



DECLARATIONS

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Existing . . . “to promote the free exchange of knowledge . . . to make its members more effective managers . . . and to establish a working association with others in a highly specialized field of insurance.”



OFFICERS 2000-2001

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GEORGE N. CASALE 2001

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110 WILLIAM ST.
NEW YORK, NY 10038
(212)225-1264

VICE PRESIDENT/PRESIDENT ELECT

JAMES M. CABALLERO 2002

ASSISTANT VICE PRESIDENT
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101 PARK AVE. - 7TH FLOOR
NEW YORK, NY 10178-0095
(212)297-6015

TREASURER

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17 STATE STREET
NEW YORK, NY 10004
(212)493-9365

SECRETARY

TIM HUGHES 2003

VICE PRESIDENT
ESSEX INSURANCE CO.
4521 HIGHWOODS PARKWAY
GLEN ALLEN, VA 23060
(804)273-1437

DIRECTORS

MICHAEL G. BECKMAN 2003

CLAIMS CONSULTANT
CNA RE
200 S. WACKER DR.
CHICAGO, IL 60606
(312)876-5122

PETER T. BERESFORD 2002

VICE-PRESIDENT-REINSURANCE
FIREMAN'S FUND INSURANCE CO.
777 MARTIN DR. A12
NOVATO, CA 94998-1201
(415)899-3730

MICHAEL J. DEGNON 2001

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ZENITH INSURANCE CO.
21255 CALIFA STREET
WOODLAND HILLS, CA 91367-5021
(818)587-2732

KATHY GRANT 2001

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26050 MUREAU ROAD
CALABASAS, CA 91320
(818)878-9500

WILLIAM R. JACOBI 2001

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(212)458-1733

LYNN F. RUPP 2002

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400 PARSON'S POND DRIVE
FRANKLIN LAKES, NJ 07417
(201)847-2848

RONALD SMILLIE 2003

VICE PRESIDENT, DIR. CLAIMS
ST. PAUL RE, INC.
195 BROADWAY
NEW YORK, NY 10007
(212)238-9642

JOHN T. SPECKMAN 2003

SOREMA NORTH AMERICA RE
199 WATER STREET
ONE SEAPORT PLAZA
NEW YORK, NY 10038
(212)480-1900

DECLARATIONS EDITOR

JAMES T. MCNAMARA

ASSOCIATE DIRECTOR
SWISS RE NEW MARKETS CORP.
55 EAST 52ND STREET, 42ND FLOOR
NEW YORK, NY 10055
(212)317-5392

GENERAL COUNSEL

MICHAEL J. MERLO

MERLO, KANOFSKY & BRINKMEIER
208 SOUTH LASALLE STREET, SUITE 950
CHICAGO, IL 60604
(312)553-5500

EXECUTIVE ADMINISTRATOR

E.A. "ANDY" ANDERSON

317 WEST COLLEGE STREET
CARTHAGE, TX 75633
(903)693-5357

Letter from the Editor

The Board of Directors will be initiating a journal in connection with our Thirty-Second Annual Conference. The Association needs your support in order to continue its educational and social missions. Please help make this journal a success.

May was a busy month for our Association. You will find in this edition the photographs from our two educational seminars (London & New York) and the Robert H. Hammond Scholarship Reception.

I hope you are looking forward to our Thirty-Second Annual Meeting in Monterey, California. Monterey is one of the most beautiful spots in the world and the program looks great. Please review the program and speaker biographies inside this edition of Declarations.

Also included in this issue is a brief article on our scholarship winner, Nicolle Gomez.

Any change in a company address, zip code, telephone, or facsimile number; name of representative, or alternate or title, should be reported to Executive Administrator, Andy Anderson. Company name changes must be reported to Membership Chairman, Ed McKinnon.

DECLARATIONS invites you to submit articles to be considered for publication. Articles can be on any subject of interest to the insurance industry. Articles should be submitted to the Editor and be accompanied by the author's biography and a photo, if available.

I would like to thank Bill Fanter and the FICC for their support and look forward to continuing to benefit from their knowledge.

James T. McNamara

President's Message

I hope you are all working to get on somebody's list.

Puzzled, I understand, but if you were at our annual meeting last year at the Registry, you may recall that I opened the conference with a pictorial history of 25 of my personal heroes, all of whom had a profound influence on my life and perhaps yours. I had chosen individuals from politics, sports, and entertainment, as well as the arts and sciences. I had challenged the audience to first think about who they would have chosen for a particular category and second to be certain that they themselves would one day be included on somebody's list. That was the ultimate challenge.

Over the last year as I made my way to various industry meetings, I was surprised at how often I was reminded of that presentation and its challenges. Almost invariably a discussion would ensue about whom someone would have included on his or her list. Someone would say, "I would have chosen Gehrig over Ruth or Mantle over DiMaggio." So, as I once again share with you my heroes, I challenge you to identify yours.

Kennedy, because he was the President of my youth, because he represented youth itself and because he was himself a profile in courage, struck down well before his time. Martin Luther King because he had a dream and almost 40 years after his death it is still not yet realized. However, we are forever moving closer to true equality and racial harmony ... so perhaps one day. Churchill for courage and perseverance, Princess Di for beauty and grace and Clarence Darrow for law, for I am a lawyer. Einstein for brilliance and Disney for children. Who could conceive of a world without Mickey Mouse and Donald Duck or Goofy? How many of us have been babysat and how many of our children and our children's children will continue to be babysat by a Walt Disney film. Rod Serling because he did for adults what Disney did for children. There were some very profound messages to be found, where else but in the "Twilight Zone."

Lucy and Ricky for comedy. Jackie Gleason because

he was Ralph Kramden, the bus driver from Bensonhurst, Brooklyn where I grew up and where I still have significant ties. For those of you who have never lived there all I can say is "How sweet it was." George Peppard because he was Banacek, a handsome claim adjuster with pizzazz. Edward G. Robinson, the pervebial tough guy who played so many characters it would be difficult to pick a favorite. However, for me it was Barton Keyes, the hard-nosed claims manager in Double Indemnity.



Joe D. because he was Italian. Because my father talked about him incessantly. Because I have his autograph and because he never ever had to make a hard catch. Ruth because he was larger than life. Babe Zaharias because she was a woman and a woman golfer to boot, and golf has always been central for this organization. Bob Hammond because he was one of us. Sinatra, "Old Blue Eyes, the Chairman of the Board", because he really did it his way. Elvis because he truly

was the King and John Lennon because he was a Beatle.

Roy Rogers because he was the King of the Cowboys. Gene Autry because he was the singing cowboy. Could you imagine Christmas without Rudolph? Who would lead the sleigh? And John Wayne because he was the "Duke."

The Unknown Soldier because he represents, not only Americans, but all those men and women who gave their lives for causes they truly believed would, and did contribute, to making this world a better place.

Last but not least, Secretariat, because I love horses and Secretariat was perhaps the greatest equine athlete of all time. First winner of the Triple Crown in 25 years, winner of the Belmont stakes by over 25 lengths and holder of the record for the fastest Kentucky Derby ever. Secretariat represents, for me, all those animals, all those dogs and cats that brought so much happiness into our lives and made our world so much brighter. Now, with you I remember them, and all those that we were all better off for having known and a little less for having lost.

Changing gears a bit, I truly hope you plan to join us in Monterey this year, October 3rd through the 6th for what promises to be a truly remarkable conference. First, the location and climate. Monterey and its surrounding areas are among the most beautiful places anywhere in the world. Temperatures at that time of the year average in the mid seventies with almost no rainfall. Second, the property itself, the Hyatt Regency Monterey boasts the oldest golf course west of the Mississippi. And since our association has some of the oldest golfers both east and west of the Mississippi, it should be an interesting match up. If golf is not your game, then enter our tennis tournament or opt for shopping and sightseeing in Carmel with my wife Anita and her cohorts. She will be glad to show you how to damage a Visa card. We have arranged for a welcome reception for you on Wednesday at the spectacular Monterey Bay Aquarium, where we will be observing and dining on exotic species of fish. Thursday, we will have a free night for dinner following a pool party reception and our traditional gala banquet, sans tux, will be on Friday evening with lots of surprises. The educational portion of the program boasts some of the finest speakers in the industry, and will also offer some surprises, so plan to attend.



Over the year we held two very successful educational conferences on both sides of the Atlantic with attendance well over 275. Special thanks to Ron Smille and Ray Bassett for their extraordinary effort in putting together great programs. Additionally, we awarded a scholarship to Nicolle Gomez who is attending the College of Insurance and shows great promise. We owe a debt of gratitude for the work of Joanne Moore in getting the scholarship program back on track. We supported the Bob Hammond fundraiser and attended the annual meetings of almost all of our sister organizations. It has been a very busy year and thanks to the entire board for their support. Lastly, I want to acknowledge Ed McKinnon and his assistant Susanne Conroy as well as my own assistant Yvonne Torres for all their efforts in putting together this year's conference. Both Yvonne and Susanne will be attending the conference this year and you will all have the opportunity to meet them in Monterey.

As I close out my year as President, I hope that I have in some small way contributed to the growth and strength of this great organization and perhaps in another small way, begun to make my way on to somebody's list. Thanks.

-George Casale

New Members

AT THE MEETING OF THE BOARD OF DIRECTORS ON
 FEBRUARY 13, 2001, IN LAS VEGAS, NEVADA,
 THE FOLLOWING NEW MEMBERS WERE APPROVED:

REGULAR MEMBER

- *AXA Corporate Solutions Insurance Co.
- AXA Re Property & Casualty Insurance Co.
- *Blanch Crawley Warren
- Claims Resource Management, Inc.
- Overseas Partners US Reinsurance Co.
- Pyramid Insurance Associates
- *QBE Re
- ReSolutions International, Ltd.
- Westco Claims Management Services, Inc.

**Denotes name change only.*

Doug Moore was reinstated as an Associate Member.

REPRESENTATIVE

- Steve Judovin
- Cathy O'Brien
- Graham Rose
- Darilyn David
- Stephen Renshaw
- Bismarck Betanco
- Anthony Prybyszewski
- Steve Adkins
- Anthony Lewycky

Asbestos – “Back to the Future”

by Peter Suranyi¹

“The past is never dead. It’s not even past.”

William Faulkner’s famous quote aptly describes the asbestos disaster, the consequences to the individual victims, to the corporations that have been forced into bankruptcy, and to insurers struggling with this huge exposure for more than two decades now. What happened and what do we do now? Where do we go from here?

The Problem – “Oh what a tangled web we weave”³

The use of asbestos in many different products throughout the industrial world, particularly in the 20th century, and its disastrous health consequences on many people who came into contact with it, has had an enormous impact on the US court system, the US manufacturers and distributors of asbestos-related products, and the insurance industry. It will continue to have a significant impact on all of us, despite our best efforts.

For years insurers have discussed, analyzed and considered what new exposure, lead, breast implants, tobacco, Y2K risks, electromagnetic fields, most recently mold claims, might become the next asbestos, with a large financial impact on the insurance industry. The verdict finally appears to be in: to paraphrase a recent article, asbestos is the next asbestos.⁴ The outlook appears fairly grim, at least as far as the rating agencies, the trade and business press, the defendants and the insurers are concerned.

The analytical and statistical data, as well as anecdotal evidence, as outlined over the last year in a drum roll of articles and reports, indicate that payments for asbestos-related diseases have been increasing significantly in the last two to three years, and ultimate exposures (the total amounts to be paid decades from now) are much greater than previously anticipated.

Let’s admit it. In the insurance industry, only relatively recently, many thought that the worst of the asbestos losses were over. Insurers had significantly increased their reserves over the last two decades, and perhaps most importantly, the aggregate product liability limits provided by insurers to the major asbestos producers appeared to be close to exhaustion. The universe of exposure, at least for most insurers, appeared to be finite. Many of us have been surprised over the last two years to learn that “it ain’t over till it’s over”.

The filings of claims and lawsuits have increased dramatically. A recent A.M. Best’s article, citing

Tillinghast’s Mike Angelina, indicated that asbestos “claims filings reach an all-time high”.⁵ In its special report, A.M. Best indicated that the “surge in asbestos claims...could cumulatively cost the industry as much as \$65 billion...nearly two-thirds higher than A.M. Best’s previous 1997 estimate of \$40 billion for such costs.”⁶ “This new estimate of ultimate asbestos-related losses” will be reached “with annual payouts easily averaging \$2 billion or more”, “for at least another 20 years”.⁷ This estimate of annual payouts is in addition to the cumulative net paid losses by the insurance industry estimated at \$21.6 billion through 12/2000.⁸ Tillinghast, the most often cited actuarial experts on asbestos and environmental losses, has increased its estimates of net US ultimate asbestos claims exposure to a total of \$55 billion to \$65 billion⁹, similar to the amounts estimated in A.M. Best’s recent special report.

New Claims/New Exposures – “where the money is”

The rating agencies, actuarial consultants, insurers, and the press have cited several reasons for the increases in the number of claims, the amounts paid for asbestos-related losses, and estimates of future payments. The most frequently mentioned factors include 1) the increasing frequency and severity of claims, including rising court verdicts, 2) the increasing number of bankruptcies filed by the historic asbestos defendants combined with the effective and very well funded search by plaintiffs’ law firms for more plaintiffs and additional peripheral defendants, 3) the failure of class action settlements before the US Supreme Court and, 4) increases in nonproducts claims, including defendants’ efforts at reclassification of asbestos products claims to premises and operations claims.

Asbestos-related diseases have long latency periods, (15-40 years), and the peak asbestos use in the US was from the 1940’s to the 1970’s. Therefore, the number of the more severe mesothelioma¹⁰ and other cancer cases can be expected to increase, as well as the number of impaired asbestosis¹¹ victims.

Most claims filed to date have been for the nonmalignant illnesses, including large numbers of asymptomatic¹² claimants. However, plaintiffs’ attorneys have skillfully packaged the serious mesothelioma claims with numerous smaller claims involving less impaired or unimpaired plaintiffs, driving up the overall settlement values. Since verdicts also appear to be increasing significantly, particularly for the more severe claims, defendants feel compelled to settle packages with large

numbers of less severe claims, adding to this upward spiral of settlement values.

New filings for asbestos-related claims are estimated to have increased to “50,000 to 60,000 claims in the last year, compared with yearly averages near 20,000 in the early to mid-1990s”¹³. The number of claims received by the Manville Personal Injury Trust doubled in 2000 from 1999. The Manville Trust had paid \$2.5 billion to more than 350,000 claimants by March 2001.¹⁴ W. R. Grace cited an “81 percentage surge to 48,786 bodily injury claims”¹⁵ when it filed for Chapter 11 bankruptcy protection.

At least 26 companies with asbestos-related problems have filed for bankruptcy (including six since the beginning of 2000). However, rather than diminishing the number of large target defendants, the bankruptcies have only encouraged the plaintiffs’ law firms to seek out new plaintiffs and new defendants with some connection, no matter how remote, to asbestos-related products or activities. These efforts have quite successfully (for plaintiffs’ firms) increased the number of total claims filed to date to almost 500,000, with an estimated additional 500,000 claims to be filed before asbestos-related claims are resolved.¹⁶ The number of defendants in asbestos-related litigation and claims has increased from the hundreds in the 1980’s to several thousand today.

The *Georgine v Amchem* and *Fibreboard v Ortiz* class-action settlements have also been cited by many as contributing to the initial search for new claimants and the subsequent increase in filings after the U.S. Supreme Court rejected the settlements.

As the product liability aggregate policy limits of the traditional defendants are eroded or exhausted, the plaintiffs have turned to new defendants, and some have claims that arguably fall under premises or operations coverages. Perhaps what is most ominous for insurers is that the older policies, that do not have asbestos exclusions, often have premises or operations coverages that are not subject to aggregate limits. Insulation contractors have had some success in two courts arguing that general liability coverage without aggregate limits may apply.¹⁷

In addition, asbestos producers and distributors, often referred to as Tier 1 and Tier 2 defendants, with installation or distribution subsidiaries, are attempting to reclassify claims as general liability claims that were previously paid as product liability claims. In this way, these policyholders can “double-dip”, getting additional non-aggregate coverage, as well as reopening previously exhausted product aggregate limits. Plaintiffs and defendants are following Willie Sutton’s advice and going “where the money is”.

The Asbestos Uncertainty Principle

“[C]onventional wisdom in the industry for many years held that this was among the more manageable of the toxic torts.” In fact “exposure may be poised to expand, rather than shrink as most actuarial models had predicted”.¹⁸

It may be that most new claims are of lesser severity, with lower exposures to asbestos among claimants in the new wave of suits against Tier 3 and 4 defendants. On the other hand, some companies are “reporting flat severity trends”,¹⁹ in other words, no changes in severity among the new claims.

Bankrupt asbestos defendants will probably not make payments for some time until trust funds are established and approved by the courts. When payments begin these will be at some fraction of the prior values, i.e. a significant discount on the dollar. A.M. Best predicts that the “slowdown in payouts, which was evidenced in lower industry paid losses in 2000, will prove to be short-lived and illusory.”²⁰ However, it does not appear that any comprehensive studies have evaluated the impact on payout patterns and amounts paid based on the bankruptcies to date.

