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Turning Bad Faith Inside Out: How Plaintiff Attorneys Are Creating Third-Party Bad Faith Claims[†]

Michael F. Cunningham
Lewis F. Collins, Jr.

"The number of bad faith cases filed in the courts appears to be exponentially increasing, but the increase does not appear to be directly linked to the actions of the insurers."[1]

I.
Introduction

Originally, Florida implemented a balanced and healthy "bad faith" legal system. It punished insurers who put their interests ahead of their insureds' by delaying payment or improperly choosing to reject a time limit demand from an opposing party. As that system developed, however, the original intent was lost. What remains is a system favorable to plaintiffs and their attorneys. It creates incentives for duplicitous and questionable behavior. It encourages gamesmanship at the expense of fair play and professionalism.

[†] Submitted by the authors on behalf of the Extra-Contractual Liability section. *The authors wish to gratefully acknowledge the assistance of David A. Mercer, a Senior Associate with the law firm of Butler Pappas Weihmuller Katz Craig in Tampa, FL for his invaluable assistance in preparing the underlying research that formed the basis of this article.*

[1] Allstate Ins. Co. v. Regar, 942 So. 2d 969, 973 (Fla. Dist. Ct. App. 2006).

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The purpose of this Article is to demonstrate the myriad ways in which plaintiffs' attorneys are "setting up" insurers in an effort to open their policy limits. Their efforts are ratified by juries who have seen their insurance rates rise and, prior to jury duty, have been helpless to strike back. This Article will reveal how the original purpose of "bad faith" laws has become perverted, leaving a system in which a minor error, miscommunication, or misunderstanding leads to a finding of bad faith. Sometimes that "error" is due to the deliberate conduct of the plaintiff's attorney, who claims he or she is merely doing what is in the best interests of his or her client.

This Article also will demonstrate how the conduct of plaintiffs' attorneys, permitted under current law, actually hurts many and protects only a select few. Rather than protecting the public, the excesses and injustice caused by Florida's current bad faith laws are actually detrimental to the vast majority of consumers and well-intentioned companies and advantageous to only a few plaintiffs and their attorneys.

While Florida trial attorneys are at the forefront of exploiting bad faith laws, such exploitation is not limited to Florida. What happens in Florida (law) does not stay in Florida. Strategies perfected by Florida trial attorneys are imported into other states via plaintiffs' attorneys with a sophisticated and effective network for sharing resources and strategies throughout the country. While the attorneys in other states are not yet as experienced or adept at carrying out these strategies, and not all states have case law similar to Florida's, it is only a matter of time before attorneys in other states catch up.

This Article will conclude with proposals intended to both remedy the unintended advantage given to plaintiffs' attorneys in the system and offer a fair and balanced approach to bad faith. This approach will neither lead to nor encourage insurer misconduct. Rather, it will provide incentives for all parties to handle claims in a forthright and honest manner, promoting justice for all parties involved.

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II.
The Inevitable, and Necessary, Rise of Bad Faith Law

Bad faith law is a necessary and important part of our jurisprudence.[2] Should an insurer fail to give proper consideration to a settlement opportunity or choose to "roll the dice" with an insured's money, it is reasonable to place the burden of these decisions on the insurer.

This principle was recognized in Florida by the supreme court in the frequently cited *Boston Old Colony Insurance Co. v. Guiterrez.*[3] Although this case was decided in favor of the insurer, it set forth four principles that govern the insurer's responsibility to its insured: (1) "to use the same degree of care and diligence as a person of ordinary care and prudence should exercise in the management of his own business"; (2) "to advise the insured of settlement opportunities, to advise as to the probable outcome of the litigation, to warn of the possibility of an excess judgment, and to advise the insured of any steps he might take to avoid the same"; (3) to "investigate the facts, give fair consideration to a settlement offer that is not unreasonable under the facts, and settle, if possible, where a reasonably prudent person, faced with the prospect of paying total recovery would do so"; and (4) to avoid

[2] This Article focuses on the insurer's duty to settle third-party claims. The voluminous topics of first-party bad faith and the insurer's duty to defend go beyond the scope of this Article.

[3] 386 So. 2d 783 (Fla. 1980).

acting in what the insurance company "considers to be its interest alone."[4] Together these principles protect the public by particularizing the duty of insurance companies to act fairly and honestly toward their insureds.

Following *Boston Old Colony*, however, the bad faith rules have been expanded by a series of decisions by the Florida courts and by creative lawyering, which has led to unanticipated consequences. Consider the following scenarios:

1. An insurer believes its insured is not at fault for causing a serious accident. The claimant/plaintiff sues the insured, claiming damages in excess of $500,000. The insurer chooses to defend the lawsuit rather than paying its $50,000 policy limits, believing its decision will be vindicated at trial. Instead, the jury finds the insured liable for the accident and awards $750,000 to the plaintiff.

2. An insurer recognizes that it will likely owe its full policy limits to a seriously injured plaintiff. However, despite repeated requests from the plaintiff's attorney, the insurer fails to send the policy limits to the plaintiff's attorney. Finally, the plaintiff's attorney is forced to file suit. The insurer immediately offers its policy limits to attempt to settle the case.

3. Upon the initial report of a serious accident, the insurer immediately recognizes that the loss will exceed its policy limits of $50,000. It affirmatively tenders the policy limits to the plaintiff's attorney. The plaintiff's attorney returns the check and demands that the insurer provide numerous affidavits to be returned to it within twenty days. The plaintiff's attorney indicates that if the affidavits are returned within the specified time period, the plaintiff's attorney will accept the policy limits in return for a release of all claims. Despite the fact that the insurer exercises due diligence, the check and the affidavits are not received by the plaintiff's attorney until the twenty-second day after the demand (the insured was on vacation and returned the affidavits to the insurer late). The plaintiff's attorney rejects the offer and advises the insurer that he will file suit and pursue a bad faith claim against it.

4. An insurer immediately recognizes its exposure for its insured's full policy limits. It receives a time limit demand from the plaintiff's attorney. The demand requires that the insurer produce all documents required by Florida Statute section 627.4137. The insurer produces all such documents, but in its initial reply, the disclosure is signed by the handling adjuster, not a manager, corporate officer, or superintendent as required by the disclosure statute. The plaintiff's attorney rejects the offer the same day for this reason. Later the same day, the insurer

[4] *Id.* at 785–86.

> hand-delivers the same document to the plaintiff's attorney's office, and the document is now signed by the proper party. The plaintiff's attorney rejects the offer and advises the insurer that he will file suit and pursue a bad faith claim against it.

The first two scenarios present viable bad faith claims; however, most would agree that the latter two scenarios do not present a traditional bad faith claim. Nevertheless, under Florida law, each of these scenarios presents a claim for bad faith with sufficient merit to reach a jury on the issue of the insurer's bad faith.

An analysis of the case law following *Boston Old Colony* will demonstrate how the law developed in such a way as to allow technical or trivial issues to support claims of bad faith and more importantly, how the case law created an opportunity for plaintiffs' attorneys to recover more than an insurer's policy limits. The holdings in the cases discussed below lead to a distinctly pro-plaintiff system, a system that leaves insurance companies vulnerable to questionable bad-faith suits. If the plaintiff's attorney fails in the tactics to create a bad faith claim, he or she has lost nothing. If the attorney succeeds, he or she may have drastically increased the client's recovery. As Justice Wells noted in his dissent in *Berges*, "[t]he goal of this strategy is to convert a policy purchased by the insured which has low limits of insurance into unlimited insurance coverage."[5]

A. *Time Limit Demand Deadlines*

First, a plaintiff or a plaintiff's attorney can choose an arbitrary, short deadline by which an insurer must respond to a time limit demand (TLD). The courts have provided no firm rules as to how many days are appropriate. In certain circumstances, a demand of less than a week might be acceptable. If the insurer misses the deadline by even one day, there is generally a question of fact for a jury as to whether the insurer has acted in good faith.[6] An insurer who diligently works to respond to a time-compressed TLD but falls short by one day may have opened its policy limits and have unlimited exposure for the plaintiff's injuries. This result holds true even if in reality the failure to meet the demand in a timely fashion was designed and intended by plaintiff's counsel.

Some creative plaintiffs' attorneys knowingly engage in actions that make it even more difficult for insurers to respond to TLDs in a timely manner. These tactics include sending the demand to the wrong department in the insurance company, dropping or transposing digits from addresses and zip codes, sending the letter when the primary adjuster is scheduled to be out of the office, or failing to mail the demand letter for some time after dating it.

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[5] *Id.* at 685 (Wells, J., dissenting).

[6] *See, e.g.*, Hartford Accident & Indem. Co. v. Mathis, 511 So. 2d 601, 602 (Fla. Dist. Ct. App. 1987) (upholding the jury's finding of bad faith after the insurance company failed to respond to plaintiff's demand within the ten days set out by the plaintiff).

The attorneys then refuse to take calls from the insurer or respond to any written inquiries. While a TLD is pending, it is common for a claim adjuster's calls to be taken exclusively by a member of the support staff who replies that the attorney is not available, not in the office, or otherwise engaged.

Other plaintiffs' attorneys send cover letters to the insurer with an enclosed compact disc (CD). The letters typically reference some inconsequential aspect of the claim and make no reference to a TLD. However, buried among many other documents on the CD is a TLD that was never referenced in the cover letter. Plaintiffs' attorneys intend that the adjuster will assume the CD contains photos of the vehicle or a copy of the letter and will not review the documents on the CD during the TLD period. If the adjuster does not review the CD during the short time period allowed for in the TLD, the attorney will claim the policy limits are opened and that the insurer has acted in bad faith.

Providing a short time to respond to a TLD, made "shorter" by mailing it to the wrong address or otherwise working to keep the demand from the insurer's attention, is typically just the beginning of the set up.

B. *Complicated TLD Terms*

Second, plaintiffs' attorneys can make the terms of the TLD letter very complicated so that the insurer may inadvertently miss a step or fail to follow every demand exactly. The "mirror image rule" provides that any deviation from the terms of the demand, no matter how small or how quickly remedied, can constitute a complete and total rejection of the settlement opportunity. Failure to produce one document requested by the plaintiff in the settlement demand can create bad faith liability for the insurer.[7] Producing the requested information even one day after the expiration of the TLD is insufficient to cure the failure to accept, and the TLD is deemed rejected[8] even if the delay was manufactured by the plaintiff's attorney.

Many TLDs request a large amount of information that is outside the insurer's immediate control. For example, many TLDs request that the insured provide a financial affidavit. The form of that affidavit and the information required are not stated in the TLD, and often the attorney will not provide any clarification as to what is required. It can be an extraordinary

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[7] *See* Nichols v. Hartford Ins. Co. of the Midwest, 834 So. 2d 217, 220 (Fla. Dist. Ct. App. 2002) (holding that the plaintiff's demands were not satisfied where the insurance company sent a settlement check and offer but the terms were not satisfactory to the plaintiffs. The offer contained a release of all future claims, which was objectionable to the plaintiffs, who returned the check and rejected the offer. The insurer therefore, did not comply with the terms of the demand letter.)

[8] *See* Berges v. Infinity Ins. Co., 896 So. 2d 665, 678 (Fla. 2004) (finding that the issue of the insurer's bad faith was properly submitted to the jury where the insurance company was aware that the insured would be liable for damages in excess of the policy limits, the TLD of twenty-five days was reasonable, the insurer failed to ask for an extension, and the insurer submitted an offer one day after the TLD expired).

challenge to obtain information from an unavailable or uncooperative insured and to relay that information in an acceptable manner to the plaintiff's attorney within the timeframe.

Florida courts have made it abundantly clear that almost anything short of full compliance with everything requested in a TLD (mirror image acceptance) will be a rejection of the demand.[9] Consequently, if an insured is vacationing out of the country or is otherwise out-of-touch during the TLD period, the insured's unavailability will cause the insurer to "reject" a TLD that requires information from, or a signature of, the insured. To compound this problem, nothing in Florida law requires the plaintiff or the plaintiff's attorney to extend the demand-period when requested.

