of the issues at stake in the litigation; and
7. The relative benefits to the parties of obtaining the information.

_Zubulake v. UBS Warburg_, 220 F.R.D. 212 (S.D.N.Y. 2003). The court found that allegations spoliation of evidence will be relevant to discovery of electronic discovery because there is a corresponding duty to preserve the evidence. _Id_. In so holding, the court outlined the responsibilities of attorneys in the process of complying with the discovery rule so as to avoid a finding of spoliation. Attorneys do not need to “supervise every step of the document production process and may rely on their clients in some respects.” _Id_. at 435. However, the attorneys have a duty to monitor compliance with the rule with much more specificity than may typically arise in the course of traditional discovery. Explicitly, the attorneys have a duty to “take reasonable steps” to “locate relevant information.” _Id_. at 432.

The attorneys, furthermore, have a continuing duty to ensure preservation of electronic information. _Id_. First, the attorney must initiate a “litigation hold” relating to all potentially discoverable information. Then, the attorney must “communicate directly with ‘key players’ in the litigation” to discuss the preservation duty to each person individually. _Id_. at 434. Then, the attorney should request that the employees produce an electronic copy of their own files. _Id_. The court summarized these steps by stating:

> In sum, counsel has a duty to effectively communicate to her client its discovery obligations so that all relevant information is discovered, retained, and produced. In particular, once the duty to preserve attaches, counsel must identify sources of discoverable information. This will usually entail speaking directly with the key players in the litigation, as well as the client’s information technology personnel. In addition, when the duty to preserve attaches, counsel must put in place a litigation hold and make that known to all relevant employees by communicating with them directly. The litigation hold instructions must be reiterated regularly and compliance must be monitored. Counsel must also call for employees to produce copies of relevant electronic evidence, and must arrange for the segregation and safeguarding of any archival media (e.g., backup tapes) that the party has a duty to preserve.

_Id_. at 439.

Given the specific nature of these opinions, attorneys have a guideline outlining their responsibilities. If the attorney does not follow these steps, sanctions could be given as seen in _Qualcomm_. It is clear that discovery of electronic information is much more time-intensive and involved than with traditional discovery.

**Practice Pointers**

In addition to using the guidelines established in _Zubulake_, the following represent some considerations for overcoming electronic discovery issues before the obstacles arise in litigation.
have set forth guidelines to protect both attorneys and clients. Unfortunately, not heeding the advice provided specifically in *Zubulake* and by example in *Qualcomm* will lead to disastrous results. Fortunately, the courts seem to accept the inherent difficulties in electronic discovery and seek to promote broad discovery within the limitations of electronic information.

**CONCLUSION**

Discovery has changed, and with electronic discovery comes multiple challenges. The area is still “grey,” with many issues unresolved. However, decisions regarding electronic discovery have set forth guidelines to protect both attorneys and clients. Unfortunately, not heeding the advice provided specifically in *Zubulake* and by example in *Qualcomm* will lead to disastrous results. Fortunately, the courts seem to accept the inherent difficulties in electronic discovery and seek to promote broad discovery within the limitations of electronic information.
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