In the end, however, the reasons for the increases in asbestos losses may have been accurately characterized by a recent article that proclaimed “Surge in asbestos cases baffles experts”.²¹ “I’m not sure why asbestos cases seem to be increasing in number and value, or why it should happen now,” said Deborah Hensler, professor of dispute resolution at Stanford University and author of *Class Action Dilemmas*.²²

“There is no way to precisely calculate how many other potential victims might sue and win huge verdicts from juries in the future” according to Armstrong’s CEO, Michael Lockhart. “That’s an unknown – disputed liability that threatens the viability of the company”.²³ Moody’s reassuringly indicates that “[n]o insurance company has been downgraded exclusively because of asbestos liabilities”, and goes on to indicate that the answer to the question of whether this will change is between “probably not” and “it is too soon to tell”.²⁴ Interestingly, in a recent Insurance Finance & Investment article,²⁵ there was speculation on whether uncertainty about asbestos might affect the secondary market for the property and casualty insurance companies with the largest asbestos reserves.

Humility is called for when it comes to assessments of the present situation with asbestos losses, and even more so for predictions on the future. This is certainly the case in the face of our experience to date. Everyone is searching for finality except the unfortunate victims of asbestos. Sadly, they are the only ones likely to obtain it.

The Multiple Solutions – “Don’t Cry for Me”, America

Coverage Litigation – Look for the “other guy”

The approach in the United States for most of the second half of the 20th century involving these types of issues and disputes has been to find “the other guy” and blame him via litigation, or by lobbying to change public policy. This perennial search for the other guy in asbestos-related claims has resulted in the massive legal battles in the early 1980’s over various coverage issues, perhaps the most significant being the trigger of coverage. In the end, neither the momentary winners nor losers appeared satisfied with the huge litigation costs, nor the results. In one of the most famous examples, *Keene Corp. v. Insurance Co. of North America*, the “winner”, the Keene Corporation, did eventually file for bankruptcy, while all the insurers providing coverage from the plaintiffs’ first exposure through manifestation of illness were found jointly and severally liable.

Bankruptcy

While bankruptcy was historically seen as a strategy of last resort, it is increasingly seen as a viable option that effectively separates the administration of this huge liability from the day to day operations of the ongoing company. It delays payments for an extended period of time, (Manville’s six years in bankruptcy protection is expected to be much longer than other companies), and eventual payments made to claimants are typically at a very sharp discount because of the limited funds available.

This is a version of “the other guy” approach. The consequences of the companies’ past actions, and the resulting present avalanche of claims, are forcing the defendants into bankruptcy, at the expense of stockholders, creditors, and the claimants themselves, who will not receive payments for several years, and then at a sharp discount on the dollar.

Asbestos vs. Tobacco – “The Bad and the Ugly”

The most recent version of the “other guy” approach are the lawsuits by asbestos defendants against the tobacco companies. The Johns-Manville Personal Injury Settlement Trust is seeking damages from the tobacco industry alleging that “the injuries suffered by victims of asbestos were aggravated by the tobacco industry”²⁶ in US District Court in Brooklyn, NY. Judge Weinstein recently declared a mistrial when the jury was deadlocked. Seven federal courts of appeals have rejected similar suits.²⁷

A Mississippi Circuit Court dismissed claims by Owens Corning attempting to recover from tobacco companies for asbestos-related claims, that, according to Owens, were due to tobacco use. The Special Master had recommended “that under Mississippi law, and the prevailing law in virtually all jurisdictions, Owens Corning is prohibited by the remoteness doctrine from

recovering from the tobacco defendants for an ‘indirect injury’ sustained by Owens Corning.”²⁸

Finding someone else, e.g. other insurers, defendants, industries, etc., did not turn out quite the way most of the parties envisioned, and many realized that often it was not practical. While companies’ interests must be aggressively represented in this litigious environment, it appeared that often the parties engaged in the unnecessary internecine struggles that have often proved to be mutually self-destructive.

Administrative Solutions – Or, “If you build it, they will come”

Various measures were attempted in the 1980’s and 1990’s to bring some rationality to the system, including the Panel on Multidistrict Litigation’s decision to consolidate federal cases in Philadelphia, the Wellington Agreement and the Asbestos Claims Facility, the Center for Claims Resolution, (“CCR”) and Owens Corning’s National Settlement Program.

The Winter 1988 – 89 issue of *Declarations* indicated in an article, “Center for Claims Resolution”, that the Center was established as “a new opportunity for defendants, plaintiffs and the courts to reach a rational resolution of the asbestos claims crisis ...the Center is dedicated to resolving meritorious asbestos-related bodily injury claims against its members in a fair and expeditious manner.”²⁹

Although it appeared to cut the costs of defense over time, as the CCR settled more quickly, it may have encouraged the plaintiffs’ bar as well, bringing more claims with plaintiffs that had questionable injuries. To handle the large volume of claims, “the CCR brokered ‘inventory’ settlements or settled claims in bulk before they went to court and with little examination of the claims.”³⁰ A recent *Wall Street Journal* article quoted attorney David Bernick’s description of a type of “Field of Dreams” strategy.³¹ As the method of relatively easy settlement was created, attorneys brought more and more claims.

These administrative mechanisms did not provide a solution, nor did the attempts to resolve large numbers of claims via the class actions, *Georgine or Fibreboard*. As Michael Angelina, a specialist with consultants Tillinghast-Towers Perrin, recently indicated, “many of the touted solutions had served simply to set off a chain of events that was leading to even more suits”.³²

Public Policy Reform

Attempts at changes in public policy on asbestos-related claims have a long history. The Keene Corporation’s optimistic forecast after the 1992 Congressional elections was proclaimed in a 1993 headline: “Asbestos Maker Foresees Relief in New Congress”,³³ and it seems ironic now. Recent attempts by insurers to coordinate with defendants, and perhaps even some of the plain-

tiffs' bar, to push for relatively modest legislative reform via a pleural registry (ies), a type of administrative, court docket management approach that would separate medically impaired plaintiffs from unimpaired ones, may be timely. These focused efforts by the insurance industry and asbestos defendants, or other tort reforms efforts, might be successful with the new Republican Administration.

However, "A.M. Best's expects that significant tort reform is at least several years away".³⁴ Other business periodicals recently were also pessimistic about public policy reform coming anytime soon.³⁵

There are no easy solutions. Perhaps there are no solutions. Nevertheless, there are incremental steps that insurance industry and claims people can take to deal with the mess. Let's remember that the large amounts of money being paid out, are, at least some of the time, for debilitating, and often deadly illnesses, caused by products that, for the most part, should not have been in the marketplace.

Where do we go from here – Between Scylla and Charybdis

To provide some perspective for insurers, A.M. Best estimates that the "asbestos earning drag" (impact of asbestos net incurred changes) on the results of the top 30 insurers with the largest asbestos exposures will range from 1.0 to 4.0 points on combined ratios in the next few years.³⁶ Although this is not good, the consequences are not disastrous. Compare the estimates of approximately \$2 billion that may be paid per year for asbestos claims in the next ten to twenty years to the costs of some of the recent natural and man-made disasters.

Like Odysseus, the insurance industry will have to steer between Scylla and Charybdis. If insurers appear to pay too easily, thereby avoiding litigation expense and the risk of adverse verdicts, they also encourage more marginal claims and unreasonable settlement demands. However, if insurers resist to the death, and too frequently let juries decide the highest exposure cases, the results will likely be as problematic.

Keeping in mind the caveat that it is always easy to second guess, and that the brief descriptions often provided in the press are not sufficient, some of the decisions to go to verdict are puzzling. The mesothelioma case where the plaintiffs produced three experts; defendants produced none; defense argued it wasn't liable as a supplier and installer; that installation did not create a high enough dose to cause the plaintiff's condition; and, plaintiffs' counsel was one of the most experienced in asbestos litigation, raises the question of whether there was a better way than waiting for an \$8 million jury verdict.³⁷

Expertise and good claims judgment may remain the best tactic, avoiding trial where possible, going all out when necessitated by outrageous plaintiff demands.

Insurers should take rigorous positions on coverage and liability, while not leaving plaintiffs with deadly illnesses to seek justice before juries. A seemingly impossible task? Probably, but one that will have to be undertaken as the bankrupt defendants leave the other still solvent companies, with less experience in asbestos litigation, more dependent on their insurers for strategy, tactics, defense and indemnification.

Back to the Basics

There is no substitute for the good solid claims work of determining the facts, applicable coverages, if any, relevant law, the policyholder's liability and the damages. However, this must be done on the massive scale required for mass tort asbestos claims.

Sufficient resources and talent must be focused on the essential coverage issues, as well as the underlying defense and indemnification of the policyholders. Important coverage issues remain for asbestos claims, including the applicability of any nonproducts coverage, the number of occurrences, questions of missing policies, potential late notice defenses, allocation, and underlying exhaustion. Good management will retain and develop the skilled staff required for these claims, as well as utilize operations management techniques for comprehensive organization of the efforts to deal with the volume and complexity inherent in these mass tort type exposures. Of course, execution, controls and continuing evaluation of these efforts are also vital.

Insurers and claims people are now better prepared to quantify exposures from newer types of claims, e.g. nonproducts, different potential defendants, etc. According to Moody's, many insurers may be relying on ground-up actuarial studies that are now several years old.³⁸ Therefore, we can anticipate the need for updated evaluations and studies. Staff at the insurance companies most involved in A&E losses now have years of experience working on ground-up analyses and coordinating among different functional areas of expertise, e.g. actuarial, claims, underwriting, etc. We are, and should be, better prepared to complete the analyses and respond to the questions that will invariably come from senior management, rating agencies, analysts, reinsurers, etc. References for methodologies on evaluating books of business are available. (As an example see Susan Cross's and John Doucette's "Measurement of Asbestos Bodily Injury Liabilities".³⁹)

Let's do our jobs, work with policyholders, trust funds, codefendants, even plaintiffs, to the extent possible, on the merits of the claims, keeping in mind that if the insurers do not handle the claims well (using best practices, etc.) their stockholders, the regulators, and the reinsurers will, to the extent possible, hold

their feet to the fire. At the same time, if insurers are not seen to act fairly, the courts, and particularly the juries, will provide a day of reckoning.

The "Return of the Jedi" – Fight the Power

Several insurers have once again chosen to stand and fight, "returning fire in the ever-widening war of asbestos litigation".⁴⁰

Equitas and its fellow insurers in the London market have effectively thrown down the gauntlet to US plaintiffs' attorneys in what several Equitas representatives characterized in the press as the "asbestos litigation industry",⁴¹ objecting to the manner in which asbestos claims are handled by defendants, or are perceived to be handled, in the US, e.g. bulk settlements of hundreds and thousands of claims at a time, with marginal efforts made at requiring proof of liability and damages.

After significant reserve increases for asbestos claims over the last year, Equitas and the London market are attempting to impose stricter standards on the US based policyholders in order to recover for asbestos-related claims. As previously discussed, many policyholders that found themselves as defendants in massive litigation involving tens of thousand and hundreds of thousands of claimants alleging asbestos-related illness often settled the claims in bulk, fearful of risking trials, particularly for the more seriously impaired claimants.

This is a back to the basics strategy, outlined in a seven page "London Market Insurers' Documentation Requirements for Asbestos Bodily Injury Claims".⁴² It includes requirements for basic documentation of the claimants involved, proofs of payments made, the types of claims, (e.g. products, premises or operations liability), evidence that claimants were exposed to the policyholder's asbestos containing product, or were exposed to asbestos in connection with the policyholder's premises or operations, and medical records with a specific medical diagnosis that the claimant suffers from a disease caused in substantial part by exposure to asbestos.

"Underwriters require sufficient evidence that the claimant was exposed to an asbestos containing product of the Assured (or, for premises/operations claims, was exposed to asbestos in connection with the Assured's premises or operations)."⁴³ For each claim there must be proof that the product that is alleged to have caused the injury is that of the defendant.

"There must be a specific medical diagnosis that the claimant suffers from a disease caused in substantial part by exposure to asbestos."⁴⁴ The medical conditions alleged, including mesothelioma, lung cancer, other cancers, asbestosis, pleural diseases and pleural plaques require certain documentation.

With finite resources and funds, Equitas may well have seen few viable options, considering the increasing size of asbestos liabilities and estimates for ultimate exposures, other than to fight the valiant fight of the Jedi warrior.

Fighting on another front, Lloyds sued Babcock & Wilcox in US Federal Court, alleging that the policyholder's bankruptcy reorganization plan breaches a coverage agreement. Included in the complaint is the assertion that the proposed reorganization plan assigns the responsibility for claims management to the recommended trust, contrary to the agreement. It also alleges that the policyholder has disclosed the confidential terms of the agreement to representatives of the claimants.⁴⁵ This is an attempt to fight the very heart of reorganization plans common under bankruptcy filings.

Other US companies, such as Federal Mogul and G-I Holdings Inc. (formerly GAF Corp.),

may also have concluded that there were few good alternatives but to stand and resist the

inventory settlements and the undocumented claims that involve multiple claimants with little or no physical impairment.

Federal Mogul proclaimed that "[o]ur intent is also to greatly reduce payments to those people who have no ill effects from asbestos", and therefore, "will examine each claim more critically".⁴⁶ Rather than file for bankruptcy, Federal Mogul obtained new credit lines and withdrew from the Center for Claims Resolution.

G-I Holdings Inc. filed a lawsuit alleging that three law firms "orchestrated a scheme to inundate the courts with hundreds of thousands of asbestos cases"⁴⁷ whether or not the cases had any merit.

To engage the adversary in the battle is certainly heartening. However, the danger of overreaching always exists, by plaintiffs' attorneys, defendants, insurers, by everyone, when an issue is as complex and fraught with emotion and history as asbestos-related claims. We should strive for some sense of fairness, of balance. Resist when it is necessary, but compromise when a reasonably fair and balanced alternative is possible.

A Barron's article years ago described the passion of the moral positions taken by the former CEO of Keene Corporation, Glenn Bailey, and Ron Motley, plaintiff's attorney, on opposite sides of this struggle, as "corporate America's version of the conflicts rending Northern Ireland, Lebanon or Yugoslavia: ancient enemies, irreconcilable differences and real victims. In the end, the truth on each side is consumed by the other's high moral purpose."⁴⁸ We would probably all agree that there are no winners in these types of struggles.

This may sound like “carry on” advice, and, in a way, it is. But carry on a little better than we have in terms of good claims, insurance and legal practices, The common sense, fair approach to these issues sounds too basic, however, when immersed in the complex detail and the struggle, people often tend to lose sight of the bigger picture.

*Justice for the “snowmen of Grand Central”
Fairness, Equity, Regulation through Litigation,
All in the eye of the beholder?*

To maintain our overall perspective it may be helpful to remember Michael Buckley, a pipefitter, and 140 fellow workers for the Metro-North commuter railroad. These plaintiffs were exposed to asbestos while working on the pipes under Grand Central Station. “Until the late 1980’s, when the railroad instituted protective measures, they would emerge from the catacombs so covered with the white powder that they were known to fellow workers as the ‘snowmen of Grand Central’. Although the doctors testified that the men faced statistically significant risks of dying from asbestos-related diseases,⁴⁹ they were not yet ill.

In the *Metro-North Commuter Railroad Co. v. Michael Buckley*⁵⁰ decision by the US Supreme Court in July 1997 the court found that Buckley could not make claims for emotional distress and lump sum medical monitoring costs under the Federal Employers’ Liability Act (FELA).

The court indicated that the “physical contact” as used in a prior case, *Gottshall*, “does not include a simple physical contact with a substance that might cause a disease at a substantially later time – where that substance, or related circumstance, threatens no harm other than that disease related risk”.⁵¹ In reference to Buckley’s emotional distress claim, “We conclude that the worker before us here cannot recover unless, and until, he manifests symptoms of a disease,”⁵² Justice Breyer wrote for the majority.

However, for the most serious asbestos-related illness, mesothelioma, victims “will typically be dead within a year of diagnosis”, and “no financial compensation can really be relevant”, according to John Kay writing in the Financial Times.⁵³

Well then when can seriously endangered, at risk, or seriously ill people recover a fair sum for their damages? At least 26 companies are bankrupt, and others may be on the way, yet the most seriously ill plaintiffs often do not seem to recover a fair sum in a timely manner. The employer of the “snowmen of Grand Central” failed in its most basic responsibilities, but so did the workers’ unions, government safety regulators, and ultimately the legal system.

From the point of view of potential defendants in mass tort litigation, and their insurers, the Court was

correct in indicating that “tens of millions of individuals may have suffered exposure to substances that might justify some form of substance exposure related medical monitoring... and that fact, along with uncertainty as to the amount of liability, could threaten both a ‘flood’ of less important cases (potentially absorbing resources better left available to those more seriously harmed...) and the systematic harms that can accompany ‘unlimited and unpredictable liability’ (say, for example, vast testing liability adversely affecting the allocation of scarce medical resources).”⁵⁴

However, from the public’s point of view, the decision could be seen as a glaring injustice to this innocent victim of his employer’s irresponsibility and callous disregard for the health and safety of some of its employees. These men were covered with asbestos powder up to the late 1980’s, decades after knowledge of the dangers of asbestos was widespread. So the sense could well be that the system as presently construed, in all its forms, for all the players in the asbestos mess, is broken, in terms of achieving some fairness, some sense of justice. Unfortunately, based on the history of attempts at broader comprehensive solutions, it may not be fixed anytime soon. The best that we can do in the insurance industry is to try to balance these factors in a common sense rational approach, even in a seemingly irrational situation.