C. *Focus on the Insurer's Conduct*

Third, following *Boston Old Colony*, no matter how improper the conduct of the plaintiff or plaintiff's attorney, that conduct is not the focus of a bad faith trial; instead, the focus is on the insurer's conduct.[10]

Regardless of how egregious the plaintiff's attorney's conduct might have been, the jury will never hear about it. This doctrine is often referred to as "reverse bad faith." Since the focus of a bad faith claim is on the insurer's conduct, the insurance company does not have much leeway to demonstrate that the plaintiff's attorney's entire course of conduct was designed to get the insurer to "reject" the TLD.[11] Viewing only the insurer's conduct, and having no frame of reference with respect to the plaintiff's attorney's conduct, it is exceedingly difficult for an insurer to demonstrate that it was the plaintiff's conduct (or the plaintiff's attorney's conduct), and not its own, that caused the demand to be "rejected."

D. *Refrain from Making Demand*

Fourth, after *Boston Old Colony*, the insurer can still be held liable for bad faith even if the plaintiff does not submit a demand letter for settlement.[12] Even in the absence of a demand or any indication that the plaintiff would settle for policy limits, the insurer is obligated to affirmatively negotiate the claim.[13] A failure to tender policy limits to a plaintiff only twenty days after the insurer receives notice of the loss has been found sufficient to support a bad faith claim.[14]

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[9] *Nichols*, 834 So. 2d at 220.

[10] *Berges*, 896 So. 2d at 677 (stating that "the focus in a bad faith case is not on the actions of the claimant but rather on those of the insurer in fulfilling its obligations to the insured").

[11] *See id.*

[12] Powell v. Prudential Prop. & Cas. Ins. Co., 584 So. 2d 12, 13 (Fla. Dist. Ct. App. 1991).

[13] *Id.*

[14] Snowden v. Lumberman's Mut. Cas. Co., 358 F. Supp. 2d 1125, 1126 (N.D. Fla. 2003) (upholding jury finding of bad faith where twenty days passed between the insurance company finding out about the severe injuries of the injured party and the injured party filing suit).

Allowing bad faith claims absent a demand letter has led some plaintiff's attorneys to actually refrain from making demands to settle the claims of their seriously injured clients. These attorneys attempt to "stay off the radar," in hopes that the insurer will not make an affirmative offer. By failing to demand the policy limits, the plaintiff's attorney can possibly "create" a bad faith claim by simply remaining quiet and allowing time to pass. Then, if the policy limits (or some portion thereof) are ultimately offered, the attorney may be in position to claim it was simply "too late" and refuse the offer. In addition to refusing to send a demand letter, the attorney may avoid providing the insurer with detailed information concerning his client's injuries. The plaintiff's attorney will refrain from taking any action that would alert the insurer to the potentially serious claim.

E. *Questions of Fact*

When there are multiple claimants to a limited insurance fund, the insurer should try to settle as many claims as possible within the policy limits.[15] While the insurer has discretion to decide which claims to settle, the reasonableness of the insurer's strategy is always a fact question.[16] Any claimant who feels he or she was offered an insufficient portion of the policy limits is free to bring suit against the insurer. That suit will not be dismissed on summary judgment, no matter how reasonable the insurer's conduct, because the reasonableness of the insurer's conduct will always be a fact question for a jury.

This rule allows the claimants to refuse a fair split of the available policy limits and, in fact, encourages them to refuse to even come to the table to discuss settlement (a common occurrence). Should the claimants fail to agree among themselves and refuse to attend a global mediation, the insurer must choose to settle with some, but not all, of the claimants. Typically, and as demonstrated in an example below, the claimants will make conflicting demands that place the insurer in a no-win situation. Any course of action it takes, even if reasonable, will leave legitimately damaged claimants without any or enough of the insurance policy proceeds.[17] This situation inevitably leads to bad faith lawsuits by those who receive none of the proceeds, a suit which will likely be heard by a jury since the reasonableness of the insurer's conduct is a question for the jury. As outlined above, the focus in the trial will not be on the attorney's conduct but rather on the conduct of the insurer.[18]

F. *Releasing One of Multiple Insureds*

An insurer with multiple insureds must attempt to get all insureds released when it settles a claim. However, as the court held in *Contreras v. U.S. Security Insurance Co.,*[19] if

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[15] Shuster v. S. Broward Hosp. Dist. Physicians' Prof'l Liab. Ins. Trust, 591 So. 2d 174, 177 (Fla. 1992).

[16] Farinas v. Fla. Farm Bureau Gen. Ins. Co., 850 So. 2d 555, 561 (Fla. Dist. Ct. App 2003).

[17] *Id.*

[18] Berges v. Infinity Ins. Co., 896 So. 2d 665, 677 (Fla. 2004).

[19] 927 So. 2d 16 (Fla. Dist. Ct. App. 2006).

the plaintiff will release only one of the insureds, the insurer is required to attempt to secure settlement for that insured only.

For example, the plaintiff's attorney represents the owner and driver of a car that was involved in a car accident. The attorney sends a letter to the insurance company requesting a release of the "insured," then refuses to provide clarify which "insured" is seeking the release. If the insurer responds without clarification, the claimant's attorney will indicate that he or she was willing to release only the insured *owner*, not the insured driver. The attorney did, after all, use the word "insured." Plaintiff's attorney will then file suit against the insured driver, claiming that the policy limits are open with respect to the driver under the *Contreras* holding.[20] If the insurer seeks clarification, the plaintiff's attorney will typically fail to respond, leaving the insurer to choose its poison. Should the insurer request a release of both insureds, the plaintiff's attorney can claim that the insurer is overreaching or failed to "mirror" the demand (clearly the TLD used the singular "insured"). Should the insurer request, on the other hand, a release of only one of its insureds, the insurer could be acting in bad faith for refusing to seek clarification under *Contreras*.[21] This example is yet another example of plaintiff's attorney benefiting from ambiguity in the TLD and a failure or refusal to provide any clarification.

G. *Settlement with a Decedent's Representative Before Probate*

An insurer may settle a death claim with a deceased claimant's representative, or likely representative, even when the probate proceedings have not been initiated.[22]

This situation results in the insurer paying insurance proceeds to someone who "might"' be the proper representative of the deceased person's estate. While the likely representative of the estate might seem obvious, it is not always so. Faced with multiple claims from different persons with different relationships to the deceased, the insurer must determine who is the proper recipient of the insurance proceeds prior to any probate proceedings. An attorney attempting to benefit from a bad faith claim understands these rules and may have a person unlikely to be the personal representative make a TLD with a short deadline. The insurer is faced with the unenviable task of deciding whether to pay this person before the probate court hears the matter.

H. *Timely Promise to Pay with Settlement Check Issued Later*

An insurer's binding promise to pay the policy limits is insufficient to meet a demand. An insurer can be found in bad faith even when it makes a binding promise to pay policy

[20] *Contreras*, 927 So. 2d at 21.

[21] *Id.*

[22] *Berges*, 896 So. 2d at 674–75.

limits if it does not actually send the settlement check in time for it to be received by the plaintiff or the plaintiff's attorney by the attorney's deadline.[23]

Consider the following situation: An adjuster receives a TLD with a short deadline. The TLD is confusing and ambiguous, and it requires the insurer to obtain comprehensive affidavits and other information from its insured to properly accept it. The adjuster has asked for clarification, but the plaintiff's attorney has not responded. On the last day the demand is due, the adjuster finally receives the affidavits from its insured. The adjuster reviews the affidavits at 3:00 p.m. on the date the demand is due. Sending the policy limits without the affidavits could, under current law, fairly be construed as a rejection of the TLD, so the adjuster has not sent the policy limits. Upon receipt of the affidavits, the adjuster faxes a letter to the attorney with the affidavit and "accepts" the TLD, placing the check for the policy limits in the mail. The agreement to pay the limits is binding on the insurer, but the plaintiff's attorney rejects the offer. The reason, supported by Florida law, is that the check was not *received* "in hand" by the plaintiff's attorney by the due date. Despite complying with all terms of the demand with the exception of check in hand (made difficult if not impossible due to the requirements of the demand itself), and making a binding promise to pay the policy limits, the insurer can be found in bad faith because the plaintiff's attorney did not have the check in hand by the deadline.

III.
Tactics Used to "Set-up" Bad Faith Claims

One might argue to insurers, "If you know you are going to get 'set-up' for insurance bad faith, simply do what you need to do to avoid that result." Unfortunately, it is not that simple. The plaintiff's attorney's greatest weapon is ambiguity. The attorney leaves important facts unstated or unclear, forcing the insurer to make choices without full information or based on assumptions. This purposeful confusion combined with a short deadline by which to respond to a TLD compounds the problem.

The key to setting up a bad faith claim is to create a situation that makes any response or action problematic, forcing the insurer to choose between several bad options. The "best" set-ups leave the insured with no safe course of action. A few of the most successful scenarios are illustrated below.

A. *The Art of Ambiguity*

On January 1, 2008, an insured plaintiff was involved in a low-to-moderate impact rear-end auto accident that was caused by his negligence. Each vehicle sustained about $1,000 in damage. The plaintiff did not report any injury at the scene of the accident. Shortly thereafter,

[23] *Id.* at 676–77 (rejecting the insurer's argument that because the insurer agreed to pay the policy limits within the time frame set by the TLD, the issue of bad faith should be rejected as a matter of law).

the forty-five year old plaintiff began treatment with a chiropractor. The plaintiff also had an MRI four weeks after the accident, and the MRI revealed what was interpreted to be a herniated disc.

On March 1, 2008, the plaintiff's attorney sent a TLD to the insurer that, by its terms, would "expire in thirty days." The demand requested payment of the insured's $25,000 policy limits in exchange for a release by the insured. It also requested the insurer to comply with a statute involving the disclosure of policy information.[24] The only document provided with the demand was a copy of the MRI report, which stated that the plaintiff suffered a herniated disc. The demand stated that the insured had not worked since the accident and that any calls or contact from the insurer would be deemed a counter-offer. Although the insurer had sent the plaintiff a copy of an authorization for medical records, that authorization was neither included nor referenced in the TLD.

On its face, the demand might have seemed reasonable. A plaintiff who suffers a herniated disc in an accident and who is unable to work for two months might be entitled to $25,000. However, looking deeper, the trips and traps of the demand become evident.

First consider the more obvious issues raised by the demand:

- When exactly is the demand due? It says it will expire in thirty days. Does this language mean thirty days from the day the plaintiff's attorney sent it, or from receipt by the insurer? The demand was dated March 1, 2008, but not postmarked until March 10, 2008. Did the attorney hold onto it for several days or a week before sending it? It was received by the insurer's imaging department on Thursday, March 13. Also, it was addressed to the personal injury protection adjuster rather than the liability adjuster and contained an incorrect claim number. The TLD was received by the liability adjuster after being shuffled through several departments on Monday, March 17. Is the demand due on March 31, April 13, or April 18? In order to ensure that it is not deemed to have responded in an untimely fashion, the insurer will have to respond by March 31. Responding at a later date could cause the plaintiff's attorney to refuse to accept a tender of policy limits, claiming that the policy limits are open because the tender is late. However, answering by March 31 gives the insurer only fourteen days to evaluate the demand, to obtain all documents it is required to produce, and to deliver the documents and settlement check, in hand, to plaintiff's attorney.
- How do we know this accident caused the injuries? What is the plaintiff's prior medical history? Did the herniation pre-exist the auto accident, or is it new? Has the plaintiff been treated by this chiropractor in the past for a similar problem? Does he really have a herniated disc, or was the MRI interpreted by a plaintiff-friendly radiologist, who interpreted a herniation whereas others might not?

[24] Fla. Stat. Ann. § 627.4137 (2011).

Should the insurer be forced to make a decision within thirty days based on this limited information? Should the insurer be forced to make a decision without the opportunity to review the medical records or have an independent doctor review the MRI films?

- In our adversarial system, in which the plaintiff's attorney is required to produce only evidence that supports his client's position, should an insurer be required to take the plaintiff or plaintiff's attorney's word for the nature and extent of the injuries suffered, without any verification? If the insurer decides not to pay the TLD because it has nothing to verify the information provided by the plaintiff's attorney, should this decision subject it to unlimited liability by a jury in a bad faith trial? The situation is especially troublesome when the plaintiff is truly injured, raising the stakes for the potential bad faith claim.
- Is the plaintiff off work due to the accident? Is the plaintiff a neurosurgeon, or is he a part-time employee at a low paying job? Was the plaintiff even working at the time of the accident? What amount of lost wages is being claimed? Should the insurer be required to accept the claim that the plaintiff is out of work as a result of the accident without any verification other than the attorney's assertion that this information is true?