¹ The opinions and characterizations expressed in this article are those of the author and not necessarily those of Swiss Reinsurance America Corporation or its affiliated companies.

² William Faulkner, *Requiem for a Nun*, 1951.

³ Sir Walter Scott, “Marmion. Canto VI. Stanza 17.

⁴ Joseph, Bryan, “Is asbestos the next asbestos? The industry has been asking the question, what is the next asbestos for many years.” *Lloyd’s List*, January 19, 2001.

⁵ David Pilla, “With Claims Filings at All-Time High, Asbestos Issue Socks Insurers Again”, *BestWeek*, June 18, 2001, Release 25, p.1, 3.

⁶ Gerard Altonji, Karen Horvath, Eric Simpson, “Asbestos Claims Surge Set to Dampen Earnings For Commercial Insurers”, *A.M. BEST*, May 4, 2001, Special Report, p.1.

⁷ Altonji, p. 6.

⁸ Altonji, p. 6.

⁹ Pilla, p. 3.

¹⁰ Mesothelioma – cancer of the lung’s outer lining or the abdominal wall lining.

¹¹ Asbestosis – scarring of the lung that can cause respiratory problems.

¹² Asymptomatic – medically not impaired.

¹³ Pilla, p. 3.

¹⁴ Daniel Gross, “Recovery Lessons From an Industrial Phoenix”, *New York Times*, April 29, 2001, p. 4.

- ¹⁵ Marcus Rubin, "USA: Surge in asbestos cases baffles experts", *Reuters News Service*, February 1, 2001.
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- ²⁷ "Johns-Manville Trust case opens", p. 8.
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- ³⁸ Witt, p. 4.
- ³⁹ Susan Cross and John Doucette, "Measurement of Asbestos Bodily Injury Liabilities", Submitted to the Casualty Actuarial Society, June 29, 1994.
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- ⁵¹ "Emotional Distress Claim, Medical Monitoring Costs Rejected by Supreme Court in Buckley FELA Case", *Mealey's Litigation Reports: Asbestos*, July 7, 1997.
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ABOUT THE AUTHOR



Peter Suranyi

Peter Suranyi is a member of the Asbestos, Pollution and Health Hazard Claims Unit at Swiss Reinsurance America Corporation in Armonk, New York. He has spoken on environmental and reinsurance issues at industry conferences. Prior to Swiss Re, he worked at Crum and Forster Managers Corporation and Liberty Mutual Insurance Company. He is a graduate of Columbia College.

New York Seminar

May 9, 2001



Dick blatt told us what's next



Michael Schell talks about change



Participants enjoy luncheon



Bob Lippincott talks about the future



Ron Moore and Frank Nicoletti



Ron Smillie starts the program

London Seminar

May 15, 2000



Tea for three



Gregory Read makes a point



Our extraordinary assistants



Tony Tunney mesmerises the audience



Opening remarks from Ray Basett



Panelists Bab Scott & Neil Goldberg

Excess/Surplus Lines Claims Association Conference Program Year 2001 Claims Meeting

Hyatt Regency, Monterey, California
October 3rd-6th, 2001

TIME	TOPIC	SPEAKER(S)
Thursday, October 4th		
8:30 – 8:45 am	Greeting & Opening Remarks	George Casale
8:45 – 9:30 am	Privacy and the Information Act	William Savino, Rivkin Radler & Kramer
9:30 – 10:15 am	Putting the Company on Trial	Mark Bonino, Michael Brady, Ropers, Majeski, Kohn & Bentley
10:15 – 10:30 am	Break	
10:30 – 11:30 am	TBA	Guest Speaker
11:30 – 12:15 pm	“Mold” The Next Generation of Asbestos x10	Harold Provizer, Lewis, D’Amato, Brisbois & Bisgaard
Friday, October 5th		
8:45 – 9:30 am	Asbestos – I Told You So	Michael Sommerville, Cetrulo & Capone
9:30 – 10:15 am	Do You Want to be an Insurance Millionaire?	John Saulino, Robert Miller, Paul McCarter, Frank Schwartz, Kathy Grant
10:15 – 10:30 am	Break	
10:30 – 11:15 am	Allocation: Who’s Left Standing When the Music Stops	Mary Ann D’Amato, Mendes & Mount
11:15 am – 12:00 noon	National Jury Trial Innovations Project	Gregory Read, Sedgwick, Deteret, Moran & Arnold
Saturday, October 6th		
9:15 – 10:30 am	Role of the Environmental Professional in the Insurance Industry	Scott Steinmetz, Fireman’s Fund Consulting Services Group, Dr. Gabriel Sabadell, Blasland, Bouck & Lee
10:30 – 10:45 am	Break	
10:45 – 11:45 am	On Line Claims Settlement – A New Approach	Honorable R. William Schoettler Vanessa C.L. Chang, Resolve It Now.com
11:45 – 12:00 noon	Closing Remarks	George Casale

Program Chair: Joanne Moore

Committee: Earl Davis, James Caballero, Frank Nicoletti

Guest Speakers

Mark G. Bonino

Mark Bonino is Co-chairman of the Appellate, Insurance Coverage and Bad Faith Department of Ropers, Majeski, Kohn & Bentley. He has handled more than four hundred appeals to completion. He has argued a number of important cases in the California Supreme Court and the Court of Appeals. Mark has been active in co-chairing and preparing the firm's national seminars and is a frequent lecturer on insurance litigation matters throughout the country. He is graduate of the University of California at Davis and Santa Clara Law School.

Michael J. Brady

Mike Brady has been a member of the Ropers, Majeski, Kohn & Bentley law firm for thirty-four years. His specialty is appellate, coverage and bad faith litigation. He is in charge of the firm's national spring seminar program, which is designed to educate the American insurance industry on the latest developments in California. In addition to lecturing before many industry groups, Mike has written in excess of fifty articles on insurance related issues which have been published in professional journals. He is an active member of the International Association of Defense Counsel and the Federal of Insurance and Corporate Counsel. He is also past president of the Northern California Association of Defense Counsel. Mike is a graduate of Stanford University and Harvard Law School.

Vanessa C. L. Chang

Vanessa Chang is Chief Executive Officer and President of Resolve It Now.com, an online dispute settlement service to property and casualty insurers and claimants and their attorneys. As one of the founders, Vanessa was responsible for the organization, financing, strategy and launch of the company. The company has four employees and three board members prominent in both the insurance and legal communities. Prior to founding Resolve It Now.com, Vanessa was responsible for starting and building the merger/acquisition, corporate finance and valuation businesses for KPMG's west coast practice. She has transformed the business into a transaction oriented, value-added fee practice. She is a member of the American Institute of Certified Public Accountants and the California Society of Certified Public Accounts. Vanessa is a graduate of the University of British Columbia at Vancouver.

Mary Ann D'Amato

Mary Ann is a managing partner at Mendes & Mount. She is in charge of the firm's New York Litigation section. She has been engaged in insurance defense and complex coverage litigation for more than twenty-five years. Much of her practice has focused on representation of London Market Insurers in asbestos and environmental related coverage disputes involving direct excess general liability and umbrella insurance. In addition she represents London Market Reinsurers in complex reinsurance arbitrations and coverage litigation. Mary Ann is the Chair of the firm's Pro Bono Committee and a frequent speaker at litigation and insurance related seminars.

Kathryn L. Grant

Kathy Grant is a Vice President with Swiss Re. She has twenty-five years of claims experience, including eleven years in reinsurance and fourteen years in various primary and excess claims technical and management positions with Allstate, Firemen's Fund and Maryland Casualty. Her property and casualty claims experience includes the handling and management of personal lines, commercial, environmental, E&O, excess and reinsurance losses. She is a delegate to the Intermediaries & Reinsurance Underwriters Association, the Brokers & Reinsurance Markets Association and the Reinsurance Association of America.

Paul Edward McCarter

Paul McCarter is the Director of Ballantyne, McKeen and Sullivan Management Services Ltd. He has handled claims in the London Market since 1990. He is a member of the London Market Brokers Committee, Claims Supervisory Board and Claims Business Panel. He is a member of the Claims Advice and Settlement System at the Lloyds Working Party. Paul was a recent speaker at the Mealey's Reinsurance Roundtable and Environmental Conferences. He is a member of the Excess Surplus Lines Claims Association and was educated at St. Peter's York.

Robert B. Miller, CPCU, RPA

Robert Miller is currently the Chief Claim Officer of the Sumotomo Marine and Fire Insurance Company's U.S. domestic claims operation. He has spent over twenty-five years with Crum and Forster Insurance Companies, the last ten as Senior Claim Officer. He

has also worked for Tillinghast and the Reliance Insurance Company. Robert has served as an umpire/arbitrator in several reinsurance arbitrations. He is a member of the Excess Surplus Lines Claims Association and the Federation of Insurance and Corporate Counsel. He graduated from the Wharton School of the University of Pennsylvania and received his CPCU designation in 1969 and RPA in 1998.

Harold Provizer

Harold Provizer is a partner in the law firm of Lewis, D'Amato, Brisbois & Bisgaard. Prior to that he formed the law firm of Provizer & Associates which has subsequently become Provizer & Phillips. Harold serves as National Counsel for numerous insurance carriers as well as National Coordinating Counsel for various complex matters such as mold and construction defect litigation. He has been a frequent lecturer on insurance and complex litigation issues and has published numerous articles which have appeared in professional publications. Harold is a member of the Defense Research Institute, American Arbitration Association and several state bar associations. He graduated from Wayne State University and Wayne Law School.

Gregory C. Read

Gregory Read is a senior partner in the San Francisco office of Sedgwick, Detert, Moran & Arnold, an international law firm. He is in charge of the firm's Specialty Litigation Group and specializes in toxic tort, aviation, product liability and other complex litigation. Gregory is a nationally recognized speaker and author on trial tactics and other matters. He testifies regularly before various legislative committees regarding the defense view of proposed legislation and rules changes. Gregory is the President of the International Association of Defense Counsel. He is one of three Managing Directors of the IADC's National Jury Trial Innovations Project. He received his B.A. and J.D. degrees from the University of Illinois.

Gabriel P. Sabadell, Ph.D., P.E.

Dr. Sabadell has over twelve years of professional experience providing consulting services in environmental engineering, groundwater hydrology, and project management, addressing soil and groundwater contamination, hazardous waste management, site assessment, regulatory compliance and litigation support matters. He has worked on projects at over thirty Superfund sites across the country. Dr. Sabadell is currently one of the leaders of the Litigation Support Group, working out of the Colorado office of Blasland, Bouck & Lee Inc. Prior to joining BBL, he worked for Environ Corporation, Knudsen Corporation and TAMS Consultants. Dr. Sabadell received an M.S. and B.S. in Chemical

Engineering from the University of Virginia and Carnegie/Mellon University respectively and a Ph.D. in Civil Engineering from Colorado State University.

John Saulino

John Saulino co-founded Penbridge Partners. They are now affiliated with RMG Consulting Inc. He began his insurance career at Liberty Mutual where he held adjuster, trial adjuster and supervisory positions. At Home Insurance Company, John served in technical management positions in the excess, umbrella and primary casualty fields. He was a Senior Vice President with Reliance National with executive responsibilities for excess, umbrella, international and all specialty claims. John is active in industry organizations and has spoken at several conferences and seminars. He is a graduate of Pace University.

William M. Savino

Bill Savino is managing partner of Rifkin, Radler & Kremer and a partner in the firm's Litigation Practice Group. He has served as counsel to the New York State Senate Committee on Insurance. Presently, he serves as trial counsel representing many of America's largest insurers in complex insurance coverage litigation involving environmental, intellectual property, product liability and reinsurance matters. Bill has been an active lecturer at numerous continuing education programs. He is Second Vice President and a member of the Board of Directors of the Nassau County Bar Association, Past Chairman of its Judiciary Committee and has served as Chairman of the Association's Insurance Committee.

Honorable R. William Schoettler

After graduating from Southwestern University School of Law, Judge Schoettler joined the Los Angeles law firm of Murchison & Cumming in 1964 and spent twenty-three years with that firm. In 1988 he was appointed to the Los Angeles Superior Court by Governor George Deukmajian. During the time he practiced law, he was President of the Wilshire Bar Association, lecturer for the California Continuing Education of the Bar on the subject of tort litigation, tried over seventy-five civil Superior Court jury trials and was a senior partner in the law firm and an Associate of the American Board of Trial Advocates. Judge Schoettler retired from the bench in July, 1992, and joined the Judicial Arbitration and Mediation Service. In 1997, he became an independent judge offering his services as a mediator and arbitrator to the Southern California legal community. He has worked through ADR International and currently Action Dispute Resolution Services. He is a frequent lecturer and has participated in many panel discussions on the subject of tort litigation and jury trials.

Frank R. Schwartz

Frank Schwartz is an Assistant Vice President of GMAC Re Corporation Specialty Underwriting/Claims. He is responsible for the management of facultative claims and the AFB programs within GMAC Re Corporation. Prior to GMAC Re, Frank served in various positions with St. Paul Insurance Company and Aramark. He is an active member of the Quaker City Professional Association and Excess Surplus Lines Claims Association. He is a Past Executive Officer of the Philadelphia Claims Association. Frank is a graduate of Rutgers University. In addition he has completed several continuing education programs.

Michael F. Sommerville

Mike is a partner with Cetrulo & Capone. He specializes in the representation of insurers in declaratory judgment actions in State and Federal Courts in New England involving multi-site environmental contamination throughout the United States and Canada. He has represented potentially responsible parties in negotiations with local, state and federal environmental agencies to accomplish cost effective statutorily required site remediations. In addition he is involved in insurance defense and coverage matters. Mike's claim background includes managerial positions with the Hartford Insurance Company and Commercial Union Insurance Company. He is a member of the Defense Research Institute, American Bar Association and Massachusetts Bar Association. Mike received a B.S. from Towson University, M.A. from Catholic University of America and J.D. from Suffolk University.

Scott H. Steinmetz, P.E.

Scott Steinmetz is a licensed professional engineer. He serves as the Director of Firemen's Fund's Consulting Services Group which is comprised of specialized engineering and scientific resources dedicated to providing value-added consulting and vendor management services within the insurance industry. The group specializes in geology and hydrogeology, environmental assessments, remediation design, cost projection, industry standards of practice, environmental regulations, project and construction management, land subsidence, cost estimating and project scheduling. Scott is a committee member of the American Society of Testing and Materials Environmental Assessment. This organization is at the forefront of developing environmental standards and practices that materially effect environmental costs. Scott received Bachelor of Science and Master of Engineering degrees from Cal Poly San Luis Obispo.



Robert H. Hammond Scholarship Reception

May 16, 2001



Scholarship winner Anthony Rupacciuolo



Vikki Hammond



Edward A. Morris accepts Harmonie Group Award



Guests enjoying presentations



Fresh air reception

Letters of the Law



William F. Fanter

I have just returned from speaking at the X/S London Seminar again organized by Ray Bassett. We had many developing matters to discuss with interested attendees from the London market. From medical monitoring to the brave new world of electronic discovery, from a review of the torts of the 70's, 80's, and 90's to the hot areas of class action litigation, mass torts, and products liability of the 21st Century, there was much to discuss to help sort out the complicated and convoluted legal landscape of the USA. I hope the program is covered in more detail elsewhere in this issue of *Declarations* as it was well attended and, hopefully, well received by the audience.

Speaking of London, the FICC will return to that City during the week of July 23rd to celebrate our sixty-fifth birthday and hold our Annual Meeting. We'll be meeting at the Grosvenor House hotel on Park Lane just across from Hyde Park in Mayfair. An important part of our programing will include an outreach to the international world of insurance and business. Members of X/S will be particularly welcome and will enjoy special arrangements for non-FICC guests. Check out our website for further information on this meeting (www.thefederation.org) or contact me directly at fanter.william@bradshawlaw.com.

Permit me to share some breaking news with you. At our Winter Meeting the FICC membership approved a change in our name to Federation of Defense & Corporate Counsel – FDCC. We hope to have the necessary administrative approvals from our state of incorporation by the start of our fiscal year - October 1, 2001. The change is prompted by a desire to be more inclusive to members of both the insurance and corporate world of business.

Our commitment to the insurance industry remains evident with our seventh annual Litigation Management College in June at Northwestern University, our maintenance of many of our 26 Substantive Law Sections dealing with issues of insurance, and our continued scholarship with emphasis on the insurance world as evidenced

by the article we feature in this issue of *Declarations* authored by James R. Stirn and Kathryn P. Broderick. With apologies to Jim McNamara, the article discusses the significance of the reversal of a lower court victory by *Swiss Re*. Here, the Second Circuit Court of Appeals held that arbitration wording typical of many reinsurance contracts was broad enough to permit arbitrators to decide an important coverage issue on a global basis, without reference to an actual or specific claim. Read the article for a discussion of ways to limit such a result.