In addition to the obvious concerns, the example TLD presents additional complications:

- Who will be released by the settlement? The TLD references "the insured." As it turns out, the vehicle was being driven by a permissive user who was also an insured under the policy. The owner of the vehicle, obviously, was the named insured under the policy. The insurer needs to know if the TLD contemplates providing releases for the driver, the owner, or both. Recall that under the *Contrares* case,[25] the insurer has a duty to attempt to obtain the release of only one insured if that is all the plaintiff is offering. In this instance, it is unclear——is the plaintiff's attorney offering to release the owner or driver or both? If the insurer seeks to clarify the offer, is it making a counter offer? Remember, the letter says that that any effort to seek clarification will be deemed a rejection of the TLD. Without the ability to seek clarification, the insurer might justifiably attempt to get both insureds released. Will this attempt be deemed overreaching when the term used in the TLD is singular and not plural? Is this a "mirror" acceptance? What if the insurer reasonably believes that plaintiff's attorney does not know that there are two insureds? Does this make a difference as to what is reasonably intended by the demand? Is it fair or reasonable to make the insurer guess as to the "true" intention of the plaintiff and his attorney?

[25] Contreras v. U.S. Sec. Ins. Co., 927 So. 2d 16 (Fla. Dist. Ct. App. 2006).

- What does plaintiff's attorney mean by "a release for the insured?" The TLD neither contains a sample release nor mentions the terms of any such release. It does not state who will be responsible for liens or other obligations. While it might seem fair to assume the TLD contemplates a full and final release of the insured, including liens and any other obligations, it certainly does not state this. Relying on this ambiguous language is problematic, especially when it comes to the insurer's duty to get a full and final release for its insured as a condition of the settlement.
- What is the plaintiff's prognosis? Did the plaintiff complete the treatment? Will the plaintiff require additional treatment? Has surgery been recommended? Has the plaintiff decided to undergo surgery? If the insurer rejects the TLD because it has incomplete information, and the plaintiff in fact does have surgery, is it reasonable to hold the insurer responsible when it was never informed of the surgery? What if surgery is recommended to the plaintiff *after* the TLD was sent, and plaintiff's counsel failed to notify the insurer? The plaintiff's attorney may argue that the insurer should have accepted the TLD because it knew of the herniated disc and that the insurer should have expected that the plaintiff would require surgery or future treatment.
- Why has the plaintiff's attorney created these ambiguities? Has he or she simply not considered the above concerns? Is he or she well-intentioned and seeking to quickly recover minimal policy limits for the seriously injured client? Is he or she trying to get more than the claim is worth by failing to disclose that the client has a pre-existing herniation, that the client was being treated by a chiropractor immediately prior to the accident, that the client did not have new symptoms or problems after the accident, or that the client was not working at the time of the accident? Is the attorney trying to get the insurance company to reject the demand because the attorney knows that the client has no pre-existing injuries and intends to undergo expensive and painful spinal surgery? If the insurer rejects the demand due to lack of information, the attorney may claim the insurer is in bad faith and has "opened up" its limits.

Given the ambiguities implicit in this hypothetical TLD, with features common to many actually received by insurers on a daily basis, how should the insurer respond? The insurer can choose to pay and settle the claim or refuse the TLD and request additional information. The insurer, in the absence of any other information, must choose whether to take the risk of overpaying a claim where the plaintiff was not really hurt or refusing to pay and later learning that the plaintiff suffered serious injuries. Here are the outcomes that could arise from this situation:

1. The insurer pays the policy limits, but the plaintiff's injuries are worth less than $25,000.

2. The insurer pays the policy limits, and the plaintiff's injuries are worth $25,000 or more.
3. The insured refuses to pay the policy limits, but the plaintiff's injuries are worth less than $25,000.
4. The insured refuses to pay the policy limits, and the plaintiff's injuries are worth $25,000 or more.

Unfortunately, due to the lack of information provided, the insurer has no way of determining which of the above situations it is facing. It has to guess at the best course of conduct, with serious consequences should it choose "incorrectly." The "incorrectness" of its decision will later be determined by a jury in a bad faith claim *after* a jury in a liability case decides (with all the information) the value of the claim.

While this situation is difficult for the insurer, there is no downside for the plaintiff. Under scenario one, the plaintiff reaps a windfall, receiving more money than he or she would rightly be entitled to. Under scenarios two and three, the plaintiff gets precisely what he or she is entitled to from the insurer. Finally, under scenario four, the plaintiff has the opportunity to "open up" the policy limits, to have the insurance carrier pay the entire amount of the plaintiff's damages despite the policy limits, and possibly to recover a bad-faith award as well.[26]

From a public policy and fairness standpoint, the above scenarios are unacceptable. Sometimes the plaintiff will get what he is entitled, but in half of the scenarios, the plaintiff receives a windfall. This windfall is not a product of an insurer's misconduct. Rather, it is the result of the plaintiff's attorney's ability to create a no-win situation for the insurance company: an insurer can risk overpaying a claim that may have little to no value, or risk rejecting the TLD and be found responsible for the full extent of the plaintiff's injuries.

If this incident was an isolated one, it might not be cause for serious concern. However, the common and recurrent nature of the scenario presented above demonstrates the severity of the problem. The insurer faces numerous bad faith claims, even though its actions were not bad, improper, or even negligent.

B. *The Multiple Plaintiff Conundrum*

The following scenario presents another opportunity for a fabricated bad-faith claim. Five teenage co-workers are in a car that is broadsided by a drunk driver. Two of the teenagers are killed; one suffers severe and life-altering injuries; one suffers serious injuries, however, the exact extent of the injuries is unknown; and one has unknown injuries. The party at fault has policy limits of $50,000 per person and $100,000 per accident. There are no other available sources of insurance recovery, and the drunk driver is destitute and facing life in prison. The police report is not available and will not be available for some time due to the severity of the accident and the pending criminal investigation.

[26] This will also include attorney's fees and the possibility of punitive damages.

The insurance company determines its insured, the drunk driver, was solely at fault for causing the accident. It immediately recognizes its affirmative obligation to tender its policy limits and to make every effort to resolve *all* of the claims. It conducts an extensive investigation into the cause of the accident and into the nature and severity of the injuries resulting from this tragic event.

The insurer consults with its insured driver and retains an attorney to represent the driver's interests. It learns that the driver was not the insured owner, and it also retains an attorney for the insured owner of the vehicle. Both attorneys hired to represent the insureds indicate they want the insurance company to do everything it can to resolve all claims against their clients within the policy limits. Quite properly, they will not provide any more specific advice or guidance as to how the insurer should deal with the multiple claims. In response, the insurer immediately begins efforts to arrange a global mediation or settlement conference to pay its policy limits to the multiple plaintiffs.

However, while this is occurring, the first deceased plaintiff's family hires an attorney who states that he is unwilling to attend a mediation/settlement conference. That attorney also makes a thirty-day TLD to release all insureds. The second deceased plaintiff's family tells the adjuster that they want to be left alone while they grieve, and they are not interested in discussing settlement *at this time*. The third plaintiff is in a coma. Her mother sends a handwritten letter to the insurer, advising that she needs "immediate" payment of the policy limits to pay her daughter's medical bills. The letter states that she is willing to release only the insured owner, not the intoxicated insured driver. The fourth plaintiff was taken from the scene by ambulance, but the insurer has been unable to obtain any further information about her injuries, despite diligent efforts. The fifth plaintiff was also taken from the scene by ambulance. A TLD has been received from the fifth plaintiff's attorney asking for payment of the policy limits in twenty days. It does not indicate who will be released, and the attorney for the fifth plaintiff has not returned the adjuster's phone calls or responded to faxes or letters.

Plaintiff	**Injury**	**Demand**
Plaintiff #1	Deceased	Thirty-day TLD, release all
Plaintiff #2	Deceased	No demand while grieving
Plaintiff #3	Severe injuries; in coma	Demand for immediate payment, release owner only
Plaintiff #4	Serious injuries, extent undetermined	No contact
Plaintiff #5	Serious injuries, extent undetermined	Twenty-day TLD, unsure who will be released

Under Florida law, the insurer has competing and conflicting obligations. Under *Powell*,[27] the insurer has an affirmative duty to negotiate serious injury claims even absent a demand: Where liability is clear, and injuries are so serious that a judgment in excess of the policy limits is likely, an insurer has an affirmative duty to initiate settlement negotiations.[28] Under *Shuster,*[29] the insurer has an obligation to attempt to settle all the claims.

It is fair to say that even King Solomon would shudder at the possibility of successfully resolving all of the claims with the limited policy in the situation presented. Yet, the insurer must take action and must do so in an extremely truncated manner. It has one demand for policy limits to be paid "immediately," one that expires in twenty days, one that expires in thirty days, and a duty under Florida law to timely pay *all* serious claims. To add another layer of complexity, one plaintiff is willing to release both insureds, another has indicated that it will release only one insured, and a third has not indicated whom she will release. Finally, the insurer has to consider whether the third plaintiff's mother is the proper person to be making demands on the plaintiff's behalf. To determine whether the mother is the proper representative, the insurer must consider whether the third plaintiff is a minor, whether the mother has a valid Power of Attorney, and whether the POA was executed properly. The insurer must also consider whether it should treat this claim on par with the other claims.

How should an insured, working in the utmost good faith and in accordance with Florida law, handle this situation? Applying the standard from *Farinas v. Florida Farm Bureau General Insurance,*[30] the insurer has multiple options.

- Call for a global mediation and refuse to settle any of the claims until that occurs
- Pay $50,000 apiece to the first two plaintiffs to make a claim
- Offer to split up the limits among the five plaintiffs equally, or according to some other formula
- Pay $50,000 each to the deceased plaintiffs
- Pay $50,000 each to two plaintiffs who appear at this time and with the information known to have the most serious injury claims
- Refuse to take any action until the insurer has complete medical information on all of the plaintiffs so it can determine the relative merits of each claim and the severity of each injury
- Interplead the policy limits of $100,000 for the court to split in some equitable manner

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[27] Powell v. Prudential Prop. & Cas. Ins. Co., 584 So. 2d 12, 13 (Fla. Dist. Ct. App. 1991).

[28] *Id.* at 14.

[29] Shuster v. S. Broward Hosp. Dist. Physicians' Prof'l Liab. Ins. Trust, 591 So. 2d 174, 177 (Fla. 1992).

[30] 850 So. 2d 555, 561 (Fla. Dist. Ct. App 2003).

Unfortunately, under each one of these scenarios, the insurer is likely to face a bad faith claim from one or more of the plaintiffs, a bad faith claim that can only be evaluated later by a jury. If the insurer allows the policy limits to expire while waiting for more information or waiting to set up a settlement conference, the plaintiffs who made those time limited offers may refuse to cooperate, withdraw their demands, and claim that the policy limits are opened for failure to timely respond. If the insurer meets two of the time limit demands, it may face lawsuits from the three remaining plaintiffs who were seriously injured but received nothing.

The only scenario under which the insurer walks away without any bad faith exposure would be one in which the plaintiffs all agree how to split the $100,000 before the first time limit demand expires. Absent an agreement from all parties, the insurer is faced with TLDs that force its hand and require it to take action without complete information. This action may result in it being sued for bad faith by plaintiffs who believe they did not get their "fair share" of the proceeds.

The case law referenced above has left insurers in Florida with a no-win scenario. Insurance companies are often left to make decisions in a short time frame, decisions which, no matter how decided, can expose the insurer to bad faith liability. Regardless of how the insurer proceeds, it can be sued for bad faith by the plaintiffs who do not receive all that they are demanding. Simply stated, there is little that the insurer can do, no matter the "good faith" it exhibits, that will insulate it from a bad faith suit.

In practice, the requirements of *Farinas*[31] are unworkable, unrealistic and simply unfair. With any more than two seriously injured plaintiffs and traditional split limits, the insurer can handle the claim perfectly, in lockstep with its insured's best interests, and still face uncertain and expensive bad faith suits.