This will be my last *Letters of the Law* column as my presidency ends at the close of our Annual Meeting in July. It has been a pleasure to work and travel with George and Anita Casale and Ray and Pauline Bassett as they have so ably carried your colors throughout the world. Moreover, my opportunity to meet with many of your members in Naples and London was both personally and professionally enriching. Hopefully, our paths will cross again.

William F. Fanter, President Federation of Insurance & Corporate Counsel



Hartford v. Swiss Re and Its Implications: Is Reinsurance Arbitration Ready to “Go Global”?

by James R. Stirn and Kathryn P. Broderick¹

For years reinsurance practitioners have debated the relative merits of arbitration and litigation. Among the shortcomings often cited with respect to arbitration is that arbitration awards – because of their brevity and confidentiality – have little or no precedential effect. As a result, arbitration awards rarely provide the parties any guidance in the interpretation of contract provisions that might continue to be at issue between them. The consequence, say critics, is that parties to the reinsurance contract may end up having to re-arbitrate the same dispute over and over, sometimes with inconsistent results.

Such critics are likely to be cheered by a recent decision of the U.S. Court of Appeals for the Second Circuit in *Hartford Accident & Indemnity Co. v. Swiss Reinsurance America Corp.*,² which held that arbitration wording typical of many reinsurance contracts was broad enough to permit arbitrators to decide an important coverage issue on a global basis, without reference to an actual or specific claim. Specifically, the appeals court held that Hartford, the cedent, could seek an arbitral opinion as to the proper billing method for pollution claims under its reinsurance treaty with Swiss Re. The decision reversed a lower court’s ruling in Swiss Re’s favor, which had held that only particular disputes with respect to particular pending claims could be submitted to arbitration.

It is too early to say, however, what the practical impact of the *Hartford v. Swiss Re* decision will be. It is important to note that the Second Circuit’s decision does not compel the arbitration panel to render the type of advisory opinion that Hartford seeks. The appeals court conspicuously refused to analyze the merits of Hartford’s request, saying only that the proper billing method was an arbitrable issue. It is ultimately left up to the arbitrators to decide whether such a global resolution is appropriate or even possible, or whether (as Swiss Re argued) the billing method depends on the particularities of each claim, making it necessary to arbitrate calculation issues on a claim-by-claim basis.

The general thesis of this article is that reinsurance arbitrators faced with this question may be reluctant to provide the kind of global resolution envisioned in *Hartford v. Swiss Re*. Whether to afford such guidance remains in the discretion of the panel, under the Second Circuit’s

analysis, and there are reasons to doubt that arbitrators will exercise such discretion in favor of making broad, explicit rulings that tell parties how future claims should be handled under a given contract.³

The Decision

Before discussing further the implications of the *Hartford v. Swiss Re* decision, a brief look at the court’s opinion and the context in which it arose may be helpful. The liabilities at issue concerned sums paid by Hartford to its various policyholders for environmental pollution claims. Hartford ceded its losses to blanket casualty excess of loss treaties containing standard arbitration clauses, but Swiss Re disputed the manner in which the claims were allocated. Hartford demanded arbitration over 34 unpaid claims; by contrast, Swiss Re demanded arbitration of only one claim. Each party refused to participate in the arbitration demanded by the other, and so each filed an action in New York federal court to compel arbitration under its own terms. As noted by the district court:

“The central dispute underlying these now-consolidated lawsuits is over whether each of Hartford’s pending claims for reimbursement by [Swiss Re] is subject to separate arbitration or whether the arbitration panel must first decide a calculation issue that Hartford contends is common to all such claims, both pending and prospective.”⁴

The allegedly common calculation issue concerned the number of limits and retentions applicable to an environmental claim that involved injury or damage over multiple years. With respect to each such pollution claim, Hartford allegedly paid its insureds by allocating the damage over multiple policy periods and then billed the casualty treaties on the basis of one limit and retention per occurrence for each such underlying policy period. According to Hartford, Swiss Re rejected this allocation of claims to multiple years and instead insisted that each claim be assigned to a single year, subject to only one limit and retention.

Hartford argued that resolving this common calculation issue at the outset by means of a declaratory judgment would streamline the entire dispute resolution process at considerable savings. Swiss Re, on the

other hand, argued that the calculation issue was not necessarily common to all the claims, that other disputed issues would still require arbitration of each claim, and that the contracts themselves limited the scope of arbitration to individual claims or transactions. After much procedural wrangling, the parties agreed that, in any event, a single arbitration panel would decide all the pending claims. But there remained Hartford's demand for a threshold determination of the "global" calculation issue allegedly common to all of its claims, both pending and prospective. As to this, the district court ruled in Swiss Re's favor. Whatever merit there might be to having the arbitrators first address this global issue, the judge held, he could only compel arbitration of actual, pending claims.

Hartford appealed, and the Second Circuit reversed. The appeals court began by noting the strong presumption in favor of arbitrability under the Federal Arbitration Act, which required any doubts about the parties' intent to be resolved in favor of arbitration. The appeals court also noted the broad language of the arbitration clauses in Hartford's reinsurance contracts, which were worded in either of two ways:

"In the event of any difference arising between the contracting parties, it shall be submitted to arbitration..."

"If any dispute shall arise between [the parties] with reference to the interpretation of this Agreement or their rights with respect to any transaction involved,...such dispute...shall be submitted to [arbitration]..." (Emphasis added).

Under such language, arbitration was triggered by "any" difference or dispute over contract interpretation, the court said. Differences over the proper method for billing pollution claims clearly constituted such a "difference" or "dispute" over contract interpretation, and therefore Hartford's demand for a global determination of the billing issue was held arbitrable. However, the court made clear that the arbitration panel was free to decide that a global determination was not possible because the billing method depends on the particularities of each individual claim. The merits of adopting a uniform billing method for all pollution claims was ultimately a question for the arbitrators to resolve, not the court.⁵

Analysis

The holding in *Hartford v. Swiss Re* cannot be regarded as a complete surprise. Given the broad language of the arbitration clauses in question and the liberal construction courts have given to arbitration clauses generally, Swiss Re probably faced an uphill fight getting the judges to deny arbitration on Hartford's terms. However, Swiss Re's argument that the reinsurance contracts require claim-by-claim adjudication based on the facts of each claim may well resonate with an arbi-

tration panel composed of reinsurance professionals.

There is a strong belief among many reinsurance arbitrators and "consumers" of the reinsurance arbitration process that each arbitration stands on its own and does not have binding effect on subsequent claims. Indeed, some view this to be an essential part of the trade-off that consumers make when they choose arbitration over litigation. Accepting the risk of injustice that results from quicker resolution and minimal judicial review is made easier by the knowledge that the impact of an adverse decision will be limited to the claims directly at issue. If it were otherwise, and a single arbitration could determine an issue for all time, the stakes would rise dramatically as would the likely cost and acrimony of the proceeding. Parties would feel compelled to approach the case as they would litigation, and the distinct advantages of arbitration in terms of time and expense might well be lost.

Consequently, there is a widespread feeling in reinsurance circles that the lack of precedential effect associated with arbitration awards is not entirely a bad thing. Evidence of this attitude is found in the confidentiality agreements that parties enter into at the outset of many reinsurance arbitrations, which typically make no exception for disclosure of an arbitration's outcome even in later proceedings involving the same parties.⁶ The standard confidentiality agreement recommended by ARIAS makes no such exception, nor does the sample agreement contained in the RAA arbitration manual.

Whether arbitrators will accept the Second Circuit's invitation to issue comprehensive declaratory judgments of the kind that Hartford seeks in its dispute with Swiss Re is unclear. Traditionally, arbitration decisions are brief and rarely reveal the facts behind the dispute or the reasoning behind the decision.⁷ It is not uncommon for arbitrators to issue a delphic one-page award that the parties could not easily apply to subsequent claims, even if they were inclined to do so.⁸ Some awards have even been known simply to award a dollar figure that neither of the parties proposed.

In recent years, ceding insurers in particular have pleaded with reinsurance arbitrators to issue "reasoned decisions" in hopes that more explicit, detailed awards would bring repose to disputes and prevent redundant arbitration of similar claims. For the most part, reinsurance arbitrators have resisted such pleas, partly out of a concern that detailed written decisions may be more likely to supply grounds for vacating the award.⁹ By contrast, it is well-established that an arbitration award will not be vacated simply because a panel has not set forth the reasons for the award.¹⁰

The reluctance of arbitrators to issue reasoned decisions could further diminish the practical effect of the decision in *Hartford v. Swiss Re*. An arbitration ruling that resolves the billing method for pollution claims

once and for all would seem to require arbitrators to set forth detailed conclusions and the reasoning behind them, if the ruling is to serve the purpose for which parties like Hartford intend it. This is true not just as a practical matter, but for legal reasons too. An arbitration decision intended to be binding on subsequent claims must make clear what arguments the panel considered and rejected, or else courts (or subsequent arbitration panels) may refuse to give it collateral estoppel effect.

Collateral estoppel is the legal doctrine used to bar relitigation of an individual issue in a subsequent action, even though the second action involves an entirely different claim than the first.¹¹ The doctrine promotes both efficiency and consistency of outcome. Before *Hartford v. Swiss Re* raised hopes of “global” issue arbitrations, ceding insurers pinned their hopes on collateral estoppel as a means of avoiding redundant arbitration of the same common issue. A series of court decisions held that arbitrators should consider the collateral estoppel effect of prior arbitration awards and court decisions. However, as a practical matter, the collateral estoppel effect of prior arbitration awards has been severely limited by the absence of explicit findings and reasons in most arbitral decisions.¹² The problem was highlighted in a 1997 Second Circuit decision, *BBS Norwalk One Inc. v. Raccolta, Inc.*,¹³ which held that the absence of a detailed arbitration award undermined its preclusive effect.

The defendants in *BBS Norwalk* sought to have a breach of fiduciary duty suit dismissed on grounds that the identical claim had been denied in an arbitration proceeding between related parties under a shareholder agreement. The Second Circuit held that to prevail on collateral estoppel grounds in such circumstances (at least on summary judgment), the defendant had to prove conclusively that the arbitrator(s) denied the breach of fiduciary duty claim on the merits. In this case, the outcome of the prior proceeding, standing alone, did not make clear whether the arbitrators had denied the fiduciary duty claims on its merits, or for some other reason (*e.g.*, in response to one or more of the defendant’s affirmative defenses). A lawyer’s letter summarizing the result in the arbitration did not suffice.

Under the *BBS Norwalk* decision, therefore, arbitrators considering the collateral estoppel effect of a prior award must delve into what the prior panel did; but short of deposing the prior panel, this cannot be done without a detailed written decision. The message for those seeking to invoke *Hartford v. Swiss Re* is that a global issue determination is only as useful as the arbitrators make it. Unless the panel provides specific conclusions and supporting reasons for its determination of a global issue, later courts or arbitrators may not give the decision preclusive effect in subsequent proceedings.

Conclusion

While the decision in *Hartford v. Swiss Re* broke new ground, it remains to be seen whether the decision will have any significant impact on the way reinsurance arbitrations are generally conducted. First, it should be noted that the parties to reinsurance contracts remain free to restrict the scope of the arbitration clause in such a way as to foreclose the type of declaratory judgment proceeding envisioned by the Second Circuit. Indeed, the appeals court expressly stated, “The parties may...limit by agreement the claims they wish to submit to arbitration,”¹⁴ but that Hartford and Swiss Re had not done so. In theory, at least, this means that parties to future reinsurance contracts could agree to limit the scope of arbitration to individual transactions, and thereby preclude the arbitrators from deciding abstract disputes without reference to an actual, specific claim.

The second constraint on the *Hartford* decision is more fundamental. The mere fact that an arbitration agreement gives the arbitrators discretion to render declaratory judgment-type decisions does not necessarily mean they will readily exercise such power. If history is any guide, reinsurance arbitrators may be wary of issuing broad rulings of general applicability, and prefer instead to decide issues on a claim-by-claim basis as in the past. They may also be reluctant to articulate their reasons for certain rulings, which could limit the binding effect of any “global” issue determination on future claims. In the final analysis, therefore, it is the arbitrators themselves who will determine whether the decision in *Hartford v. Swiss Re* has any lasting impact.

¹ The authors are founding partners in the Washington, D.C. law firm Broderick, Stirn & Regan. The views expressed in this article do not necessarily represent those of the firm or its clients.

² 246 F.3d 219 (2d Cir. 2001).

³ Obviously, given the court’s conclusion in *Hartford v. Swiss Re* that arbitrators may issue a declaratory judgment over one party’s objection, there can be no question that a panel has the power to issue a declaratory judgment in a case where both parties requested such a ruling. Indeed, an arbitration panel’s refusal to do so in the face of the parties’ request for such a ruling might present issues as to the validity of the panel’s action under the Federal Arbitration Act.

⁴ 87 F. Supp. 2d. 300, 301 (S.D.N.Y. 2000).

⁵ The court also found that the parties’ earlier consent to consolidate all of the pending claims in a single proceeding made it unnecessary for the court to decide whether judges have the power to compel such consolidation of claims where the reinsurance contracts are silent on the question of consolidation.

⁶ See Weissman & Annis, “Should Reinsurance Arbitration Decisions Be Confidential?” *Mealey’s Litig. Reporter: Reins.* Vol. 6, No. 21 at 17, 20 (March 13, 1996).

⁷ See Raim & Scott, “Merits of Arbitration v. Litigation,” p. 14 (paper presented at conference entitled “Environmental Liability: Reinsurance & Insurance Winning Strategies,” held in Boston, MA, May 23-24, 1994).

⁸ See Knoerzer, "Collateral Estoppel and Arbitration," *Arias-US Quarterly* Vol. 4, No. 2 (2nd Quarter, 1997), p. 10.

⁹ See Knoerzer, "The Preclusive Effect of Arbitration Awards," *Mealey's Litig. Reporter: Reins.* Vol. 6, No. 16 at 16, 20 (Dec. 20, 1995).

¹⁰ See, e.g., *Transit Casualty Co. v. Trenwick Reinsurance Co. Ltd.*, 659 F. Supp. 1346, 1355 (S.D.N.Y. 1987), *aff'd*, 841 F.2d 1117 (2d Cir. 1988).

¹¹ See *Metromedia Co. v. Fugazy*, 983 F.2d 350, 365 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 2445 (1993) ("The doctrine of collateral estoppel, or issue preclusion, bars a party from relitigating in a second proceeding an issue of fact or law that was litigated and actually decided in a prior proceeding . . . and the decision of the issue was necessary to support a valid and final judgment on the merits.").

¹² *National Union Fire Ins. v. Belco Petroleum Corp.*, 88 F.3d 129 (2d Cir. 1996) (prior arbitration award); *U.S. Fire Insurance Co. v. National Gypsum Co.*, 101 F.3d 813 (2d Cir. 1996) (prior court decision). Resolving a long-standing debate as to who should decide collateral estoppel issues, the Second Circuit held in both cases that where a broad arbitration clause applies, the collateral estoppel defense, like any other defense, was to be determined by arbitrators, rather than the courts.

¹³ 117 F.3d 674 (2d Cir. 1997).

¹⁴ 2001 WL 377122 *5.

ABOUT THE AUTHOR

James R. Stirn is a founding partner in the Washington, D.C. firm of Broderick, Stirn & Regan, where his practice centers on insurance and reinsurance issues. He regularly assists clients with handling environmental, asbestos, and other mass tort claims and has represented reinsurers in disputes involving both their assumed and ceded business. His practice has also included drafting reinsurance contracts and extensive experience dealing with reinsurance pool arrangements. Mr. Stirn has authored several published articles on reinsurance topics and played a significant role in the development of a model reporting form widely used in the industry for reporting environmental claims to reinsurers.

Before entering practice, Mr. Stirn clerked for Judge John J. Gibbons of the U.S. Court of Appeals for the Third Circuit. He graduated magna cum laude from Yale University, and obtained his J.D. degree cum laude from the University of Pennsylvania Law School, where he served as Comments Editor of the *University of Pennsylvania Law Review*.

Kathryn P. Broderick is a founding partner in the law firm of Broderick, Stirn & Regan in Washington, D.C. The firm regularly represents clients on both ceded and assumed reinsurance claims, commutations, pools and associations, contract wording, MGA arrangements, regulatory and corporate matters, negotiation, arbitration, and litigation. In addition to serving as counsel in numerous reinsurance matters, Ms. Broderick has testified as an expert witness on U.S. insurance and reinsurance law in the *Lark v. Outhwaite* litigation and *Hiscox v. Outhwaite* arbitration in the U.K. She has also served as a reinsurance arbitrator and has published extensively in the reinsurance field. Ms. Broderick is a member of the District of Columbia Bar, the U.S. Supreme Court Bar, and the Bars of several federal appellate and district courts. She is also a member of the American Bar Association (Litigation and Tort & Insurance Practice Sections); ARIAS-U.S.; the Defense Research Institute; and the Federation of Insurance and Corporate Counsel, in which she currently chairs the Reinsurance Section. She obtained her undergraduate degree summa cum laude from Trinity College at Duke University, and graduated with highest honors from the National Law Center at George Washington University. She was a member of Phi Beta Kappa and the Order of the Coif, and served as a member and then as Notes Editor of *The George Washington Law Review*.