C. *No Bodily Injury Coverage and the $10,000 Pair of Jeans*

The final technique for setting up a potential bad faith claim arises in the context of policies that do not contain bodily injury coverage. An insured purchases a policy authorized by Florida law, providing $10,000 in property damage (PD) coverage and $10,000 in personal injury protection (PIP) benefits. By its express terms, the policy excludes coverage for bodily injury (BI).

Assume that the insured negligently caused a serious accident. There was one plaintiff who suffered serious and permanent injury. The plaintiff had to be taken to the hospital by flight-for-life. The value of the injury claim is clearly in excess of $500,000.

One month after the accident and before disclosure of any policy information, the insurer received a letter from the plaintiff's counsel, stating the following:

[31] *Id.*

> Please be advised that I represent the plaintiff, who was injured in a horrendous accident. My client has been seriously injured and is in desperate need of funds. Therefore, please pay all of your insured's policy limits to resolve this matter, provide me with an affidavit of no other insurance, and provide an affidavit of no other assets executed by your insured. Be advised that in addition to the life-threatening injuries my client suffered, he also suffered the loss of his eye glasses, his watch, and his pants. These items were one-of-a-kind and made specifically by a world-class designer especially for my client. My client also lost other valuable items. In exchange for payment of the policy limits, my client will release the insured. This demand will expire in seven days. My client's family is desperately in need of the available funds in order to pay medical bills and to purchase food. Failure to respond timely will be a rejection of this demand.

The letter was dated October 8, 2008. It was postmarked October 10, 2008. It was received in the insurer's imaging department on October 13. It was put in the handling adjuster's mailbox the afternoon of October 13. The adjuster opened and read the demand on October 14.

As with the other examples provided above, on first glance, the demand appears reasonable and fair. However, on closer examination, it is clear that the demand is cleverly written and uses ambiguity as a weapon to force the insurer's hand. The adjuster reviewing this letter has numerous concerns:

- When exactly is the demand due?
- What "policy limits" are being demanded? Is the demand for PD limits only, is it for PD and PIP, or does the plaintiff's attorney believe there are BI limits available?
- Does the insurer need to pay $10,000 for the property damage claim, even though it has not been provided with any documentation of the amount of property damage actually suffered by the insured? If it requests documentation of the damages, and the time within which to respond to the demand passes, will it be able to pay the PD policy limits and resolve the case once the damages are proven? Should the plaintiff's attorney be required to provide some proof for the damages before the insurer's obligation to pay the claim is triggered?
- Does the insurer need to pay the PIP benefits of $10,000 to the plaintiff? What if the plaintiff has already assigned his or her rights to payment to the medical providers?
- What claims will be released if the policy limits are paid? The letter says it will release "all claims." Does this truly mean that "all claims," including BI claims, will be released with the payment of the PD or PIP limits? Or, upon payment of the PD limits, will the plaintiff's attorney claim that he was willing to release only PD claims for payment of PD limits?

- Is the insurer required to obtain an affidavit of no other insurance and of no assets from the insured? If so, why is it required to do so, since the PD claim cannot be worth more than the $10,000 limits? What if the insurer cannot locate the insured in time? What should those affidavits say? Is the insurer assuming a duty to handle the BI claim if it provides these documents to the plaintiff, even though the plaintiff has no BI coverage?
- If the demand includes a release for bodily injury, is the insurer allowed or required to negotiate this claim on behalf of the plaintiff who has no BI coverage? What are the consequences if it does so?
- Why did the plaintiff's attorney provide only seven days to respond? Did he do so to take advantage of the ambiguity and uncertainty created by his demand?

In addition to the ambiguities created by the TLD, the attorney's actions following the letter can create more dilemmas. Assume that the handling adjuster called the plaintiff's attorney's office to seek clarification. The adjuster was told by the attorney's secretary that the attorney is out of town and cannot be reached. The attorney will be unavailable until October 18. The secretary is not authorized to give an extension to the demand or to answer any questions with respect to the demand. The handling adjuster leaves a message and asks the attorney to call him if the attorney calls in for messages. The adjuster does not receive a call from the handling attorney, and out of an abundance of caution, he considers the demand to be due seven days from the date noted on the letter. Thus, the due date happens to be the following day, October 15.

With no ability to obtain clarification, the adjuster now faces a quandary:

1. The insurer might obtain the affidavits, pay the PD and PIP limits, and ask for a release of all claims as promised. This solution presumably settles the BI claim, for which there is no coverage, but it likely causes the insurer to overpay the unsupported PD claim. Also, it is quite possible that the attorney, having had all of his or her conditions satisfied, will now claim that he or she was unaware that there was no BI coverage, and indicate that there is no settlement because there cannot be a meeting of the minds.
2. The insurer might fail or refuse to obtain the affidavits but notify the insured of the demand. The insurer might meet the demand with respect to the PD and PIP limits and ask for a release of all claims as promised. This offer will likely be rejected by the plaintiff's attorney for failure to provide the affidavits, resulting in a tort suit against the insured and a later bad faith suit.
3. The insurer might refuse to pay the PD claim and demand proof of damages. This option may cause the plaintiff's attorney to consider the demand rejected and to file suit against the insured seeking the full extent of the BI and PD damages. The insurer will be required to defend the insured for the PD claim and will also

> be required to defend against any subsequent bad faith suit if a large judgment is entered.

Once again, the case law in the bad faith arena puts the insurer in a no-win situation. If the insurer cannot locate the insured in the short time period allowed, it will have to let the TLD lapse without a response that satisfies the "mirror image" rule. This result may cause the plaintiff's attorney to allege that the policy limits are open and to bring a bad faith suit.

Two cases dramatically reveal the risk the insurer is faced with on claims for which there is no bodily injury coverage. In *Allstate Indemnity Co. v. Oser,*[32] the court held that since the carrier undertook a duty to obtain affidavits from its insured, it could be held responsible for the full extent of the plaintiff's bodily injury damages if a settlement was not properly achieved. Even though the insurer provided no coverage for bodily injury, it is potentially obligated to compensate the plaintiff for his or her bodily injuries.

Likewise, in *Sorocka v. Severe*,[33] the court held that the insurer that rejected what it believed to be an inflated property damage claim could be held responsible for the full extent of the plaintiff's injuries. In *Sorocka,* the plaintiff made a demand for the payment of the BI limits. However, included in the demand was an inflated claim for property damage (PD) with no supporting documentation. Plaintiff's counsel demanded policy limits on the BI claim and $750 for the PD claim for lost property. The insurer believed the BI claim was justified but believed that the PD claim was inflated. The insurer delivered a release and check for the BI policy limits but never accepted or paid the PD claim.[34]

As a result, plaintiff rejected the tender and filed suit against the insured. The insured claimed that the parties had settled the BI claim. The insurer argued that it was free to settle the BI claim and leave open the PD aspect of the claim because the demand did not specify both claims had to be accepted. The appellate court disagreed, stating that the insurer could not pick the types of damage it wished to accept.[35] Since there was not a proper settlement, the insured was exposed to an excess judgment and the carrier to bad faith liability for failing to settle the claims against its insured.

These cases further illustrate how the law of bad faith in Florida has taken a wrong turn. Originally, bad faith law was intended to prevent the insurance carrier from putting its interests ahead its insureds'. Now, minor errors, value disputes, and simple misunderstandings are sufficient to form the basis of a bad faith lawsuit. These limits have been stretched to include coverage that was not purchased or contemplated by the parties to the insurance contract.

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[32] 893 So. 2d 675 (Fla. Dist. Ct. App. 2005). *But see* Rodriguez v. Am. Ambassador Cas. Co., 4 F. Supp. 2d 1153 (M.D. Fla. 1998) (refusing to find that insurer had acted in bad faith in failing to inform insured of the insured's offer to settle bodily injury claim where insured did not have coverage for bodily injury).

[33] 858 So. 2d 388 (Fla. Dis. Ct. App. 2003).

[34] *Id.* at 389.

[35] *Id*.

IV.
Why "Trial By Jury" Is Not a Suitable Solution to the Problems of Bad Faith Claims

Florida courts have declared that most bad faith issues should not be decided as a matter of law, but by juries. What could be fairer than having six impartial jurors deciding the outcome of a dispute? Who can quarrel with allowing our jury system to sort out right and wrong in these situations? There are a number of compelling reasons why the right to a trial by jury is not always the appropriate solution to the problems created by bad faith claims that arise in the scenarios described in this Article. First and foremost is the fact that the focus of the trial is on the insurer's conduct, not the plaintiff's actions. For instance, a jury was not allowed to hear a jury instruction on legal causation and the plaintiff's comparative negligence.[36] This rule is the equivalent of putting blindfolds on the jurors. Surely hearing only one side of an argument would tend to bias the jury in favor of the plaintiff. As a result, one could argue that it is impossible for the insurer to receive a fair trial.

Second, the jury has the benefit of hindsight, even though it is instructed to evaluate the insurer's conduct with the information available to the insurer at the time of its actions. Although the insurer is forced to make decisions in the absence of much information, the jury in the liability case gets to see how the injuries played out when making its decision. A plaintiff's attorney who does not provide information to the insurer about his client's need for surgery has the benefit of his client actually having undergone surgery by the time of the bad faith trial. What the insurer never knew (but allegedly should have foreseen), the jury now knows. While the jury is told to view the facts as the insurer had them at the time the demand was made, in actuality the jury knows what happened after the demand was made. The jury must determine whether bad faith exists and award damages. Unless there is a system that allows the bifurcation of liability and damages, the jury will inevitably apply hindsight when judging the insurance company's conduct.[37]

A third reason why bad faith trials are less than ideal is that jurors in these types of serious injury cases must decide whether to compensate a profoundly injured person at the expense of a well-funded insurance company or send that person home with no money. Despite the court's admonishments concerning sympathy, it is difficult to imagine how a jury could not be swayed by this factor, even in the absence of clear wrongdoing by the insurer.

Finally, refusing to grant summary judgment in bad faith cases (thereby guaranteeing jury trials in bad faith suits) has helped to create the incentive using the tactics described in this Article to set up a bad faith claim.

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[36] Nationwide v. King, 568 So. 2d 990, 990 (Fla. Dist. Ct. App. 1990).

[37] The authors are unable to find one instance where a Florida trial court bifurcated liability and damages in a bad faith case.

V.
A Problem That Affects Everyone

In these difficult economic times, there is an understandable lack of sympathy for insurers facing bad faith claims. However, as Justice Wells of the Florida Supreme Court pointed out, this issue does not impact only insurers. In fact, it harms everyone but the plaintiffs' attorneys and plaintiffs who are successful in their efforts to set up insurers:

> Just as it is an obvious truth that "there is no free lunch," likewise, there is no free liability insurance. It is an undeniable fact which follows logic and common sense that bad faith judgments against insurers drive up the premium costs for all insureds, particularly for insureds who purchase low-limits liability insurance policies. Liability insurance is a pool of money. The pool is filled by premiums and drained by claims. When an insured purchases and pays premiums on $20,000 of insurance but the insurer pays $2.5 million in claims, someone has to fill up the pool. Initially, this amount may come out of an insurer's profits, but eventually the someones are the other insureds, whose premiums are increased.[38]

The real cost of Florida's bad faith laws is borne by all.

VI.
Proposed Solutions

Some Florida judges are beginning to notice and understand that bad faith law has expanded beyond its original framework and that plaintiff's attorneys are perverting it for personal gain beyond its original intent. Courts have also begun to recognize the prevalence of tactics utilized to set up insurance companies for bad faith claims. Courts have little authority to rewrite bad faith law. There are, however, steps that courts and the legislature can take to bring bad faith back into line with its original intent.

To reverse the deviation from the original intent of the bad faith laws, courts can use an objective standard and permit evidence of the plaintiff's conduct. As Justice Wells artfully noted in his *Berges* dissent, courts can utilize logical, objective standards for bad faith.[39] Once these objective standards have been explained, the court can decide bad faith issues as a matter of law. This system would prevent a jury from escalating a *de minimus* deviation from a demand letter into a multi-million dollar verdict. The second step the courts can take is to recognize and permit evidence of a set-up and comparative (reverse) bad faith. Plaintiffs' attorneys will be forced to ensure that their demands are reasonable and can be

[38] Berges v. Infinity Ins. Co., 896 So. 2d 665, 686 (Fla. 2004) (Wells, J., dissenting).