Intense Fighting; Serious Losses. Outcome Uncertain!

Dispatches from the Hostile Frontier of Electronic Data Discovery'

by Rob Hawn, Esquire. Cozen and O'Connor

This article discusses a contentious trend toward electronic data discovery in civil litigation. It considers the implications of this trend for public and private organizations engaged in litigation. The implications include the possibility that organizations will soon find themselves required, time and again, to produce their electronic records in response to an aggressive adversary's comprehensive discovery requests.² Equally possible, of course, is the reciprocal response, in which discovery requests for an adverse party's electronic data becomes a common tactic of every organization's litigation strategy. In this hostile litigation frontier, the escalation in number, magnitude, severity and costs of these skirmishes seems inevitable.

The article recommends an immediate course of action that an organization can adopt to minimize the damaging consequences, should an adversary launch a discovery assault on its electronic databases. And the article proposes responsible tactics that will enable an organization to recover relevant electronic evidence from an adversary's databases, without contributing unnecessarily to the high cost and elevated tension attributed to such discovery strikes.

The martial theme of this article has been affably applied to the subject matter as a convenient, though not particularly clever analogy. It does not, hopefully, reveal a baser dimension of the author's dark subconscious. In any event, whatever the reader may glean from the following discussion, it should be remembered the best strategy in the face of conflict is most often that which is executed with élan and an enduring sense of humor. Given the gravity of the subject matter and the daunting nature of its numerous associated problems, this may be the only strategy likely to prove effective in advancing or defending the interests of your organization.

I. Standing Vigilant On The Rampart

You may find this article discouraging to read. It would, after all, be difficult to overstate the detriment suffered by some Americans who have been obliged to produce their electronic data in civil discovery proceedings.³ Prodded by a growing body of case law, legal commentary and news media reports of sensational judicial or legislative hearings, trial lawyers are beginning to appreciate electronic data discovery and its potential impact on the course of litigation involving their

clients. Thus, discovery requests seeking a litigant's electronic mail archives and related databases are increasingly common on the litigation front.

Your organization may have already encountered this aggressive trend, either on your terms or otherwise. If not, then the current litigation environment in this country suggests that it's only a matter of time before your organization's electronic records are the objective of another party's discovery plan. The data may even be targeted by a subpoena *duces tecum* arising from litigation in which your organization is not a party. In any event, as a consequence of responding in good faith to electronic data discovery requests, your organization could incur enormous costs in labor, administrative expenses, consultant fees and legal fees, not to mention diversion of corporate resources and interruption of productivity. And well it should, because the consequence of failing to respond, deliberating and in good faith, to such discovery requests is likely to be exceedingly more costly.

Yet, you should also be encouraged as you read. Rarely has a litigation phenomenon revealed itself so emphatically and characteristically, enabling lawyers to advise, and clients to take a proactive course of action to minimize the phenomenon's consequences upon themselves, while maximizing its impact upon their adversaries. Establishing and enforcing electronic record retention policies is the course of action that provides the vigilant organization with a bulwark against discovery assaults. By enhancing the security and sophistication of the enterprising organization's electronic records management, this course of action also positions the organization to exploit the vulnerable adversary, whose electronic databases may be fraught with disregarded, damaging evidence to its own legal culpability. Now is the time to act, however, to minimize your organization's risk of loss from skirmishes over electronic data discovery.

II. The Emerging Threat

"The electronic information revolution is...as profound as the printing press revolution in its potential impact on cultural and social patterns for creating and using information." H. Perritt, Jr., *Electronic Records Management and Archives*, 53 U. Pitt. L. Rev. 963, 980-81 (1992).

"[T]oday it is black letter law that computerized data is discoverable if relevant." **Anti-Monopoly, Inc. v. Hasbro, Inc.**, 94 Civ. 2120, 1995 WL 649934 (S.D.N.Y. Nov. 3, 1995).

One explanation for the increasing attention now being given to the discovery of electronic data may lie with the fact that until relatively recently, few people and certainly very few lawyers or judges had acquired any meaningful experience or skill in using computers. This shared ignorance might easily have discouraged all but the most adventurous litigants and their counsel from exploring the foreboding frontier of electronic data discovery. However, today, as one court observed: "From the largest corporations to the smallest families, people are using computers to cut costs, improve production, enhance communication, store countless data and improve capabilities in every aspect of human and technological development." **Bills v. Kennecott Corp.**, 108 F.R.D. 459, 462 (D. Utah 1985). See generally G. Johnson, *Emerging Technologies and the Law: A Practitioner's Overview of Digital Discovery*, 33 *Gonz. L. Rev.* 347, 348 (1997).

In the past ten years, virtually everyone, including members of the corporate and legal communities have become more sophisticated in their understanding and use of computers and computer data. Still, for the most part, the restraint among litigants regarding the discovery of an adversary's electronic records has long continued. Perhaps initial intimidation engendered by ignorance has been supplanted more recently by reluctance spawned from a common sense of "mutual assured destruction", considering the potentially enormous expense of engaging in reciprocal electronic data discovery.⁴ Yet, despite the chill of reciprocation, a growing number of litigants are emboldened to engage in electronic data discovery by an increasingly irresistible allure: **electronic mail.**⁵

Judicial opinions, news reports and, for that matter, internet chat rooms regularly discuss examples of long forgotten and presumably destroyed electronic mail that was subsequently uncovered in litigation by an adversary through discovery and admitted into evidence with devastating effect at trial.⁶ As one civil litigator observed: "Most sophisticated business persons have been trained not to put damaging things on paper, but I don't think the culture's gotten there on e-mail, because people don't think of them as documents. People think of them a lot like telephone conversations." John Willems, litigation partner at White & Case, New York City, as quoted in *Electronic Discovery Proves Effective Legal Weapon*, *The New York Times*, March 31, 1997. In part, the recurring circumstance in which compromising electronic data is exposed through civil discovery proceedings results from a widely shared naivete among executives, managers and employees of most public and private organizations regarding basic computer operating systems and appli-

cations. Foremost among common misconceptions is the belief that an electronic message or "email", once deleted by the sender or recipient, is destroyed and unrecoverable, hence undiscoverable. This is, of course, simply untrue.⁷

A simplified explanation of the basic computer technology underlying the "delete" mechanism exposes the myth.⁸ Generally, a computer's operating system keeps a record of every data file present on its storage device (e.g., its hard disk drive). Depending on the system, the record is maintained in an electronic directory called a file allocation table, a master file table, or less frequently a VTOC (volume table of contents). This directory tracks all of the space on the storage device that's available to record data at any given time.⁹

Typically, a computer's storage device is comprised of several round platters, which are coated with a magnetic medium. The platters are electronically formatted with circular tracks that run from the outside edge of the platter toward its center. Each track is further divided electronically into sectors¹⁰. A sector is capable of holding 512 bytes of information, each of which in turn can hold 8 bits of information. A bit has been described as "the quintessential data element: it exists in only two states – binary 1 or 0, on or off".¹¹

Because few documents are comprised of a mere 512 bytes of information, more than one sector is usually required to record a document. Thus, when a computer's hard drive is originally formatted, the operating system automatically collects the sectors into groups and assigns each group a unique address. These groups, ranging in size from a few sectors in number to more than 128 sectors, are called allocation units, blocks or clusters.¹² The sectors comprising a specific cluster may be located in a variety of different areas on the platter. However, a cluster's sectors are usually situated contiguously, to maximize the computer's search and retrieval speed. As a rule, only one file is recorded on a cluster of sectors. By rapidly distinguishing between used and available clusters on the platter, the computer's directory allocates an available cluster onto which a document's data can be recorded.¹³

Given this background, it's perhaps easier to understand the computer process of "deleting" a recorded document (a "file"). As previously noted, when "deleted", a file is not instantaneously eradicated. Instead, the file's directory entry is marked "invalid", effectively severing the link between the file's directory entry and its actual data. Consequently, the sectors storing the "deleted" file data are released and, thus, made available to be overwritten with new data.¹⁴

It's difficult, however, to predict if, when or how much of any released sector will actually be overwritten with new data. Certainly, a computer system's data storage capacity and amount of activity affects the chances that deleted data will be overwritten on a

released sector within a specific time period. The chances that data will be overwritten are further influenced by the operation of some common computer processes, which tend either to preserve data or destroy it.¹⁵ In any event, so long as it's not overwritten, the recorded data of a "deleted" file, or at least some portion of that data, can remain intact on a computer's storage device indefinitely and may, therefore, be recoverable. In this regard, it's important to remember that blocks or clusters of sectors bearing data of a "deleted" file will be overwritten only by data of a single "new" file. Thus, if the "new" file contains less data than the "deleted" file, then a fragment of the "deleted" data will not be overwritten with "new" data. Consequently, the surviving data fragment of the deleted file will be preserved for as long as the "new" file continues to occupy that block of sectors.¹⁶

Concededly, the foregoing discussion does not adequately reflect the complexity of current technology. It should, however, serve to dispel the myth that deleted data cannot be discovered. It should also discourage any notion of diverting adversaries from discovering relevant electronic data with bald representations that the requested information is lost or deleted.¹⁷ No sophisticated adversary will be put off by such contentions. And any organization that resorts to these excuses assumes a serious risk. According to one commentator:

Few organizations actually know the full extent of the information they possess. ...It is not unusual to find even a relatively small organization possessing tens of gigabytes¹⁸ of data accumulated over the years – and not even remotely aware of the actual contents of all that data. Institutional databases spanning terabytes¹⁹...are becoming more common – and will proliferate in the future.²⁰ The simple fact is that most organizations simply don't have a clue as to what is in all that data. Or at least they don't until they are forced to produce it – and then they wish they had been a bit more careful in their dataacquisition patterns.²¹

If the commentator is correct in his conclusions, then your own organization may be awash in an unnecessarily vast universe of potentially discoverable and possibly harmful electronic information. It is this universe of data that, sooner rather than later, an adverse litigant will try to recover from your organization through civil discovery.²²

III. Rules of Engagement

It is beyond the scope of this article to exhaustively review the substantial and growing body of case law and legal commentary relating to the discoverability of a litigant's electronic data.²³ A few legal points of reference may, however, prove helpful.

It has been held that a discovery respondent is required to produce data in digital format, although

this may require the respondent to create a costly new electronic record and despite the respondent's prior production of the requested data in "hard copy" format. See **National Union Electric Corp. v. Matsushita Electric Industrial Co.**, 494 F. Supp. 1257 (E.D. Pa. 1980). In part, the **NUE** Court based its decision to compel the production of data in digital form on the Fed. R. Civ. P. 34 provision requiring requested information to be produced in a "reasonably useable form".²⁴ *Id.* at 1262. See also **Anti-Monopoly, Inc. v. Hasbro, Inc.**, *supra*. In this context, it's significant that experts have estimated thirty percent (30%) of electronic data never appears on paper and would not be discovered through the production of paper records, including "hard copies" of electronic data. J. Jessen & K. Shear, *The Impact of Electronic Data Discovery on the Corporation*, Presentation at the National Conference of the American Corporate Counsel Association in May 1994.

Similarly, it has been held that a discovery respondent must extract and produce relevant data from its computer databases, although this may require the respondent to create a new program to retrieve the data. See **Oppenheimer Fund, Inc. v. Sanders**, 437 U.S. 340 (1978). Likewise, a respondent has been required to produce data sets stored on computer tapes sequentially, just as a respondent might normally organize files when producing paper documents. See **Daewoo Electronics Co. v. United States**, 650 F.Supp. 1003 (Ct. Int'l Trade 1986). "The normal and reasonable translation of electronic data into a form usable by the discovering party should be the ordinary and foreseeable burden of a respondent in the absence of a showing of extraordinary hardship." *Id.* at 1006.

Effective discovery of electronic data will include initial comprehensive requests for information regarding the respondent's entire electronic information systems profile. These requests may be propounded in the nature of document requests or a deposition of a knowledgeable party representative. The requests will cover in detail the features of the respondent's general systems, networks, desktop and laptop computers, backup and archiving systems, electronic mail and other messaging systems, document management systems, database management systems, applications and system auditing functions. In this way, the requesting party may seek relevant information by focusing further discovery requests on areas of the respondent's electronic information systems that are more likely to contain the information.

A respondent's failure to adequately search all of its systems for relevant data or to respond fully and completely to proper electronic data discovery requests is counterproductive and risky. First, there is little judicial sympathy for organizations that complain of the burden and high costs associated with producing their electronic data in response to discovery requests.²⁵

In **Bills v. Kennecott Corp.**, *supra*, for example, a discovery respondent asked the court to shift to the requesting party the costs of retrieving electronic data from the respondent's computers. In denying the respondent's motion, the **Bills** Court considered four factors:

1. Whether the amount of money involved is not excessive or inordinate;
2. Whether the relative expense and burden in obtaining the data would be substantially greater to the requesting party as compared with the responding party;
3. Whether the amount of money required to obtain the data as set forth by the responding party would be a substantial burden to the requesting party; and
4. Whether the responding party is benefited in its case to some degree by producing the data in question.

Bills v. Kennecott Corp., 108 F.R.D. at 464. In reaching its decision, the court observed: "...that information stored in computers should be as freely discoverable as information not stored in computers...the party responding [to discovery requests] is usually in the best and most economical position to call up its own computer stored data." *Id.*²⁶

And further, the courts are completely intolerant of organizations that attempt to destroy relevant electronic data, rather than produce it, or that have failed to adequately preserve relevant data for discovery, or that have simply ignored their obligations to produce relevant data in response to appropriate discovery requests. Confronted with such misconduct, judges have regularly imposed severe sanctions against the wrongful party.²⁷

For example, in *Crown Life Ins. Co. v. Craig*, 995 F.2d 1376 (7th Cir. 1993), Craig sought discovery from Crown Life of all written documents relating to the calculation of commissions owed to Craig by Crown Life. Eventually, Crown Life was compelled by magistrate's order to produce all responsive documentation, which the insurer, by affidavit, affirmed it had done. Thus, Craig received only summary documentation of his commissions in the belief that no supporting data existed. At trial, evidence revealed that Crown Life maintained a database containing raw data underlying the summaries, all of which data were retrievable, but none of which was produced to Craig. Pursuant to Craig's motion, the trial court imposed sanctions that were tantamount to a default judgment against Crown Life, when the court learned that Crown Life witnesses studied information from the database while preparing for trial. Crown Life appealed the severe sanction, contending the database's data was never specifically requested in dis-

covery. Further, Crown Life argued that the raw data stored in the database were not "documents", because the data never existed in "hard copy" format. The Seventh Circuit was not persuaded, noting that Fed. R. Civ. P. 34 included computer data in its description of documents. *Id.* at 1383. Accordingly, the appellate court affirmed the trial court's imposition of sanctions.²⁸

And in circumstances where a default judgment was unwarranted, courts have not been reluctant to impose monetary sanctions against a wrongful party. See **Procter & Gamble Co. v. Haugen**, 179 F.R.D. 622, 631-2 (D. Utah 1998) (wherein monetary sanctions were imposed against a corporation that failed to search or preserve electronic mail communications involving key employees who were previously identified as having relevant information). See also **Applied Telematics, Inc. v. Sprint Communications Co.**, 94-4603, 1996 U.S. Dist. Lexis 14053 (E.D. Pa. Sept. 17, 1996) (wherein monetary sanctions were imposed against a party that failed to prevent relevant data from being overwritten on back-up tapes, which in the normal course of business were recycled weekly).

Additionally, courts have sanctioned parties for such misconduct by subjecting them at trial to an adverse inference regarding their failure to produce relevant electronic data.²⁹ To this end, a court may instruct the jury that if they believe it to be appropriate, they may assume evidence made unavailable by the acts of a party or its agents would have been unfavorable to that party. See generally **Nation-Wide Check Corp., Inc. v. Forest Hills Distrib., Inc.**, 692 F.2d 214 (1st Cir. 1982) (affirming a trial court's imposition of sanctions involving an adverse inference instruction). See also M. Bester *A Wreck on the Info-Bahn: Electronic Mail and the Destruction of Evidence*, 6 CommLaw Conspectus 75 (Winter 1998) at 83 n.123.³⁰

In the context of sanctions, those cases in which litigants have been punished for failing, either intentionally or negligently, to preserve relevant electronic data are particularly pertinent. Their importance derives from the broad judicial interpretation of a litigant's obligation to preserve relevant data:

While a litigant is under no duty to keep or retain every document in its possession once a complaint is filed, it is under a duty to preserve what it knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably likely to be requested during discovery, and/or is the subject of a pending discovery request.

William T. Thompson Co. v. General Nutrition Corp., 593 F. Supp. 1443, 1455 (C.D. Cal. 1984) (citations omitted and emphasis supplied). In this case, the court entered a default judgment against G.N.C. when it determined that G.N.C. destroyed records, includ-

ing electronic data, after service of the complaint, but before discovery requests were propounded. Consider as well, ***In re Prudential Ins. Co. Sales Practices Litig.***, 169 F.R.D. 598 (D. N.J. 1997), wherein the court ordered Prudential to preserve all documents relevant to a class action brought by policyholders. Although Prudential directed its employees to preserve information pursuant to the court order, some relevant information was nevertheless negligently destroyed due to Prudential's "haphazard and uncoordinated approach to document retention". *Id.* at 615. Consequently, the court sanctioned Prudential by imposing a \$1 million fine, ordering the payment of plaintiffs' attorney fees, and further ordering Prudential to promulgate a formal, company-wide document retention policy. *Id.* at 607-12 and 616-1.