[39] *Id.*

justified if the courts permit the insurer to challenge the reasonableness of demands and to provide evidence of whether a plaintiff truly intended to settle the claim under the demand's terms. In such a circumstance, the failure to adhere to the *truly* essential elements of the offer is significant from a damage standpoint. Comparative bad faith—long since rejected—may be a useful tool for the courts to "level the playing field" a bit.

Another solution to avoid unreasonable outcomes is to bifurcate the "liability" and damages portions of the bad-faith trial. As noted above, bifurcation would prevent the jury from learning things about the facts and injuries that the claims representative did not know at the time of the demand. This method may eliminate some of the second-guessing or hindsight from the jury deliberations. A judge would be encouraged to consider bifurcation in such a circumstance.

These proposals could start to bring the laws of bad faith back into line, but the difficulty with the judicial approach is time. Case law has developed, issue by issue, over a period of almost thirty years. Resolving the land mines caused by these decisions may take equally long. The better approach may be for the legislature to step in and define objective standards and goals for the courts. At the same time, the legislature could implement a requirement for a civil remedy notice in third-party cases.

Florida law already requires a civil remedy notice as a prerequisite for the filing of first-party bad faith claims.[40] The civil remedy notice, if properly defined and specific, notifies the insurer of the potential bad faith claim and provides the insurer the precise steps needed to correct the alleged violation. A properly drafted civil remedy notice also provides the insurer a safe harbor period to correct the alleged bad faith. A civil remedy notice would be a good solution if the true reason for bad faith law is to prevent dishonest and unfair tactics by insurance carriers in the settlement of disputed claims. The civil remedy notice would also operate to provide a means to "correct" the concerns raised by plaintiffs, without resorting to arbitrary time demands and confusing settlement terms.

These are just some of the steps that can be utilized to bring bad faith law back to its original intent: to protect the public by enforcing the duty of insurance companies to act fairly and honestly toward their insureds.[41] If bad faith law is meant to prevent an insurance carrier from acting unfairly and dishonestly toward its insured, is it not time for fairness and honesty in evaluating both the claims of the injured and the insurer's conduct in third-party bad faith claims? If a carrier is supposed to evaluate a settlement demand "with due regard" to the interests of its insured, shouldn't its conduct be viewed without the application of hindsight?

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[40] Fla. Stat. Ann. § 624.155 (2004 & Supp. 2011).

[41] An insurance company acts in bad faith in failing to settle a claim when, under all of the circumstances, it could and should have done so, had it acted fairly and honestly towards its insured and with due regard for their interests. Fla. Standard Form Jury Instructions in Civil Cases, § MI 3.1 (2011).

Implementing the above suggestions would begin to right the wrong that has been occurring on a daily basis in Florida. It would also serve to promote justice and efficiency by punishing only truly improper conduct by insurers. Finally, it would ensure that consumers are not paying more for their insurance due to bad faith claims that are brought despite the fact that an insurer has made every attempt to act in good faith toward its insured.

Restrictions on the Insured's Right to Settle

Thomas R. Newman

I.
Introduction

Liability insurers, both primary and excess, include provisions in their policies to protect themselves against collusive or otherwise unreasonable settlements—for example, an excessively generous settlement or settlement where the claim was defensible—entered into by the insured without their consent. On the primary level, the widely used ISO Commercial General Liability Coverage Form[1] accomplishes this objective by including in its conditions a "no voluntary payments" provision[2] and a "no action" clause.[3] Similarly, although excess

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[1] ISO Commercial General Liability Form, CG 00 01 10 01. "The CGL insurance form is created and published by the Insurance Services Office, Inc. (ISO), which revises and updates the basic policy language for the insurance community every few years as necessary." Jennifer Janik, *Trademark Law and the CGL*, 10 Conn. Ins. L.J. 171, 176 (2004); *see generally* Insurance Services Office, http://www.iso.com (last visited June 3, 2011).

[2] The ISO Commercial General Liability form, CG 00 01 10 01 provides as follows:

> 2. Duties In The Event Of Occurrence, Offense, Claim Or Suit
>
> . . .
>
> d. No insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent.

[3] The ISO Commercial General Liability Form, CG 00 01 10 01 provides as follows:

> 3. Legal Action Against Us
>
> No person or organization has a right under this Coverage Part:
>
> a. To join us as a party or otherwise bring us into a 'suit' asking for damages from an insured, or
>
> b. To sue us on this Coverage Part unless all of its terms have been fully complied with.
>
> A person or organization may sue us to recover on an agreed settlement or on a final judgment against an insured; but we are not liable for damages that are not payable under the terms of this Coverage part or that are in excess of the applicable limit of insurance. An agreed settlement means a settlement and release of liability signed by us, the insured and the claimant or the claimant's legal representative.

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and umbrella liability coverage forms differ from company to company, they all contain some variant of the "loss payable,"[4] "no action," or "consent to settlement"[5] clause.

Courts have relied upon each of these provisions "in holding that the insurer is not obligated to pay or indemnify a settlement which the insured had entered into without obtaining

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[4] *See, e.g.,* Merrimack/Cambridge Mutual Fire Ins. Co., Businessowners Excess Liability Coverage Form. BX0002(8/98), which provides as follows:

> 4. Loss Payable.
>
> Our liability for any portion of "Ultimate Net Loss" shall not apply until the insured or any "underlying insurer" shall be obligated to pay the applicable limits of any "underlying insurance" or the "retained limit," whichever is applicable. When "Ultimate Net Loss" has been determined, the insured may make "claim" under this policy as soon as practicable thereafter. Such insured's obligation to pay any amount of "Ultimate Net Loss" shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and us.

[5] *See, e.g.,* Motiva Enter., LLC v. St. Paul Fire & Marine Ins. Co., 445 F.3d 381, 383 n.1 (5th Cir. 2006).

the prior written consent of the insurer."[6] Where an insurance policy includes one of these provisions, "an insured who settles a claim or suit or otherwise incurs expenses without the carrier's consent runs a very serious risk of being required to pay for such settlement or expenses out of pocket."[7]

Given their effectiveness, familiarity with these provisions is essential. This Article will provide an overview of "no action" and "loss payable" clauses in Part II and "no voluntary payments" and "consent to settlement" provisions in Part III. The Article will conclude in Part IV by identifying helpful principles to guide the interpretation of these clauses.

II.
"No Action" Clauses

"No action"[8] clauses require that the insured's liability or obligation to pay the amount of the ultimate net loss "shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and [the insurer]."[9] These provisions accomplish two principal objectives.

First, a "no action" clause is designed "to avoid joinder of the [insurer] by the injured person in the damage action against the insured."[10] Second, "no action" clauses "prevent suit against the carrier by the injured person or the insured until the damages have been fixed by final judgment after trial of that action or by proper agreement."[11] Accordingly, the insurer has no contractual obligation to the insured or any third party until the insured's liability to the claimant has been established."[12]

A. *Validity of "No Action" Clauses*

"No action" and "loss payable" clauses have been upheld as binding and enforceable provisions of the policy that limit the right to sue the insurer and do "not violate public policy or any provision of law."[13] However, there are some exceptions to this general rule.

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[6] New Appleman New York Insurance Law § 16.12 (2d ed. 2010).

[7] Limor Lihavi, *Making Sense of Notice, Cooperation, and Consent Provisions in Liability Insurance Policies*. 50 Orange Cnty. Lawyer 50, 53 (2008).

[8] In the excess insurance context, the same language may be contained in a "loss payable" clause. *See* Merrimack/Cambridge Form, *supra* note 4.

[9] *See* Merrimack/Cambridge Form, *supra* note 4.

[10] Batsakis v. Fed. Deposit Ins. Corp., 670 F. Supp. 749, 758–59 (W.D. Mich. 1987).

[11] *Id.*

[12] *See* 7A Lee R. Russ & Thomas F. Segalla, Couch on Insurance 3d § 105.4 (3d ed. 2005).

[13] Cotton States Mut. Ins. Co. v. Keefe, 113 S.E.2d 774, 778 (Ga. 1960); Rosenthal v. Sec. Ins. Grp. of New Haven, 205 So. 2d 816, 818 (La. Ct. App. 1967).

First, a "no action" clause will not protect an insurer that has waived[14] or is estopped[15] from relying on the terms of its policy. Waiver or estoppel will arise in scenarios where the insurer unjustifiably denies liability on a claim before an action is commenced against the insured;[16] where the insurer unjustifiably delays settlement of an insured claim;[17] or if the insurer fails to conduct the defense and abandons its insured.[18]

In jurisdictions with direct action statutes,[19] a "no action" clause will be ineffective to protect the insurer from actions by the insured or third parties. Although precise language in these statutes differs from state to state, the statutes have two commonalities: (1) they make the insurer directly liable to a tort victim—regardless of whether there has been a final judgment or settlement; and (2) they provide the insured with an independent cause of action against the insurer. Further, direct action statutes require an insurer to appear as a party in litigation and do not permit an insurer's defenses against an insured to be used against third parties.[20]

Finally, a "no action" clause will not protect an insurer that acts in bad faith or wrongfully refuses to defend or settle. In these instances, the insurer has forfeited control of defense and settlement, and the insured is "free to settle the lawsuit on his own, and the insurer is bound by a stipulated judgment."[21]

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[14] Waiver is "the intentional relinquishment of a known right, with both knowledge of its existence and an intention to relinquish it." City of New York v. State, 357 N.E.2d 988, 995 (N.Y. 1976). Mere silence is not sufficient to establish what is required for waiver: namely, a manifest intent to relinquish a known right. Gilbert Frank Corp. v. Fed. Ins. Co., 520 N.E.2d 512, 514 (N.Y. 1988).

[15] Demolition Contrs., Inc. v. Westchester Surplus Lines Ins. Co., 381 Fed. Appx. 526, 532–535 (6th Cir. 2010).

[16] *See* Thomas W. Hooley & Sons v. Zurich Gen. Acc. & Liab. Ins. Co., 103 So. 2d 449, 452-53 (La. 1958).

[17] *See* Emile M. Babst Co. v. Nichols Constr. Corp., 488 So. 2d 699, 703 (La. Ct. App. 1986).

[18] *See, e.g.*, Milbank Mut. Ins. Co. v. Wentz, 352 F.2d 592, 600-01 (8th Cir. 1965); Idaho v. Bunker Hill Co, 647 F. Supp. 1064, 1075 (D. Idaho 1986).

[19] Wisconsin, Louisiana, and Rhode Island have direct action statutes. Wis. Stat. §§ 632.24, 632.34, 803.04 (2009-10); La. Rev. Stat. Ann. §§ 22:1269 (2009 & Supp. 2011); R.I. Gen. Laws Ann. § 27-7-1 (West 2008); R.I. Gen. Laws Ann. § 27-7-2 (West 2008 & Supp. 2010).

[20] *Id.*

[21] Safeco Ins. Co. v. Superior Court, 84 Cal. Rptr. 2d 43, 45 (Ct. App. 1999).

B. *Judicial Interpretation of "No Action" Clauses*

In general, courts will enforce "no action" clauses as written. In almost all jurisdictions, "courts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing."[22] However, courts in a few jurisdictions[23] have allowed equitable considerations to interfere with the operation of "no action" clauses, particularly where the insurer contends that there is no coverage for a settlement that the insured agreed to without the insurer's consent.[24]

C. *Declaratory Judgment Actions*

The effect of a "no action" clause requiring a final judgment or settlement varies, depending upon whether the plaintiff is seeking damages or declaratory relief from the insurer.

Where the insured's action is for damages against its insurer, and the policy requires a final judgment or settlement before the insurer can be sued, if there has been no final judgment or settlement the "insurer can defeat the action based upon the insured's failure to satisfy this condition precedent."[25] However, the final judgment or settlement requirement does not prevent an insured from seeking a declaration of the insurer's duty to provide coverage or a defense before a final judgment is entered against the insured,[26] particularly if "the insurer

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[22] Vt. Teddy Bear Co. v. 583 Madison Realty Co., 807 N.E.2d 876, 879 (N.Y. 2004); *see also* Fieldston Prop. Owners Ass'n. v. Hermitage Ins. Co., 945 N.E.2d 1013,1019 (N.Y. 2011) ("If the policies were drafted using different language, we might hold differently, but we may not judicially rewrite the language of the policies at issue here to reach a more equitable result"); Moshiko, Inc. v. Seiger & Smith, Inc., 529 N.Y.S.2d 284, 288 (App. Div. 1988) ("The fact that plaintiff may have contracted for coverage that was of little use to it at the time [of the loss] does not mean that it is entitled to more beneficial coverage which it did not contract for.").