Two caveats are warranted at this juncture. First, discovery disputes involving electronic data are being resolved with far less predictability and far greater expense to litigants than might be suggested by the case law. Organizations are being subjected to avoidable adverse, costly and unjust discovery orders, because litigants, their counsel and the courts continue to harbor serious misconceptions about numerous technical and practical aspects of electronic data discovery. Clearly, the unpredictability of judicial intervention involving electronic data discovery disputes has been influenced by the failure of litigants and their counsel to adequately educate themselves on the wide array of technical, legal and practical ramifications of engaging in discovery of this nature. Consequently, they are incapable of effectively educating or otherwise providing correct information to the judges who are called on to resolve these complex disputes. Judges must be educated, adversaries must be constrained and organizations, themselves, must be disciplined to conduct electronic data discovery according to reasonable, focused, technically sound, legally supported and preferably negotiated schedules, schemes and protocols. Unless litigants conduct this process responsibly, and courts supervise it sensibly, the discovery of electronic records can lead to extraordinarily expensive and unjust results, which could ultimately compromise the integrity of our justice system.

Secondly, the case law does not begin to adequately describe the catastrophe befalling an organization that is sanctioned for spoliation of electronic evidence as a consequence of its negligent, ambivalent or arrogant response to electronic data discovery requests. Nor does the case law reflect the hidden costs incurred by every organization that is subjected to discovery of its electronic records. Typically, in these circumstances, organizations are required to commit extraordinary manpower and technological resources to conduct an adequate search of their vast databases and other electronic archives. Inevitably, these organizations endure serious disruption of their normal operations as a consequence of these searches. Often, they require the expertise of

specialists to identify, locate, access and produce discoverable data that was originally created or retained on currently obsolete computer systems. And almost certainly, they incur huge legal fees, as their attorneys review emails and other electronic documents by the tens of thousands to redact privileged information, protect confidential communications and avoid "overproduction" of information before turning the material over to their adversaries.³¹

These caveats may seem exaggerated to you. They are not. And while the discovery of electronic records is costly to all parties under any circumstance, your organization can significantly reduce the expense of tomorrow's electronic data discovery by acting prudently today.

IV. Establishing A Defensive Perimeter

Together, the previously cited judicial opinions underscore a pair of equally important, but contrary concerns. First, organizations as litigants are extremely vulnerable to the discovery by adversaries of seriously compromising evidence, because their needlessly vast electronic databases are likely to contain such information, although the problematic data should have been purged months, if not years ago, when the organizational value of the data expired. Obviously, organizations must attempt to reduce their exposure by purging all valueless or otherwise obsolete data from their electronic files. Yet, the untimely or ill-considered purging of any electronic data can expose organizations to devastating judicial sanctions and other catastrophic consequences, even if the purging occurs before litigation ensues.

Of course, the tension between these competing concerns generates conditions ripe for exploitation by an organization's adversaries, either by discovering the organization's compromising data or by subjecting the organization to possible court sanction for spoliation of evidence, if the data can't be produced. It is a veritable "win-win" situation that increasing numbers of litigants are enjoying at the expense of their unprepared or ill-advised adversaries.

Simply stated, the problem confronting concerned organizations is the need to purge their electronic records at the risk of incurring severe court sanctions for doing so. This problem, however, can be remedied. "The best way to avoid any appearance that documents have been destroyed in order to avoid production in litigation is to establish a document retention program that is designed for the selective retention and destruction of documents." See L. Youst & H. Koh, *Management and Discovery of Electronically Stored Information*, Computer L. Rev. and Tech. J. (Summer 1997) at 86.

Document retention programs have been described as procedures for the systematic review, retention and destruction of documents received or created in the

course of business. See, C. Cotton, *Document Retention Programs for Electronic Records: Applying a Reasonableness Standard to the Electronic Era*, 24 Iowa J. Corp. l. 417, 419 (1999). This description also applies to electronic data retention policies. For this reason, references to document retention policies should be interpreted to include policies specifically applied to electronic data, as well. The terms, therefore, may be used interchangeably.³²

Unfortunately, it appears that record retention programs are not widely established, nor enforced by organizations that generate and maintain electronic data. "The vast majority of large business enterprises now have some formal document management program. Nevertheless, some companies still approach document retention and destruction in an ad hoc manner." L. Solum & S. Marzen, *Truth and Uncertainty: Legal Control of the Destruction of Evidence*, 36 Emory L. J. 1085, 1185 (1987) (footnote omitted). "While most clients have document retention policies, few clients apply those policies to electronic information." Committee on Federal Courts, *Discovery of Electronic Evidence: Considerations for Practitioners and Clients*, 53 The Record 656, 667 (Sept./Oct. 1998).

Candidly, there are advantages and disadvantages to the adoption of record retention policies. One commentator identified and distinguished both in this manner:

Four advantages—

1. [t]he elimination of the onerous expense of storage of irrelevant and obsolete documents;
2. a reduction in the burden and cost of retrieval of documents in response to business requests, government investigations or litigation;
3. a substantial reduction of legal risks flowing from documents, particularly those which are hastily drafted, erroneous or misleading; and
4. the avoidance of an adverse inference from the non-production of documents in litigation.

Six disadvantages—

1. the expense of establishing and administering a program, including the commitment of human and capital resources needed to assure compliance;
2. the inability to prove a fact affirmatively, because documents have been destroyed;
3. a diminished flexibility of response to formal and informal requests for documents;
4. the adverse inferences arising from incomplete compliance with the retention program;

5. the adverse inferences arising from selective destruction outside the boundaries of the program (selective destruction appearing less corrupt without a program); and

6. other adverse legal effects, including the discoverability of the program.³³

Generally, these advantages and disadvantages apply as well to electronic data retention policies. Thus, although the storage expense of electronic data is obviously far less than the cost to store paper documents, the costs of searching electronic data for relevant information can be enormous, particularly when attorneys must review hundreds of thousands of unclassified emails to redact privileged communications. Consequently, while the first advantage may not apply to electronic data, the second advantage clearly does, as do the third and fourth identified advantages.

All of the disadvantages, on the other hand, apply with equal validity to electronic records. Yet, these disadvantages notwithstanding, the adoption of electronic data retention policies is necessary, if organizations are to effectively prepare themselves for an onslaught of electronic data discovery requests. Accordingly, the disadvantages serve as reference points to assure that an organization adopts appropriate retention policies, and correctly applies them for the right reasons. In this regard, the fourth and fifth identified disadvantages, pertaining to the *ad hoc* and selective enforcement of record retention policies, describe practical errors that are important to avoid.

There are two serious mistakes that can be made when instituting [a document retention] program. First, conducting the program on an *ad hoc* basis and second, conducting it on a selective destruction basis. An *ad hoc* approach may take place, for example, when additional space is needed or when files are very old. This approach is typically disorganized and may not destroy all copies of the desired documents, or it may destroy documents that must, by law, be retained. A selective destruction is usually triggered by some event, such as an investigation or lawsuit...embarking on this type of program can be very dangerous due to the exposure of the party destroying the documents to potential civil and criminal liability. Youst & Koh, *supra* at 86-7.

Though presumably obvious, there is a third conceptual mistake in creating record retention policies that should be mentioned and certainly must be avoided. Under no circumstances may an express or implied purpose of a record retention policy be the destruction of documents, the contents of which are perceived to have legal significance that may one day be harmful to the organization. In **Carlucci v. Piper Aircraft Corp.**, 102 F.R.D. 472 (S.D. Fla. 1984), the trial court sanctioned

Piper by entering a default judgment against the aircraft manufacturer after learning that as a matter of procedure Piper employees systematically reviewed and destroyed specific classes of documents. Apparently, Piper viewed documents such as engineering drawings as potentially harmful, simply because the documents were likely to be relevant in some future litigation. In **Carlucci**, the company's keen foresight led to its downfall, when as a consequence of this policy, Piper could not produce to the plaintiff certain obviously relevant documents, which had long since been destroyed. Remarkable, in the court's opinion, was the fact that Piper's practice of destroying documents occurred pursuant to a policy, which had a stated purpose of destroying records that might be harmful to the company in litigation. *Id.* at 485-6.³⁴

Donald Skupsky, a widely recognized authority on document retention procedures and policies, has identified eight basic steps in the creation and early operation of valid, effective record retention programs encompassing both paper and electronic documents:

1. Systematically develop the records retention program.
2. Address all your records in the records retention schedules, including reproductions.
3. Address all media in the records retention schedules, including microfilm and machine-readable computer records.
4. Obtain written approvals for the records retention schedules and the program procedures.
5. Systematically destroy records when permitted by the records retention program.
6. Control and manage the operation of the records retention program.
7. Stop destroying records, even when permitted by the records retention program, when litigation, government investigation or audit is pending or imminent.
8. Maintain documentation supporting the development and implementation of the records retention program, including records retention schedules, procedures, changes in procedures, approvals, legal research and listing of records destroyed.

See D. Skupsky, **Recordkeeping Requirements**, §2-10 (1991). This article's author has assisted Cozen and O'Connor clients in establishing electronic data retention policies according to Skupsky's plan. The process is work intensive and requires organization executives, operations managers, human resources personnel,

information technologies specialists, outside consultants and legal counsel to collaborate as a team. Each team member is called upon to devote substantial amounts of time and resources to achieve the objective, which is the formulation of a policy that meets the following requirements:

1. that documents maintained in accordance with applicable laws and regulations be preserved for as long as necessary, but in any event for a term not to exceed a specified number of years;
2. that documents required for the conduct of business be filed in a systematic manner and be accessible whenever necessary;
3. that documents relevant to foreseeable or pending litigation and other judicial or governmental investigations or proceedings be identified and preserved;
4. that documents required to be permanently maintained are catalogued and reduced to electronic media for convenient and economical storage and access;
5. that all other documents be destroyed;
6. that audits of all electronic data be regularly conducted to assure compliance with the retention policy provisions;
7. that a mechanism be established which assures the immediate suspension of data destruction occurring pursuant to provisions of the retention policy; and
8. as a guiding principle, that the retention policy assures any uncertainty as to its application be always resolved in favor of retention.

See W.F. Reinke, *Limiting the Scope of Discovery: The Use of Protective Orders and Document Retention Programs in Patent Litigation*, 2 Alb. L. J. Sci. & Tech. 175 (1992).

Done correctly, the process involves the delegation and performance by team members of important tasks, not simply in the inception of a record retention program, but also in its continuing operation and enforcement. Examples of these tasks include:

1. Profiling the company's computer systems to determine how they work in an operational context. This profile needs to include a review of the hardware and software in use, an inventory of the electronic media available, such as computer tapes and disks, and an analysis of the accumulated or stored information.

2. Creating an electronic information database that indexes electronic media and details the file sets contained in that media.³⁵
3. Developing and implementing policies and procedures regarding information creation and retention.
4. Periodic review and audit of the information systems.³⁶

K. Shear, Electronic Evidence; It's Not 'Cutting Edge' Anymore. Disregard it at Your Peril", Law. PC at 2, (August 1, 1994). Predictably, the process requires team members to participate in numerous meetings and consultations, to engage in thoughtful inter-disciplinary debate and deliberation, and to carefully maintain a written record memorializing the factual bases and other considerations that prompt the adoption of specific policies or procedures. Underpinning this initiative is the need for record retention policies and procedures that are practical, effective, enforceable and validated by the express commitment of the organization to enforce the policies as written. If the product of the initiative is a record retention program that is deficient in any of these respects, then the effort may be wasted.

Not to be lost in this general discussion of record retention policies is one necessary policy feature, noted both by Skupsky and Reinke, *supra*, which derives its importance primarily from the unfortunate consequences that may befall an organization, if the feature doesn't work. This, of course, is the policy mechanism that assures the immediate suspension of document destruction schedules, as applied to specific types of documents, when it's determined that those documents may be relevant to a particular legal action. Without the effective operation of this mechanism, record retention programs are useless to organizations that depend on the existence of these programs to shield them from judicial sanction for spoliation of evidence resulting from routinely scheduled document destruction. See, e.g., ***In re Prudential Ins. Co. Sales Practices Litigation***, *supra*. The effective operation of this mechanism alone, however, will not spare an organization from judicial sanction, if a court determines that the organization destroyed potentially relevant documents in accordance with a record retention program, which is unreasonable in its purpose, design or operation.

To decide if a party acted reasonably in destroying relevant documents pursuant to an established record retention policy, courts have been guided by ***Lewy v. Remington Arms Co.***, 836 F.2d 1104 (8th Cir. 1988). In ***Lewy***, Remington appealed a jury verdict of liability for injuries sustained by Lewy resulting from an accidental discharge of a shotgun. Specifically, Remington argued that the following jury instruction was inappropriate: "If a party fails to produce evidence which is

under his control and reasonably available to him and not reasonably available to the adverse party, then you may infer that the evidence is unfavorable to the party who could have produced it, but did not." *Id.* at 1111. Lewy sought and obtained this jury instruction, because Remington had been unable to produce documents, which were destroyed pursuant to Remington's record retention policy. Remington contended that the documents were destroyed according to routine procedures and should not, therefore, give rise to an adverse inference. *Id.*

The Eighth Circuit reversed and remanded the case, setting forth several factors to be considered by district courts in determining whether or not sanctions are appropriate when a party is unable to produce evidence, because the evidence was destroyed pursuant to a record retention program. *Id.* at 1112. First, the trial court must determine whether [the delinquent party's] record retention policy is reasonable considering the facts and circumstances surrounding the relevant documents: "For example, the court should determine whether a three year retention policy is reasonable given the particular document. [It] may be sufficient for documents such as appointment books, but inadequate for documents such as customer complaints". *Id.* Then, the court must consider the extent to which the destroyed documents were relevant to pending or probable lawsuits: "In making this determination, the court may also consider whether lawsuits concerning the complaint or related complaints have been filed, the frequency of such complaints and the magnitude of the complaints.". *Id.* Finally, the court must consider whether the record retention policy was instituted in bad faith: "In cases where a document retention policy is instituted in order to limit damaging evidence available to potential plaintiffs, it may be proper to give an instruction similar to the one requested by [Lewy]". *Id.*

The ***Lewy*** criteria are, of course, useful to organizations engaged in the process of establishing record retention policies. These organizations must, however, consider an additional factor, which the ***Lewy*** Court offered in dicta: "[I]f the corporation knew or should have known that the documents would become material at some point in the future, then such documents should have been preserved... [A] corporation cannot blindly destroy documents and expect to be shielded by a seemingly innocuous document retention policy." *Id.* As this caveat reminds us, the thoughtful establishment and consistent enforcement of record retention policies will not immunize organizations from judicial sanction, if they fail to pay careful attention, as civil litigants, to their fundamental discovery obligations. However, policies that meet the requirements of the law and adopt the advice of the commentators should provide the vigilant organization with secure and effective electronic data management, so long as the policies are constantly, correctly and consistently enforced.³⁷

V. Reconnaissance in Force

Practically speaking, it is senseless for any organization to pursue discovery of an adversary's electronic records unless the organization is prepared to respond in good faith to the adversary's inevitable "counter" requests for electronic data. After all, the organization seeking an opponent's electronic files, though its own electronic records are in disarray, has foolishly exposed itself to a catastrophe, if the records contain damaging evidence against its interests that the organization doesn't know exists.³⁸ Obvious as it seems, this danger can be overlooked by an organization boiling with enthusiasm to rake through another entity's electronic databases in search of relevant evidence. The prudent organization is well advised, therefore, to "secure its own defenses" by instituting and enforcing record retention policies and practices before it contemplates a foray deep behind an adversary's electronic lines of defense.³⁹

For the organization launching a discovery assault ("requestor") against an adversary's electronic databases ("respondent"), it is critically important to fix the location of the targeted electronic information. Otherwise, this extremely volatile evidence may evaporate and disappear.

The risk of spoliation of documents is also greater with electronic evidence than it is with documentary evidence. The daily operation of computer systems can result in the deletion or alteration of electronic evidence. For example, if files have been deleted, but not yet overwritten as of the commencement of a litigation, continued use of the computer system may result in those deleted files being overwritten before they are preserved for document production.

Committee on Federal Courts, *Discovery of Electronic Evidence: Considerations for Practitioners and Clients*, *supra*, at 662. Preservation of this evidence can be achieved, depending on the circumstances, by one of several means. In most cases, it should be sufficient to place the respondent on notice by written correspondence of its legal obligation to preserve electronic data, which the requestor believes to be relevant to matters of pending litigation.