[23] California, Florida, and Kansas have followed the view articulated in *Diamond Heights Homeowners Ass'n. v. National American Insurance Co.*, 277 Cal. Rptr. 906, 915–917 (Ct. App. 1991). N. Am. Van Lines, Inc. v. Lexington Ins. Co., 678 So. 2d 1325, 1331-32 (Fla. Dist. Ct. App. 1996); Wholesale Grocers, Inc. v. Americold Corp., 934 P.2d 65, 81 (Kan. 1997) (holding that excess insurer has an obligation to exercise good faith in deciding to consent to a settlement).

[24] See, *infra*, Part III.

[25] Caldwell Trucking PRP Grp v. Spaulding Composites Co., 890 F. Supp. 1247, 1258 (D.N.J. 1995); Bacon v. Am. Ins. Co., 330 A.2d 389, 395 (N.J. Super. Ct. Law Div. 1974). *But see Batsakis v. Federal Deposit Insurance Corp.*, 670 F. Supp. 749, 758–59 (W.D. Mich. 1987), where the court, relying upon Michigan law, refused to create an exception permitting an insured to pursue a declaratory judgment action before entry of final judgment, holding that such "'no action clauses' have been upheld as valid and consistent with Michigan public policy which militates against premature actions against liability insurers."

[26] A "party who has brought a claim for personal injury or wrongful death against another party may maintain a declaratory judgment action directly against the insurer of such other party," N.Y. C.P.L.R § 3001 (McKinney Supp. 2011), in accordance with New York Insurance Code § 3420(a)(6)).

allegedly has repudiated the contract and declined to furnish an agreed defense of a covered damage action."[27]

D. *"Finally Determined"*

The "standard 'no action' clause clearly contemplates that the insured's liability shall be considered to be finally determined after trial by the entry of judgment against him, regardless of whether an appeal is subsequently taken."[28] The expression "final judgment"

> designates that judgment of the court of original jurisdiction by which the rights of the parties are adjudicated and determined. The finality of the judgment so entered is not affected by the pendency of an appeal. . . . [I]n the absence of a stay a judgment entered . . . has complete finality. Execution may be entered thereon even though an appeal is pending. The judgment may be satisfied while the appeal is pending. Though there may be a reversal and another final judgment, nevertheless, the first judgment was a final judgment in the action.[29]

If the insured fails to stay execution of the judgment pending appeal, the judgment creditor is privileged to proceed against the insurer to collect the unsatisfied judgment. On the other hand, where enforcement of the judgment has been stayed during the pendency of an appeal by the posting of an appeal bond or by court order, there is no "final judgment" within the meaning of a "no action" or "loss payable" clause.[30]

E. *"Actual Trial"*

The requirement that the insured's liability must be established after an "actual trial" means that the final judgment must be the result of a true adversarial proceeding. An "actual trial" requires "a suit at law . . . with all the concomitants embraced within such a . . . procedure."[31] "Friendly suits," or proceedings brought to obtain judicial approval of a settlement that was entered without the insurer's prior consent will not satisfy the "actual trial" requirement.[32]

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[27] Condenser Serv. & Eng'g Co., Inc. v. Am. Mut. Liab. Ins. Co., 131 A.2d 409, 414 (N.J. Super. Ct. App. Div. 1957).

[28] Ring v. State Farm Mut. Auto. Ins. Co., 708 P.2d 457, 458 (Ariz. 1985); Gen. Accident Fire & Life Assurance Corp. v. Harris, 117 So. 2d 44, 45 (Fla. Dist. Ct. App. 1960).

[29] Matter of Bailey, 40 N.Y.S.2d 746, 749–50 (App. Div. 1943); Clougherty v. Royal Ins. Co., 232 A.2d 610, 615–16 (R.I. 1967).

[30] Tucker v. State Auto. Mut. Ins. Co., 132 S.W.2d 935, 937 (Ky. 1939).

[31] Fernald v. Providence-Washington Ins. Co, 50 N.Y.S. 838, 840 (App. Div. 1898).

[32] Gulf Ins. Co. v. Tex. Cas. Ins. Co., 580 S.W.2d 645, 648 (Tex. App. 1979).

Despite courts' strict reading of the "actual trial" requirement, arbitration proceedings *will* satisfy this provision in some instances. Where the underlying contract upon which the claim was made against the insured calls for arbitration,

> liability under the policy may result only through an award in arbitration proceedings, . . . [and] the carrier is deemed to have meant the word 'trial' as used in [the] policy to include arbitration proceedings, and to have intended that 'judgment' shall include such judgments as are entered upon confirmation of arbitration awards.[33]

F. *Timing of the Settlement*

For purposes of a "no action" or "loss payable" clause, a court will find that the parties entered a valid settlement even if the settlement was made subject to court approval, and they have not yet obtained such approval.[34]

III.
"Consent to Settlement" Clauses

"Consent to settlement" or "no voluntary payment"[35] provisions help insurers prevent collusion, "invest the insurer with the complete control and direction of the defense or compromise of suits or claims,"[36] and protect insurers against "'coverage by fait accompli.'"[37] Under these provisions, notice is a condition precedent to the insurer's obligation to pay, and "the right to be indemnified cannot relate back to payments made or obligations incurred before notice."[38]

A. *Validity of "Consent to Settlement" Clauses*

Like "no action" clauses, "consent to settlement" clauses are generally enforceable. An insured "who does not comply with the terms of his policy by preserving for his insurer the opportunity to defend or compromise, is usually not entitled to recover under his contract."[39]

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[33] Cross Props., Inc. v. Home Indem. Co., 246 N.Y.S.2d 683, 686 (Sup. Ct. 1964).

[34] *See* Vigilant Ins. Co. v. Bear Stearns Co., 884 N.E.2d 1044 (N.Y. 2008); *see also* TLC Beatrice Int'l Holdings v. Lewis, 97 Civ. 8589, 2000 U.S. Dist. LEXIS 2917 (S.D.N.Y. March 16, 2000), *aff'd*, No. 00-7411, 2000 U.S. App. LEXIS 27848 (2d Cir. Nov, 3, 2000).

[35] *See, e.g.* 14 Steven Plitt, Daniel Maldonado & Joshua D. Rogers, Couch on Insurance 3d §§ 203.1-203.6 (3d ed. 2005 & Supp. 2011). Some courts and commentators distinguish no voluntary payment clauses from "consent to settlement" provisions; however, the provisions have the same effect. *See, e.g.* Kent D. Syverud, *The Duty to Settle*, 76 Va. L. Rev. 1113, 1172–1185 (1990).

[36] Gribaldo, Jacobs, Jones & Assocs. v. Agrippina Versicherunges A.G., 476 P.2d 406, 415 (Cal. 1970).

[37] Low v. Golden Eagle Ins. Co., 2 Cal. Rptr. 3d 761, 770 (Ct. App. 2003) (quoting Jamestown Builders, Inc. v. Gen. Star Indem. Co., 91 Cal. Rptr. 514, 517 (Ct. App. 1999)).

[38] Truck Ins. Exch. v. Unigard Ins. Co., 94 Cal. Rptr. 2d 516, 522–524 (Ct. App. 2000).

[39] Diversified Mortg. Investors v. U.S. Life Title Ins. Co. of N.Y., 544 F.2d 571, 575 (2d Cir. 1976).

After all, the "[insurer] has bargained for the contractual right to contest the liability of its insured instead of having its money given away by an agreement to which it was not a party."[40]

The New York case of *Vigilant Insurance Co. v. Bear Stearns Cos.*,[41] illustrates the approach generally taken by courts throughout the country that uphold consent to settlement clauses, with the result that if the insured's liability has not been fixed or rendered certain by judgment after actual trial or a settlement agreed to by the insurer, the insurer will be absolved of any obligation to contribute to the settlement.[42] In that case, the New York Court of Appeals ruled in favor of the insurer, reasoning that

> [a]s a sophisticated business entity, Bear Stearns expressly agreed that the insurers would "not be liable" for any settlement in excess of $5 million entered into without their consent. Aware of this contingency in the policies, Bear Stearns nevertheless elected to finalize all outstanding settlement issues and executed a consent agreement before informing its carriers of the terms of the settlement. Bear Stearns therefore may not recover the settlement proceeds from the insurers.[43]

However, when an insurer declines coverage or unjustifiably refuses to defend its insured, the insured may settle rather than proceed to trial to determine its legal liability, and the insurer will be liable for the amount of any reasonable settlement, even though its policy required the insured to obtain its consent to the settlement.[44]

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[40] Coil Anodizers, Inc. v. Wolverine Ins. Co., 327 N.W.2d 416, 418 (Mich. Ct. App. 1982). *See also* Harville v. Twin City Fire Ins. Co., 885 F.2d 276, 279 (5th Cir. 1989) ("Under Texas law, the 'no action' clause is a valid condition precedent to liability under the policy"); State Farm Fire & Cas. Co. v. Winsor, 5 F. Supp. 2d 1258, 1264 (D. Wyo. 1998) ("[W]here there is no agreement as to liability . . . and the amount of damages has not been determined by judgment after actual trial, there is no right of action under the policy's liability coverage"); Jones v. S. Marine & Aviation Underwriters, Inc., 888 F.2d 358, 361 (5th Cir. 1989) (concluding, under Mississippi law, that "[g]enerally, when an insured makes a settlement without the insurer's previous consent as required by the policy, the insured is not entitled to reimbursement from the insurer because the insured has breached a condition of coverage"); Seaborn v. Preferred Accident Ins. Co. of N.Y., 246 P.2d 365, 367 (Okla. 1952).

[41] Vigilant Ins. Co. v. Bear Stearns Co., 884 N.E.2d 1044 (N.Y. 2008).

[42] There are earlier New York law decisions to the same effect that remain good law. *See,* e.g., White v. Globe Indem. Co., 233 N.Y.S.2d 244, 246 (App. Div.1962); McWilliams v. Home Ins. Co., 57 N.Y.S. 1100, 1103 (App. Div. 1899).

[43] *Vigilant*, 884 N.E.2d at 1048.

[44] Luria Bros. & Co. v. Alliance Assurance Co., 780 F.2d 1082, 1092 (2d Cir. 1986); Isadore Rosen & Sons, Inc. v. Sec. Mut. Ins. Co., 31 N.Y.2d 342, 347 (1972); Jones v. S. Marine & Aviation Underwriters, Inc., 888 F.2d 358, 362 (5th Cir. 1989) (applying Mississippi law); U.S. Fid. & Guar. Co. v. Safeco Ins. Co., 522 S.W.2d 809, 819–20 (Mo. 1975).

B. *Timing of Consent*

The precise requirements for prior written consent vary dramatically among policies. Some policy forms expressly require the insurer's prior written consent to a settlement;[45] others suggest that the requirement of "prior" consent may fairly be implied from the policy wording;[46] and some policies are silent about the time when the consent must be obtained.[47] In the latter case, subject to other policy terms and the governing case law in the particular jurisdiction, a policyholder may not have breached the policy condition if it is able to obtain the insurer's consent to a reasonable settlement at any time prior to payment.

The fact that a court finds a settlement to be "'fair, adequate, and in the public interest'"[48] will not, by itself, negate the insured's obligation under the policy to obtain the insurer's consent before the insured agrees to a settlement.

C. *Prejudice Requirement*

There is a jurisdictional split as to whether prejudice is required for the insurer to raise breach of a consent to settlement provision as a defense. In some jurisdictions, the insurer does not have to show prejudice from an unconsented-to settlement in breach of the policy terms. The settlement constitutes prejudice as a matter of law.[49] One court explained that

> an insurer's right to participate in the settlement process is an essential prerequisite to its obligation to pay a settlement. When, as in this case, the insurer is not consulted about the settlement, the settlement is not tendered to it and the insurer has no opportunity to participate in or consent to the ultimate settlement decision, we conclude that the insurer is prejudiced as a matter of law. Under these circumstances the breach of the consent-to-settle provision in the policy precludes this action.[50]

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[45] TLC Beatrice Int'l Holdings, Inc. v. CIGNA Ins. Co., 97 Civ. 8589, 2000 U.S. Dist. LEXIS 2917 at *11 (S.D.N.Y. March 16, 2000) ("The Insureds shall not admit liability for or settle any Claim . . . without the Insurers' prior written consent, which consent shall not be unreasonably withheld.").