This notice letter, which is best if drafted as instructive in tone and substance, should clearly state that it has been written preliminary to, rather than in lieu of forthcoming comprehensive discovery requests. The letter should identify, as specifically as possible, what electronic data the requestor seeks, where the targeted data may be stored, the types of records or information that will be required to authenticate the data, and who might possess relevant information regarding the data.⁴⁰ The letter should also specify that the respondent is required to produce an exact copy ("a mirror image") of the targeted data to the requestor in electronic form.⁴¹

To be effective, the notice letter should be delivered to the respondent or its counsel as soon as the requestor reasonably believes that potentially relevant electronic information may be in the respondent's possession, custody or control. In most cases, this belief roughly coincides with the filing of a complaint in the underlying legal controversy. The notice letter should, therefore, be served with the requestor's complaint or responsive pleading, as the case may be. In some cases, however, the requestor's belief exists before any complaint has been filed in a legal controversy. In such circumstances, the letter should not await the filing of a complaint; instead, it should be written and delivered to the respondent promptly.

Occasionally, a requestor may reasonably believe that once a respondent is placed on notice regarding the potential relevance of its electronic records, evidence will be lost or destroyed, absent judicial intervention. In these circumstances, injunctive relief in the form of a temporary restraining order ("TRO") should be available to the requestor in most jurisdictions.⁴² This recourse enables the requestor to obtain a restraining order and serve it on a responder without alerting the responder in advance that its electronic data has been targeted for discovery. By design, however, *ex parte* restraining orders are meant to preserve the status quo only for that period of time necessary to hold a hearing. ***Granny Goose Foods, Inc. v. Brotherhood of Teamsters***, 415 U.S. 423, 439 (1974). Infrequently, the requestor may believe that its interests will not be adequately protected by the issuance of a TRO. Should this circumstance arise, it may be possible for the requestor to obtain an *ex parte* court order directing the seizure and impoundment of the respondent's electronic files. However, such extreme judicial intervention can be obtained only if the requestor demonstrates that the respondent would disregard a direct court order and dispose of the targeted electronic data within the time it would take to convene a hearing. See ***First Technology Safety Systems, Inc. v. Depinet***, 11 F.3d 641, 650 (6th Cir. 1993) (*dicta*).

Implicit in the preceding tactical discussion is an assumption that the requestor has acquired detailed knowledge of the respondent's electronic records and computer systems, sufficient to provide the specific information recommended for inclusion in the notice letter or a motion for injunctive relief. Frankly, this degree of knowledge is rare. Usually, the requestor has little or no insight regarding the technological layout and function of a respondent's computer systems. Yet, without knowing an adversary's electronic "profile", it's often difficult to propound initial discovery requests for the production of electronic data that are not so broadly applicable or generally worded as to avoid incurring the respondent's immediate objection.⁴³ Therefore, the requestor must determine the respondent's electronic "profile", as quickly and thoroughly as possible. Until the requestor gains a basic understanding of how the

targeted computer systems are physically and electronically structured, as well as who operates and supports the systems, the electronic discovery initiative will be easily misguided and deterred. If this intelligence isn't developed early and adequately in the case, then the initiative could be doomed, regardless of how much time, money and resources are ultimately committed to the effort.

To develop this intelligence, the requestor should initiate early, informal negotiations with the respondent aimed at limiting and refining the scope of the electronic data sought and identifying where in the respondent's computer systems the relevant electronic data is most likely to be found.⁴⁴ Informal pursuit of electronic data through negotiations with an adversary should never be overlooked or discounted, because powerful incentives exist for both parties to cooperate in this discovery, not the least of which is a shared concern for cost management. Eventually, however, most cases require some level of formal discovery to develop the parties' respective electronic profiles. The initial phase of discovery should, therefore, involve interrogatories and requests for the production of documents that are designed to establish the respondent's electronic profile in detail. Often, this phase of discovery includes the deposition of the respondent's designee(s) having knowledge of the structure, organization, and operation of the respondent's various computer networks.⁴⁵

During the second phase of discovery, selected employees or other representatives of the respondent are deposed regarding the manner in which they used the organization's computer systems while conducting the organization's business or otherwise engaging in activity on the organization's behalf. In most cases, deponents are selected for one of two basic reasons. First, people are deposed because they regularly operated segments of the respondent's computer systems that are likely depositories of relevant electronic data. And secondly, people are deposed because their activity, itself relevant to the litigation, involved the operation of specific portions of the respondent's computer systems, which may therefore contain electronic evidence. During these depositions, it is critically important to determine precisely how the deponents operated their workstation computer hardware and software, as well as other elements of the respondent's computer systems accessible to them. Only by determining exactly what these witnesses did with their computers, and how they did it, during the normal course of operations can the requestor and its consultant position themselves to locate, access and recover relevant evidence from a respondent's computer systems.

The remaining phases of discovery involve the isolation, authentication and preservation of the electronic evidence, followed by an analysis of the data to determine, among other things, whether or not further

discovery of the respondent's electronic databases is warranted. During these phases, the consultant's role is pivotal, both in assuring that the evidence is found and correctly interpreted, but also in recovering the evidence in the most efficient and cost-effective manner.⁴⁶ Often, the latter consideration requires negotiation to gain direct, on-sight access to the respondent's computer systems. If the respondent can be persuaded to provide such access in the shared interest of controlling litigation costs, then direct databases searches conducted by the respondent's personnel under the direction of the requestor's consultant are certain to be quicker, thorough, sharply focused and productive. Consequently, the analysis of the recovered data should be easier and, hopefully, effective in achieving a just resolution of the underlying legal controversy.

VI. Scouts and Outriders in a Hostile Frontier

Discovery skirmishes involving electronic data are inevitably costly and, occasionally, catastrophic. They can escalate in intensity, requiring the deployment of assets, the extent to which is rarely encountered in civil litigation. They can, and will, encompass issues which exceed the scope of this article, such as the discoverability of electronic litigation databases, the right of privacy applied to data generated or stored on an organization's computer systems by its personnel, and the admissibility of the data recovered through the discovery process. The shrewd organization has already prepared contingency plans for its assault upon the electronic records of its potential adversaries, as well as for the defense of its own electronic databases. The unwary organization, in contrast, lies at the mercy of its own technological capability and those entities that are prepared to exploit it. This is a dangerous time in a hostile frontier, to be traversed only under the guiding hand of experienced scouts and the vigilant eye of veteran outriders.

In 1993-1995, Cozen and O'Connor established its own electronic data retention policy in conjunction with a universal study and up-grade of the firm's information technology capability. The firm's direct experience in developing the data retention program confirmed the value and effectiveness of engaging the organization's various decision-makers/policy setters in a cooperative multi-disciplinary effort to achieve a necessary goal. By virtue of our experience in addressing electronic record retention issues for the benefit of the firm and on behalf of our clients, Cozen and O'Connor is qualified, capable and willing to assist your organization in achieving the same objective. We are likewise prepared to exploit the vulnerabilities of your organization's adversaries by the execution of fair, aggressive and effective electronic data discovery tactics. Don't hesitate to call us with your questions or concerns.⁴⁷

¹ This paper is an expansion of a previous article by this author entitled "Thunderheads on the Horizon: A Developing Tornado in Electronic Data Discovery", which focused on an organization's effective response to an adversary's civil discovery request for production of the organization's electronic data. This paper broadens the article's scope to include a discussion of the requirements for effective discovery of an adversary's electronic records.

² For our purposes, the term "**electronic records**" is used interchangeably with "**electronic data**" and "**electronic information**". "**Data**" is defined as "an item of information". The definition of "**information**" is "the meaning of data as it is intended to be interpreted by people". "**Records**" means "a data structure that is a collection of fields (elements), each with its own name and type". The Computer Dictionary (Fourth Edition); Microsoft Press 1999.

It is the data (information) that is processed and stored as records on computers, which is the subject of this article. A "**computer**" is defined as "any device capable of processing information to produce a desired result". *Id.* Again, for our purposes, "computer" is generally limited to mean the hardware ("the physical components of a computer system", *id.*) and software ("computer programs; instructions that make the computer work", *id.*) that typically comprise the electronic computer systems on which most of us rely every business day.

³ Oliver North, Bill Clinton and Bill Gates, for example, have each heard the contents of electronic mail written by or about them read into the public record with devastating effect against their legal interests and humiliating personal consequences.

⁴ "Even assuming that the burdens and costs of such discovery are not at issue, which will be rare, remember that requesting electronic discovery is, at least in commercial disputes, analogous to nuclear deterrence: once one side pushes the button, there is little downside to the other side seeking the same information.", J. Lehman, *Tips for Discovery of Electronic Information*, The Practical Litigator, Vol. 8, No.6, (November, 1997).

⁵ In 1997, Americans were estimated to spend 200 million hours per day using computers. See G. Lardner, Jr., *Panel Urges U.S. to Power Up Cyber Security*, Washington Post, Sept. 6, 1997. That same year, Time Magazine estimated that 2.6 trillion electronic mail messages passed through U.S.-based computer networks during a twelve-month period. By 2000, the number of annual e-mail messages was expected to climb to an estimated 6.6 trillion. See S. Gwynne and J. Dickerson, *Lost in the E-mail*, Time, April 21, 1997, at 88. "In 1991, according to the Electronic Messaging Association, an industry trade group that helps corporations establish e-mail policies, 8 million Americans had access to e-mail. In 1997, the number grew to 67 million. Now, 96 million Americans use e-mail. By next year, that number is expected to increase to 108 million, with office workers exchanging 25.2 billion messages daily." D. Bennahum, *Daemon Seed*, Wired 7.05, May 1999.

⁶ John Jessen, President and CEO of Electronic Evidence Discovery, Inc. has characterized electronic mail as a "time bomb that will come back to hurt companies whose employees don't know how to use it properly..." As quoted by J. Temes, *E-Mail's Dark Side*, CFO: The Magazine For Senior Financial Executives, March 1993, at 13. Examples cited by Jessen, as quoted in *Daemon Seed*, *supra*:

1. "Yes, I know we shipped 100 barrels of [deleted], but on our end, steps have been taken to ensure that no record exists. Therefore, it doesn't exist. If you know what I mean. Remember, you owe me a golf game next time I'm in town."
2. "Did you see what Dr. [deleted] did today? If that patient survives it will be a miracle."
3. "HI DAVID, PLEASE DESTROY THE EVIDENCE ON THE [litigation] YOU AND I TALKED ABOUT TODAY. THX LAURA"
(Response) "****EVIDENCE DESTROYED*** HI LAURA ACK YR MSG. AND TAKEN CARE OF. ALOHA DAVID"

And another example from Jessen, as quoted during his interview on CBS Television's 60 Minutes broadcast of June 16, 1996 in a segment entitled *For Your Eyes Only*:

"Eric, the papers have been signed and [deleted] bank is now the owner of Parcel 15. We've made it through the whole process with-

out alerting them to the old waste site on the Northwest Side"

⁷ According to one commentator, there are three dangerous myths regarding the discoverability of electronic information:

- i. So long as there is no paper copy, an opponent won't be capable of finding electronic information.
- ii. Should opposing counsel seek discovery of electronic information, the computer has stored the most sensitive data in secure files that no one will be capable of finding.
- iii. The technology involving the storage of data in computers allows sensitive information to be quickly and easily erased.

See P. Grady, *Discovery of Computer Stored Documents and Computer Based Litigation Support Systems: Why Give Up More Than Necessary?*, 14 J. Marshall J. Computer & Info. L. 523, 527 at n.11 (Spring 1996) (citing J. Frazier, *Electronic Sleuthing*, Law PC, August 15, 1993).

⁸ This author does not presume to have the expertise required for the explanation provided in the text. The succeeding discussion is based on J. Saperstein, *Uncovering Electronic Evidence: The Use and Abuse of Discovery in the Age of Technology*, (1999-2000), an article privately published and distributed by the commentator. Additionally, this author heavily relied on information generously provided by Ken Shear of Electronic Evidence Discovery, Inc., which is gratefully acknowledged.

⁹ Saperstein, at 42.

¹⁰ Saperstein, *Id.*

¹¹ Saperstein, *Id.*

¹² Saperstein, *Id.*

¹³ Shear explains that a computer's operating system only deals with allocation units (clusters) to store data files. In assigning addresses via its register or tracking available storage space through its directory, a computer does not monitor sector-level information. See n. 6, *supra*.

¹⁴ *Id.* According to Shear, several consequences may result from severing the link between the "deleted" data and its directory entry. For example, once the deleted data has been overwritten, a file name may remain in the directory without any associated data. Or the directory entry's space may be reused, leaving fragmentary data on the storage device that lacks a file name. Or both the directory entry of the "deleted" file and the file's "deleted" data may remain intact, and therefore subject to being "undeleted". Or, of course, both the "deleted" data and its directory entry may be overwritten, and for all practical purposes unrecoverable.

¹⁵ Shear cites "swap files" as an example of a process that tends to destroy data. "**Swap files**" are defined as hidden files on the computer hard drive that hold parts of programs and data files that don't fit on the computer's memory, thereby temporarily enhancing the computer's memory capacity. "The operating system moves data from the swap file to memory as needed and moves data out of memory to the swap file to make room for new data." *The Computer Dictionary* (Fourth Edition); Microsoft Press 1999. As a consequence of this function, large segments of "deleted" data are overwritten at one time. Program features that automatically save open files to a storage device at specific intervals, thereby assuring that current changes to a document are preserved ("autosave"), obviously exemplify processes that tend to preserve data.

¹⁶ For this reason, special permanent deletion software is available that "wipes" the storage device of all data from a "deleted" document, when it's deleted. However, Saperstein warns, routinely overwritten and even wiped data may still be recoverable through chemical and electron microscopy techniques.

¹⁷ *Id.* In circumstances involving the alleged deletion of relevant data by a discovery respondent's employee, a requesting party has been permitted to enter the respondent's premises and copy the respondent's computer hard drives in order to obtain all deleted data not yet overwritten by the respondent's computer operations. See *Gates Rubber Co. v. Bando Chemical Industries, Ltd.*, 167 F.R.D. 90, 100 (D. Colo. 1996) (regarding the "Site Inspection Order").

See also J. Howie, Jr. *Electronic Media Discovery: What You Can't See Can Help (or Hurt) You*, Trial (January 1993) at 70. The availability of this recourse to an adversary is particularly important to keep in mind, should your organization confront discovery requests for the production of electronic records that have been deleted.

¹⁸ A gigabyte is defined as 1024 megabytes (1024 x 1,048, 576 bytes) [or commonly, one billion bytes]. The Computer Dictionary (Fourth Edition); Microsoft Press 1999. Saperstein equates a gigabyte to approximately 488,000 typewritten pages of information. See n. 18, *infra*.

¹⁹ A terabyte, a measurement used for high capacity data storage, is defined as 1,099,511,627,776 bytes [or commonly, one trillion bytes]. The Computer Dictionary (Fourth Edition); Microsoft Press 1999. Saperstein equates a terabyte to 500,000,000 typewritten pages of information. See n. 18, *infra*.

²⁰ Shear warns that Saperstein's estimates are dated. Noting that it's currently difficult to find a hard drive with less than ten gigabyte capacity and that typical operating systems alone require over one gigabyte of capacity, Shear advises that some small organizations already maintain terabytes of data. Substantial portions of this data are not user-created, however, and presumably would not be relevant in civil discovery.

²¹ Saperstein, at 44.

²² Based on the operation of this technology, Saperstein predicts that a litigant should be able to recover all or part of an adversary's reportedly deleted electronic records, provided that: a.) the litigant's discovery request and search of the adversary's storage devices are timely; b.) the adversary's computer system is not overly active; and c.) special software hasn't been used to scrub the adversary's computer storage devices clean.

²³ A review of this nature is available from Cozen and O'Connor in a paper entitled "Discovering and Protecting Electronic Files", written in February 2000 by James P. Cullen, Jr., a fellow member of Cozen and O'Connor, and updated in July 2000 by Paul A. Dean, a third year student at the University of Notre Dame Law School.

²⁴ In 1970, Fed. R. Civ. P. 34(a), pertaining to the scope of document production, was amended to include not only writings, but "data compilations from which information can be obtained [and] translated, if necessary, by the respondent through detection devices into [a] reasonably usable form." Regarding the amendment, the Fed. R. Civ. P. 34 Advisory Committee cited the need for a broader description of "documents" to accommodate changing technology. According to the Committee Note, the amendment clearly applies to electronically stored information and, in many instances, requires a respondent to produce at least a printout of computer data. See L. Youst & H. Koh, *Management and Discovery of Electronically Stored Information*, Computer L. Rev. and Tech. J. (Summer 1997). Similar amendments have been made to Fed. R. Civ. P.26(a)(1). Cf. Fed. R. Evid. 1001(1) & 1001(3), both of which have also been amended.

²⁵ "Courts have increasingly required the responding party to bear the cost of producing electronic data." Youst & Koh, *supra* at 82 [quoting C. Lovell & R. Holmes, *The Dangers of E-mail: The Need for Electronic Data Retention Policies*, 44 R.I.B.J. 7, 9 (1995)].