[46] *Vigilant*, 884 N.E.2d at 1047 ("The Insured agrees not to settle any Claim . . . without the Insurer's consent, which shall not be unreasonably withheld . . .").

[47] Diversified Mortg. Investors v. U.S. Life Title Ins. Co. of N.Y., 544 F.2d 571, 575 (2d Cir. 1976) ("No claim for damages shall arise or be maintainable under this policy . . . for liability voluntarily assumed by the insured in settling any claim or suit without the written consent of this company.").

[48] *Vigilant*, 884 N.E.2d at 1046.

[49] *New York Central Mutual Fire Insurance Co. v. Danaher,* 736 N.Y.S.2d 195, 196 (App. Div. 2002), provides an example of a jurisdiction that did not require a showing of prejudice. In that case a New York court held that an insurer "is not required to demonstrate prejudice to assert a defense of non-compliance."

[50] Motiva Enter., LLC v. St. Paul Fire & Marine Ins. Co., 445 F.3d 381, 386–87 (5th Cir. 2006); *see also* Danrik Constr., Inc. v. Am. Cas. Co. of Reading, 314 Fed. Appx. 720, 724 (5th Cir. 2009) ("[T]his court, in construing Texas law regarding an identical consent-to-settle clause, held that an insurer suffers prejudice as a matter of law when an insured unilaterally settles a claim.").

Other jurisdictions require that the insurer must show actual prejudice. For example, one court held that

> a no-settlement clause contains a condition the insured must fulfill to create the insurer's obligation to pay under the policy. Such conditions designate the manner in which claims covered by the policy are to be handled once a claim has been made or events giving rise to a claim have occurred. They are clearly placed in policies to prevent the insurer from being prejudiced by the insured's actions. To release an insurer from its obligations without a showing of actual prejudice would be to authorize a possible windfall for the insurers.[51]

A third approach, adopted first in California[52] and then subsequently in Florida[53] and Kansas,[54] applies to insurers that do not acknowledge coverage and fail to provide a defense or accept a reasonable opportunity to participate in the settlement of a claim. Regardless of whether it is a primary or excess insurer,

> where an insurer reserves its right to deny coverage while declining a reasonable opportunity to participate in the defense or settlement of the claim, the insurer may not simply assert the insured's breach of a consent clause to avoid coverage under the policy, but rather must show that the resulting settlement was fraudulent, unfair, or unreasonable.[55]

In *Diamond Heights Homeowner's Ass'n v. National American Insurance Co.,*[56] the First District Court of Appeal of California first recognized what the Second District Court of Appeal later characterized as "a narrow exception to the general rule that consent clauses in liability insurance policies are enforceable as a matter of law without any showing of prejudice by the insurer."[57] In *Diamond Heights,*[58] Central National, an excess insurer with no duty to defend or pay defense costs, refused to consent to a proposed settlement of an underlying construction defect action against the developer of a condominium project that implicated its umbrella policy.

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[51] Public Util. Dist. No. 1 v. Int'l Ins. Co., 881 P.2d 1020, 1029 (Wash. 1994).

[52] Diamond Heights Homeowners Ass'n. v. Nat'l Am. Ins. Co., 277 Cal. Rptr. 906, 915-917 (Ct. App. 1991).

[53] N. Am. Van Lines, Inc. v. Lexington Ins. Co., 678 So. 2d 1325, 1331-32 (Fla. Dist. Ct. App. 1996).

[54] Wholesale Grocers, Inc. v. Americold Corp., 934 P.2d 65, 81 (Kan. 1997) (excess insurer has an obligation to exercise good faith in deciding to refuse consent to a settlement).

[55] Safeco Ins. Co. of Am. v. Certain Underwriters at Lloyd's, London, No. BC378070, 2011 WL 1796529, at *9 (Cal . Ct. App. May 11, 2011).

[56] 277 Cal. Rptr. 906 (Ct. App. 1991).

[57] *Safeco Ins*., 2011 WL 1796529, at *11.

[58] 277 Cal. Rptr. 906.

Condition H of the policy provided the following as to any action instituted against the insured:

> Assistance and Cooperation. [Central] shall not be called upon to assume charge of the settlement or defense of any claim made or suit brought or proceeding instituted against the Insured but [Central] shall have the right and shall be given the opportunity to associate with the Insured or the Insured's underlying insurers, or both, in the defense and control of any claim, suit or proceeding relative to an occurrence where the claim or suit involves, or appears reasonably likely to involve [Central], in which event the Insured and [Central] shall cooperate in all things in the defense of such claim, suit or proceeding.[59]

Condition J in Central National's policy "included the standard 'no action' clause providing that the insured could make a claim of loss 'after the Insured's liability shall have been fixed and rendered certain either by final judgment against the Insured after actual trial or by written agreement of the Insured, the claimant, and *the Company [Central]*.'"[60]

Prior to entering into the settlement, Diamond Heights' counsel notified Central National of the settlement demand and that Central National's policy would be impacted by a settlement ("it is most likely that the primary policy limits will be exhausted"), and it requested an immediate coverage decision.[61] Central National later learned that both underlying primary insurers had committed their policy limits (totaling $1,500,000) at a mandatory settlement conference and that the settlement amount would reach Central National's policy. Central National responded by offering to contribute $150,000 toward the settlement.[62]

After the case was assigned to trial, the parties reached a settlement agreement in open court. Counsel for Central National was present and objected to the settlement at the time it was placed on the record. The insurer later objected to the policyholder's motion confirming good faith settlement on the grounds that the amount of the stipulated judgment was unreasonable and the result of collusion. The trial court confirmed the settlement was entered in good faith and found that the settlement amount was fair.[63]

Central National moved for summary judgment on the grounds that a non-breaching insurer acts within its contractual rights whenever it refuses to voluntarily settle a claim and insists on adjudication of the matter on the merits. The trial court granted Central National summary judgment, finding that the settlement "did not comply with condition J, in that

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[59] *Id.* at 911 (alteration in original).

[60] *Id.* at 911-12 (alteration in original).

[61] *Id.* at 912.

[62] *Id.*

[63] *Id.*

'Central was not obligated to consent to the settlement despite the fact that it was entered with the court's assistance, and the defense of the action was never tendered to or rejected by [Central].'"[64] In confirming the order granting summary judgment following reconsideration, the court stated that

> "[w]hen the primary carriers agreed to pay their policy limits, plaintiff did not demand that Central either approve the settlement or accept the defense of the action. Since Central objected to the settlement but was not asked to assume the defense, there was no waiver or estoppel with respect to the provisions of Condition J of the policy."[65]

In a case of "first impression under California law," the court of appeal, relying on general principles governing the relationship between primary and excess insurers and the duty of good faith in settling cases, reversed the grant of summary judgment in favor of Central National and held that

> a primary insurer may negotiate a good faith settlement of a claim in an amount which invades excess coverage, and that the primary insurer may enter into such settlement binding upon the excess insurer without the excess insurer's consent, notwithstanding the "no action" clause under condition J, subject to certain conditions.[66]

The court of appeal attached significance to the fact that Central National did not *volunteer* to assume the defense of the case:

> In a case where probable liability far exceeds primary policy limits and invades excess limits, the excess insurer, if given the authority, might object to reasonable settlements simply because all costs of litigation would be borne by the primary insurer,[67] and the amount of potential liability if the case proceeded to trial might not be substantially greater than the amount to be paid in settlement. The excess insurer would get a "free ride" at the expense of the primary insurer to the detriment of all other parties involved.

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[64] *Id.* at 913 (alteration in original).

[65] *Id.*

[66] *Id.* at 915.

[67] As they should, because the primary insurer's premium, unlike that of the excess insurer, is calculated to include a charge for assuming the defense obligation. "Clearly, the respective policy premiums charged were predicated on the respective obligations assumed by the carriers." Chubb/Pac. Indem. Grp. v. Ins. Co. of N. Am., 233 Cal. Rptr. 539, 543 (Ct. App. 1987).

> The excess insurer is not without a means of avoiding a proposed settlement or challenging a final settlement. First, as stated,[68] *it may voluntarily waive policy provisions* such as condition H [cooperation and assistance] and agree to undertake the defense (once the primary insurer tenders its full policy limits) and either conduct its own settlement negotiations or take the action to trial. It may also challenge the settlement on the ground of unreasonableness or that it is a product of collusion between primary insurer and insured.[69]

There was nothing "voluntary" about Central National's "waiver" of its rights under the "no action" clause of Condition J, found by the Court of Appeal *as a matter of law* because Central National had rejected a reasonable settlement and at the same time failed to offer to undertake the defense, which it had no contractual duty to do and for which the primary insurers had received premium. "Primary policies, such as the pertinent [Central National] policy, are significantly more expensive because, unlike excess policies, primary policies bear most, if not all, the burden of providing a defense."[70]

While *Diamond Heights* has been followed outside of California in only two states, Florida and Kansas,[71] it has been followed in California by *Fuller-Austin Insulation Co. v. Highlands Insurance Co.*[72] and, most recently, *Safeco Insurance Co. of America v. Certain Underwriters at Lloyd's, London.*[73]

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[68] "Although such holding is in apparent conflict with the 'no action' clause of condition J, we conclude the excess insurer *may* waive its rights under that clause if it rejects a reasonable settlement and at the same time fails to offer to undertake the defense." 277 Cal. Rptr. at 916.

[69] *Diamond Heights,* 277 Cal. Rptr. at 917 (emphasis added).

[70] Deutsche Bank Trust Co. Ams. v. Royal Surplus Lines Ins. Co., No. 06C-09-261, 2011 Del. Super. Lexis 89, at * 73 (Del. Super. Ct. February 25, 2011). In General Motors Acceptance Corp. v. Nationwide Insurance Co. 828 N.E.2d 959, 962 (N.Y. 2005), the New York Court of Appeals noted as follows:

> Primary insurance premiums are based, at least in part, on the insurer's consideration that it may be liable to defend an action. In this sense, "primary" policy premiums are higher, relatively speaking, than "excess" premiums, because the primary insurer contemplates defending a potential lawsuit when it contracts with the insured. . . . Relieving primary insurers of this duty to defend would provide a windfall to the carrier insofar as the costs of defense-litigation insurance-are contemplated by, and reflected in, the premiums charged for primary coverage.

See also Auto. Ins. Co. of Hartford v. Cook, 850 N.E.2d 1152, 1155 (N.Y. 2006) ("When a policy represents that it will provide the insured with a defense, "it actually constitutes 'litigation insurance' in addition to liability coverage.").

[71] N. Am. Van Lines, Inc. v. Lexington Ins. Co., 678 So. 2d 1325, 1331-32 (Fla. Dist. Ct. App. 1996). *Cf.* Associated Wholesale Grocers, Inc. v. Americold Corp., 934 P.2d 65, 81 (Kan. 1997) (concluding that excess insurer has an obligation to exercise good faith in deciding to consent to a settlement).

[72] 38 Cal. Rptr. 3d 716, 738-39 (Ct. App. 2006) ("The rationale of *Diamond Heights* applies here."). The court acknowledged, however, "that *Diamond Heights* has been criticized." *Id.* at 738 n.11.

[73] No. B222451, 2011 WL 1796529 (Cal App. May 11, 2011).