²⁶ See also **In re Brand Name Prescription Drugs Antitrust Litigation**, 1995 WL 360526 (N.D. Ill. 1995), wherein the court held that a discovery respondent must bear the estimated \$50,000 to \$70,000 cost to compile, format, search and retrieve responsive data from approximately 30 million pages of e-mail data stored on its backup tapes. In so ruling, the court concluded the respondent alone should bear the extraordinary costs of the production, reasoning: "...if a party chooses an electronic storage method, the necessity for a retrieval program or method is an ordinary and foreseeable risk". Further, the court observed that the requesting party had no control over the respondent's record-keeping scheme. See generally **Playboy Enterprises, Inc. v. Welles**, 60 F. Supp. 2d 1050 (S.D. Cal. 1999)(courts seek to balance the equities of the circumstances, in determining which party must bear the costs of producing electronic data). But see e.g. **Anti-Monopoly, Inc. v. Hasbro, Inc.**, *supra*, wherein the requesting party was ordered to bear some of the costs associated with discovery of electronic information.

²⁷ "Sanctions may be imposed against a litigant who is on notice that

documents and information in its possession are relevant to litigation, or potential litigation, or are reasonably calculated to lead to the discovery of admissible evidence, and destroys such documents and information." **National Ass'n of Radiation Survivors v. Turnage**, 115 F.R.D. 543, 556 (N.D. Cal. 1987) (citations omitted).

This power [to sanction] is broader and more flexible than the authority to sanction found in the Federal Rules of Civil Procedure. ...The Supreme Court has described the inherent powers of the federal courts as those which "are necessary to the exercise of all others."...Deeply rooted in the common law tradition is the power of any court to manage its affairs, "which necessarily includes the authority to impose reasonable and appropriate sanctions upon errant lawyers practicing before it."...In particular, the courts have the inherent power to enter a default judgment as punishment for a defendant's destruction of documents.

Telectron, Inc. v. Overhead Door Corp., 116 F.R.D. 107, 126 (S.D. Fla. 1987) (citations omitted).

²⁸ See also **American Bankers Ins. Co. v. Caruth**, 786 S.W. 2d 427 (Tex. Ct. App. 1990), which affirmed a default judgment entered against a party that failed to produce requested information in discovery. In that case, the insurance company was initially excused from producing certain information, because 30,000 boxes of documents had to be searched to obtain the information, thereby constituting an undue burden. However, at trial, evidence was presented that the company also maintained the information in a computer database, which was easily retrievable.

²⁹ This common law doctrine provides that a fact finder may draw an unfavorable inference against a party who has destroyed relevant evidence, because the party is assumed to have been motivated by the desire to conceal damaging evidence. Thus, when a party has failed to produce requested information, courts have imposed a sanction, based on this doctrine, in the form of an "adverse inference" jury instruction. See Fed. Jury Prac. & Instr. 12.05 (1997 Supp).

³⁰ Before leaving the subject of sanctions, it should be noted that in **United States v. Lundwall**, 1 F. Supp. 2d 249 (S.D.N.Y. 1998), parties were criminally indicted for obstruction of justice and conspiracy, because they destroyed relevant documents during discovery proceedings in a civil matter. Following the recovery of certain audio tapes in the highly publicized underlying civil case, top Texaco executives, including Lundwall, could be heard discussing plans to destroy evidence relevant to a class action filed against Texaco alleging employment discrimination. Although the executives were subsequently acquitted of the charges by a jury, this case represents one of the very few instances in which individuals have been criminally charged with destroying records to avoid producing them in civil discovery proceedings. See R. Ziegler & S. Stuhl, *Spoliation Issues Arise In Digital Era*, The National Law Journal at B09 (February 16, 1998).

³¹ On the issue of expenses, author David Bennahum quoted John Jessen of Electronic Evidence Discovery Inc., which appears in Bennahum's article entitled *Daemon Seed*:

"We were involved with a case with 300 people and all of their email going back four years," Jessen says. "It was a live email system with 16 backup tapes. The final email count was a couple million messages." That's relatively small, yet because the company was unprepared for electronic discovery, management had to hire 60 temps to sit at 60 workstations and pick through each message; relevant messages were forwarded to one of twenty attorneys. Those were cataloged and delivered to the opposition, under court order. "In nine months, they had looked through not even a fraction of the live mail, let alone the backup tapes," Jessen says. "They had put in \$700,00 at this point." ...Jessen's solution was to copy all the mail to a central server and have an algorithm sort and search the email for keywords. He billed the company \$200,000, pushing the total cost of making email available to the plaintiff to \$900,000.

See D. Bennahum, *Daemon Seed*, *supra*, at n.3 and accompanying text.

³² However, as a matter of consistency and convenience, the author refers by preference to matters of “record retention”, given the term’s appropriately neutral applicability to both paper and electronic documents.

³³ Advantages and Disadvantages of a Written Document Retention Program. J. Fedders & L. Guttenplan, *Document Retention and Destruction: Practical, Legal and Ethical Considerations* 56 Notre Dame Law. 5, 13 (1980):

³⁴ In **Piper**, however, the judge observed: “I am not holding that the good faith disposal of documents pursuant to a bona fide, consistent and reasonable document retention policy can not be a valid justification for a failure to produce documents in discovery.” *Id.* at 486.

³⁵ This is not an easy task. Most organizations fail to appreciate the extent to which copies of electronic documents, and particularly email, proliferates, often without the knowledge and beyond the control of the document’s author. Yet, for every copy generated, an additional storage device must be taken into account, either to inventory existing data or to expunge the data from the system according to record retention policies. Obviously, without careful data management and strict rules of communication, there is always a serious risk that some copies of electronic documents will be overlooked.

³⁶ The purpose of these periodic audits is to test the efficiency of the record retention policies, as well as the organization’s compliance with the policies. In this regard, the auditors are principally searching for data that should have been purged pursuant to the policies

³⁷ Do not be misled by the text’s foregoing discussion. While the discussion presents general concepts and basic ideas, there are many considerations and countless details to be taken into account before an effective record retention program can be seamlessly instituted as organizational policy without risking exposure to judicial sanction or misinterpretation of the motives underlying the policy’s establishment. These matters range far beyond the scope of this article. Please contact this author, if you are interested in discussing the issues in detail.

³⁸ “One of the reasons such information is lying around waiting for a lawsuit is because electronic data maintains a low profile, unobtrusively accumulating for years on the unassuming computer in the office corner.”, J. Pooley & D. Shaw, *The Emerging Law of Computer Networks: Finding Out What’s There: The Technical and Legal Aspects of Discovery*, 4 Tex. Intell. Prop. L.J. 57, 60 (Fall, 1995).

³⁹ “Practitioners who go after the opposing side’s digital data will likely find that opposing counsel will return the ‘favor’...Hence, before you embark on digital discovery, you must frankly assess your client’s computer system(s) and determine if they will ‘survive’ digital discovery.” G. Johnson, *Emerging Technologies and the Law: A Practitioner’s Overview of Digital Discovery*, 33 Gonz. L. Rev. 347, 359 (1997).

⁴⁰ The type of data sought should include data files, databases, e-mail, calendar programs, access lists, computer logs and archival data. Persons who may possess such information will include facts witnesses and those who work directly with the witnesses, including supervisors, secretaries, and administrative assistants. See G. Johnson, *Id.*, at 364 n.82.

⁴¹ “Mirror image” is defined as an image that is an exact duplicate of the original with the exception that one dimension is reversed. *The Computer Dictionary (Fourth Edition)*; Microsoft Press 1999. “A mirror image captures all information, including allocated space where data and applications reside, unallocated space where whole or partially deleted files reside and the administrative area. Merely copying the drive would only capture allocated space.” See Committee on Federal Courts, *supra*, 53 The Record at 658 (citing W. Webb, the *New Age of Electronic Discovery*, 5 Legal Assistant Today 26 [May / June 1996]). It includes the estimated 30% of data that never appears on paper. See the related discussion at p. 8, *supra*, of the text.

⁴² For example, Fed. R. Civ. P. 65 (b) provides, in pertinent part:

A temporary restraining order may be granted without

written or oral notice to the adverse party or that party’s attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party’s attorney can be heard in opposition, and (2) the applicant’s attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting the claim that notice should not be required. Every temporary restraining order granted without notice shall...expire by its terms within such time after entry, not to exceed 10 days, as the court fixes.... In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time... On 2 days’ notice to the party who obtained the temporary restraining order without notice..., the adverse party may appear and move for its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

⁴³ It may also prove difficult for the requestor, in the face of a respondent’s motion for protective order, to convince many judges that the discovery requests must be broad in scope to capture elusive, transitory evidence which is extremely vulnerable to destruction, modification or other compromise. Candidly, far too few judges currently deciding electronic data discovery motions possess a sophisticated understanding of computer technology. Consequently, the requestor must anticipate the need to patiently disabuse a wary jurist of the notion that electronic data discovery requests are merely the net by which trolling litigants hope to snare a treasure of evidence. See related discussion at p. 11, *supra*, of the text.

⁴⁴ The requestor should also engage the services of a consulting expert who is qualified:

- a. to assist in developing a respondent’s profile;
- b. to draft appropriate discovery requests;
- c. to physically inspect the respondent’s computer systems (by consent or court order) and supervise the retrieval of relevant data;
- d. to interpret the electronic records ultimately produced by the respondent; and
- e. to assess the worth of the electronic evidence to the requestor.

To the extent that the consultant’s expertise is also engaged to assist in requestor in preparing its own responses to an adversary’s electronic data discovery requests, caution should be taken to preserve the privileges applicable to the data. For example, the consultant may be retained by outside counsel, who directs the consultant’s activities. The consultant should agree to preserve and protect the confidentiality of any reviewed data. See Committee on Federal Courts, *supra*, 53 The Record at 659.

⁴⁵ Sample excerpts of initial phase discovery requests prepared by the authored with the direct assistance and extensive contribution of Electronic Evidence Discovery, Inc. are found in the Appendix to this article. These excerpts reflect the degree of specificity warranted in these requests, if an adversary’s electronic profile cannot be established by informal means. Subsequent waves of written discovery requests for the production of electronic records should mimic the pattern of these excerpts in organization, specificity and definition of terms.

⁴⁶ See K. Kuchta, *Discovering a New World: Electronic Media*, a paper presented at the FICC Mid-Year Meeting in Orlando, Florida, which includes a helpful discussion on the technological considerations of a computer forensic specialist who is engaged in this phase of electronic data discovery.

⁴⁷ This article is intended to generally educate the reader on current legal issues. It is not intended to provide legal advice. Accordingly, this article should not be relied upon without seeking specific legal advice on the matters discussed herein. Copyright © 2000 Cozen and O’Connor. ALL RIGHTS RESERVED.

ABOUT THE AUTHOR



Rob Hawn, Esquire.
Cozen and O'Connor

Rob Hawn is a Member of the Firm and concentrates his practices in catastrophic property loss litigation, civil fraud, and civil RICO litigation.

Prior to joining Cozen O'Connor in 1986, Rob served for three years as an Assistant District Attorney with the Philadelphia District Attorney's Office (1983-1986).

Before attending law school, Rob served for five years as a police officer with the Greeley, Colorado Police Department.

In addition to his usual law practice, Rob serves pro bono as a Child Advocate and Guardian ad litem representing abused, abandoned and neglected children under the auspices of the Support Center for Child Advocates in Philadelphia. Rob is a member of the Pennsylvania Bar Association, where he serves on the Children's Rights Committee. Rob is also a member of the Philadelphia Bar Association, the International Association of Arson Investigators, and the National Fire Protection Association.

Rob earned his B.A. degree at Syracuse University in 1976 and his law degree at the Delaware Law School of Widener University in 1983. He is admitted to practice in Pennsylvania. He is also admitted to practice before the United States District Courts for the Eastern and Middle Districts of Pennsylvania, the United States Court of Appeals for the Third Circuit, and the Supreme Court of the United States.

Winning the Talent War In Turbulent Times

by Eileen McDargh, CSP,CPAE

The reinsurance industry is not immune to the influence of our current economic slowdown. The pace of change, the dot.com disappearances, and the flushing sound heard on Wall Street throw many organizations into knee-jerk reactions. From consolidations, mergers, and acquisitions to re-engineering profit centers, creating new product lines and calming a variety of stakeholders, managers are faced with turbulent situations.

Responding to such pressures requires both a level head as well as the realization that it's still true that the business of building a business—whether new or old economy—still requires sound management, good marketing, and most importantly, good people.

Jettisoning employees in financial tough times can very well result in losing industrious producers, top talent, longtime workers, and top managers. Such short-sightedness can be costly on many fronts. The cost of recruiting talented workers typically runs 70-200% of their annual salaries. A loss of sales personnel can hurt a company's bottom line. Lose front-line customer service people and the customer might be penalized. A company doesn't make profits. People do.

And because people DO make the profits, keeping solid employees has never been more critical. Lose the war NOW in talent, have your best folks jump ship to the competition, or cut too far, and you'll be scrambling for the brainpower necessary when the economy turns around.

How DO you win the talent war in times like these? The good news is that "show me the money" is not the primary reason people stay. A recent study of 4000 professional and clerical workers found that job satisfaction keeps more workers than pay levels alone. The survey found that only 6% of people who were satisfied with their jobs but unhappy with their pay plan to quit. The percentage jumps to 27% when they were dissatisfied with their jobs but happy with their pay! If they were unhappy with both their pay and job situation, the percentage of those ready to bail jumped to 41%!

The challenge: what makes for satisfaction? What do valued employees want? A two-year study by Dr. Beverly Kaye, author of *Love'Em or Lose'Em*, said what employees valued most is: career growth, learning and development; exciting work with consistent performance expectations, accountability and challenge; meaningful work (making a contribution), great people, being part of a team, good boss, recognition for a job well done, fun on the job, autonomy over work, work/life

balance, and flexibility in areas such as work hours.

It's easier to put the burden of retention of pay. Pay is easier and quicker. But investing money without investing in the relationship with employees garners little true commitment. Creating a culture for satisfaction takes time, prompts internal analysis, and leaves long-term positive results on the bottom line.

Based upon the work done by Kaye and her team at Career Systems International (CSI), retention practices by good managers focus on three areas: development, style, and environment. The developmental focus begins with understanding what hiring practices make for a good fit from the outset. It includes such practices as job enrichment, career growth, mentorship, and expansion of goals into areas of challenge suited for each individual.

A manager's style has much to do with retention. This skill set involves informal as well as formal recognition practices, interpersonal skill development between a manager and the employee, sharing power, and self-awareness of behaviors that disenfranchise employees.

An environmental focus for retention means that managers explore practices that encourage information sharing, alignment of values, and the creation of workplace where laughter and joy are present. While few organizations can (or want to) match the zany reputation of Southwest Airlines, simple, spontaneous bits of fun can make a great difference. One power company in the Pacific Northwest has a frisbee memo day in which all pieces of internal correspondence are twirled down a hall to the receiving party!

Arie de Geus, chairman and CEO of Synopsys, a 2900-employee firm with \$800 million in revenue is implementing a new program to help retain "high fliers" (star employees) and "solid citizens (stable, loyal workers). Former Royal Dutch shell executive, de Geus believes, "The ability to learn faster than your competition maybe the only sustainable competitive advantage." That's why training is at the heart of his new retention program.

Managers themselves must be trained in the art of retention. Institutionalized caring—i.e. standard benefits packages, can miss the mark because managers haven't asked employees what they individually want. And if managers are not caring, it doesn't matter anyway. The employee is out the door.

At Synopsys, 30 % of the time of senior executives is devoted to retention-related activities. They begin by asking employees about their values and needs and the incentives that will make them stay. For employees who leave for greener pastures, they use the "Motel Six" strategy. In other words, "we'll leave the light on for you."

Turn a light on your management practices and see if you're winning the talent war. Retool, retrain and you will retain!

ABOUT THE AUTHOR



Eileen McDargh, CSP,
CPAE

Called a "human capitalist" and an "capacity expander" by her clients, **Eileen McDargh, CSP, CPAE** is the author of *Work for a Living & Still be Free to Live* and a contributor to business journals and newspapers. As a professional speaker, executive coach and facilitator, she draws upon practical business know-how, life's experiences, and over 20 years of consulting to national and international organizations. To contact Eileen McDargh, call Amanda Host, insurance industry specialist at Leading Authorities Speakers Bureau, (202) 721-7651.

Emil Rago/Excess Surplus Lines Claims Association Scholarship

John T. Speckman



Nicolle Gomez, 2001 Emil Rago
Scholarship recipient

The 2001 recipient of the Emil Rago Scholarship is Nicolle Gomez, Class of 2004 at the College of Insurance. Her present course of studies is expected to lead to her objective of "a challenging internship in insurance services as a Claims Representative".

Nicolle's curriculum will lead to a Bachelor of Business Administration with a Major in Insurance. She is a member of the Gamma Iota Sigma (National Insurance Co-ed Fraternity) and a writer for "The Mentor", the newsletter of the College of Insurance.

Outside of her studies, Nicolle has maintained a very active lifestyle in part-time work, sports activities and an extensive listing of volunteer work. She has worked at the College of Insurance as a Student Assistant in the President's office and also as a Clinical Assistant for an Orthodontist. Her sports activities include Volleyball and Rollerblading and she has a keen interest in Astronomy. Particularly notable are Nicolle's volunteer activities which include NYC Cares Day Volunteer, Red Cross Blood Donor, Habitat for Humanity and Helping to raise Guide Dogs for the Seeing Eye Organization.

Our best wishes to Nicolle as this year's scholarship recipient and for her future endeavors in the world of Insurance Claims.

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