In *Safeco*, Safeco was insured under a primary professional liability policy issued by Certain Underwriters at Lloyd's, London ("Underwriters") and New Hampshire Insurance Company ("NHIC") (collectively, the "Insurers.") The policy covering Safeco prohibited Safeco from settling any claim or incurring any defense costs without the written consent of the Insurers.[74] The policy provided coverage for defense costs, but it did not impose a duty to defend upon any of the Insurers; defense costs reduced the limits of liability ($25 million each Loss) and any deductible amount ($10 million per Loss). The policy also provided that the Insurers had the right to participate in the investigation, defense, and settlement of any claim, and were to be provided with all of the information, assistance, and cooperation that they reasonably requested.[75]

Following the filing of a third-party lawsuit against Safeco for bad faith and legal malpractice, Safeco entered into a $10 million settlement of the suit without the Insurers' consent. When the Insurers refused to provide coverage for the costs incurred by Safeco in defending and settling the third-party suit, Safeco brought an action against the Insurers for breach of contract and declaratory relief. The trial court granted the Insurers' motions for summary judgment on the ground that Safeco's violation of the consent clause voided any coverage. While the court of appeal affirmed the trial court's order granting summary judgment in favor of NHIC, it reversed the order granting summary judgment in favor of Underwriters because "there [wa]s simply no basis upon which a jury could find that NHIC's consent to the settlement was ever sought by Safeco or withheld by NHIC."[76]

The court of appeal in *Safeco* noted that while "California courts generally recognize that the insured's breach of a consent clause bars coverage under the policy without a showing of prejudice by the insurer,"[77] in *Diamond Heights* and then *Fuller-Austin*

> the Courts of Appeal held that where an insurer reserves its right to deny coverage while declining a reasonable opportunity to participate in the defense or settlement of the claim, the insurer may not simply assert the insured's breach of a consent clause to avoid coverage under the policy, but rather must show that the resulting settlement was fraudulent, unfair, or unreasonable.[78]

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[74] "'The Insured agrees not to settle any Claim, incur any Defense Costs or otherwise assume any contractual obligation or admit and [sic] liability with respect to any Claim which exceeds U.S. $2,500,000 without the [Insurers'] written consent, which shall not be unreasonably withheld. Except as stated above, [the Insurers] shall not be liable for any settlement, Defense Costs, assumed obligation or admission to which they have not consented.'" *Safeco*, 2011 WL 1796529 at * 1 (alteration in original).

[75] *Id.*

[76] *Id.* at *14.

[77] *Id.* at *9.

[78] *Id.* at *9.

These decisions "set forth a narrow exception to the general rule that consent clauses in liability insurance policies are enforceable as a matter of law without any showing of prejudice by the insurer."[79]

In *Safeco,* the court read *Fuller-Austin* and *Diamond Heights* as reflecting a fundamental concern about

> the unique position held by an insurer that neither acknowledges coverage nor provides a defense, and hence, exercises no control over the action. The courts in both cases recognized that it would be inequitable to allow such non-defending insurers "to hover in the background of critical settlement negotiations and thereafter resist all responsibility on the basis of lack of consent." Rather, principles of equity can require that an insurer that neither assumes a defense nor accepts a reasonable opportunity to participate in the settlement of a claim establish that the resulting settlement was fraudulent, unfair, or unreasonable.[80]

In sum, the approach taken in California and followed in Florida and Kansas essentially rewrites the parties' contract and punishes excess and similar insurers for not "volunteering" to assume the defense in situations where they have no contractual duty to do so. Presumably, in these situations either the premium the primary insurer charged was more because of its obligation to defend the insured[81] or, if the policy was an excess indemnity policy and the insured agreed to defend itself,[82] the insured's premium was less than it would otherwise have been if the policy obligated the insurer to furnish a defense upon exhaustion of the underlying coverage or retention.

IV.
Conclusion

One would expect courts to always enforce "no action," "no voluntary payments," "loss payable," and "no consent to settlement" provisions in an insurance policy simply because they are clear and unambiguous, binding terms of a contract. However, this is not always the case, and counsel should be aware of the different interpretations of these clauses discussed herein. In particular, when denying coverage on the basis of an insured's failure to fulfill a "consent to settlement" clause's requirements, the insurer should be aware of the developments under California law and the possibility that, like the courts in Florida and Kansas, other state courts might be persuaded to adopt the California approach, particularly courts that lean toward applying equitable principles when resolving insurance coverage disputes related to settlements of underlying claims.

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[79] *Id.* at *11.

[80] *Id.*, at *11 (quoting *Fuller-Austin*, 38 Cal. Rptr. 3d at 741).

[81] Chubb/Pac. Indemn. Grp. v. Ins. Co. of N. Am., 233 Cal. Rptr. 539, 543 (Ct. App. 1987).

[82] *See, e.g.,* N. Am. Van Lines v. Lexington Ins. Co., 678 So. 2d 1325, 1328-29 (Fla. Dist. Ct. App. 1996).

Expansion of Pre-Suit Discovery in Federal Courts: Preparing for the Brave New World[1†]

Sidney J. Hardy
Heather M. Nagel

I.
Introduction

Although we borrowed our title from the work of the great visionary, Aldous Huxley, we feel compelled to start our article with the words of a different cultural icon. Kenny Rogers said it best: "[y]ou got to know when to hold 'em, know when to fold 'em. Know when to walk away and know when to run."[2] But knowing how to play the hand you were dealt is difficult when the rules of the game are changing, and you are betting blind.

Pre-suit discovery in both federal and state courts has always involved a certain amount of calculated risk. Sometimes a party will draw the right card and have its petition to perpetuate evidence granted, allowing it to preserve key evidence and gain coveted information to help it frame a complaint.[3] On other occasions, a party is forced to fold when its petition to perpetuate evidence is denied.[4]

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[1] Aldous Huxley, Brave New World (1932).

[†] Submitted by the authors on behalf of the FDCC Intellectual Property section.

[2] Kenny Rogers, *The Gambler*, on The Gambler (United Artists 1978).

[3] *See, e.g.,* Martin v. Reynolds Metals Corp., 297 F.2d 49, 56 (9th Cir. 1961).

[4] *See, e.g.,* Lucas v. Judge Advocate Gen., Naval Criminal Investigative Serv., 245 F.R.D. 8, 10 (D.C. 2007).

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Unfortunately, the strategic game plan some litigants have developed to play the pre-suit discovery game may be of little use in the future. After two recent Supreme Court decisions, *Bell Atlantic Corp. v. Twombly,*[5] and *Ashcroft v. Iqbal*,[6] it is clear that the pre-suit discovery landscape is changing, and the risks and rewards are becoming more difficult to evaluate—even for the best gambler.

Twombly and *Iqbal* impose a heightened pleading standard that effectively abrogates the Rule 8 notice pleading standard.[7] Under the new standard, a complaint must do more than demonstrate a legally sufficient claim. Rather, a claim will be dismissed if it lacks sufficient facts to demonstrate that a *plausible* claim for relief exists within the four corners of the complaint. This new standard will present a daunting obstacle for plaintiffs who are unable to obtain adequate factual support for their claims before discovery.

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[5] 550 U.S. 544 (2007).

[6] 129 S. Ct. 1937 (2009).

[7] Before *Twombly* and *Iqbal*, a complaint only needed to provide

> (1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;
> (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and
> (3) a demand for the relief sought, which may include relief in the alternative or different types of relief.

Fed. R. Civ. P. 8(a)(1)–(3).

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This article will closely examine the possible expansion of pre-suit discovery in light of *Twombly* and *Iqbal*. First, Part II of this article will address the history of pre-suit discovery under the Federal Rules of Civil Procedure and its current implementation in the federal courts. Next, Part III will discuss *Twombly* and *Iqbal* and the potentially dramatic impact these cases may have in federal courts. Finally, Part IV will evaluate potential models of expanded pre-suit discovery, including existing state laws that permit a party to use pre-suit discovery to help frame or draft a complaint.

II.
Pre-suit Discovery in the Federal Court System under Rule 27 of the Federal Rules of Civil Procedure

Historically, Rule 27 has seldom been used, and as a consequence most attorneys have all but forgotten its existence.[8] However, in the wake of *Twombly* and *Iqbal*, many attorneys will need to dust off their law school textbooks and re-acquaint themselves with the rule.

[8] For example, both Lexis and Westlaw searches indicate that Rule 27 has been cited in fewer than 540 cases. This number is small when compared with other, more commonly invoked Federal Rules of Civil Procedure; for example, the results of Lexis and Westlaw searches indicate that Rule 12 has been cited in more than 8,700 cases; Rule 20 has been cited in more than 3,000 cases.

The current Federal Rules of Civil Procedure only permit pre-suit discovery to perpetuate testimony of an individual who may not be available to testify at trial, or to preserve evidence that may not be available for inspection at trial.[9] The new "plausibility" standard may demand use of pre-suit discovery for additional purposes: in particular, to help parties draft complaints that will survive a motion to dismiss.

A. *The History and Application of Rule 27*

The Federal Rules of Civil Procedure were drafted in 1937. Rule 27 was first implemented one year later, in 1938. Since its inception, there have been very few substantive changes to the rule.

Under the original rule, a party was allowed to take a deposition only to preserve the *testimony* of an individual who was at risk of not being able to testify at trial.[10] The original rule lacked a mechanism to preserve tangible evidence.[11] To remedy this deficiency, Congress amended Rule 27 in 1946 and gave courts the authority to "issue orders like those authorized by Rules 34 and 35."[12] This amendment allowed individuals to petition the court to obtain pre-suit discovery to preserve evidence by inspecting tangible evidence and performing mental examinations before commencement of a suit.[13]

B. *Application of Rule 27*

Under Rule 27, a petition must show all of the following:

- "that the petitioner expects to be a party to an action cognizable in a United States court but cannot presently bring it or cause it to be brought";[14]
- "the subject matter of the expected action and the petitioner's interest";[15]
- "the facts that the petitioner wants to establish by the proposed testimony and the reasons to perpetuate it";[16]
- "the names or a description of the persons whom the petitioner expects to be adverse parties and their addresses, so far as known";[17] and
- "the name, address, and expected substance of the testimony of each deponent"[18]

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[9] Fed. R. Civ. P. 27.

[10] Martin v. Reynolds Metals Corp., 297 F.2d 49, 56 (9th Cir. 1961).

[11] Egan v. Moran Towing & Transp. Co., 26 F. Supp. 621, 622 (S.D.N.Y. 1939).

[12] Fed. R. Civ. P. 27(b)(3).

[13] *See* Fed. R. Civ. P. 34(a)(1) ; Fed. R. Civ. P. 35(a)(1).

[14] Fed. R. Civ. P. 27(a)(1)(A).

[15] Fed. R. Civ. P. 27(a)(1)(B).

[16] Fed. R. Civ. P. 27(a)(1)(C).

[17] Fed. R. Civ. P. 27(a)(1)(D).

[18] Fed. R. Civ. P. 27(a)(1)(E).

These requirements apply to both plaintiffs and defendants.[19] For example, in *Martin v. Reynolds,* a plant owner expected to be sued by a neighboring landowner who believed that the plant was emitting noxious chemicals that were causing his cattle to get sick or die.[20] The landowner began to dispose of the deceased cattle and sell the remaining cattle. Concerned that it would not be able to test the cattle to determine the cause of death, the plant owner who expected to be a defendant filed a Rule 27 petition to preserve the cattle, which was granted by the court.[21]

Courts disagree as to whether the inspection of documents or a proposed examination must be taken in conjunction with a Rule 27 deposition.[22] The majority position is that a petitioner can obtain an inspection or examination without taking a Rule 27 deposition, so long as the requirements under Rule 27 are met.[23] Under the minority view, an inspection under Rule 34 or an examination under Rule 35 must be done in combination with a Rule 27 deposition.[24]

In sum, if a party—whether a plaintiff or defendant—cannot satisfy Rule 27's requirements, his or her petition will be denied, and the evidence he or she seeks may be lost.

C. *The Drafters' Intent and an Expansive Interpretation*

The language of Rule 27 is malleable enough to permit a party to obtain pre-suit discovery to help draft a complaint in order to "prevent a failure or delay of justice."[25] Although the drafters never expressly prohibited this practice, there is no question that Rule 27 was *not* designed to help parties draft complaints.[26] Ample support for this proposition can be found in cases cited in the Advisory Committee notes to Rule 27.[27]

Further, comments made by Advisory Committee members indicate that pre-suit discovery was intended for the sole purpose of preserving evidence. After Rule 27 was implemented, Professor Edson R. Sunderland, an Advisory Committee member, stated that "[u]nder the literal wording of the rule, the suggestion that … [the rule be used for discovery

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[19] *See In re* Ingersoll–Rand Co., 35 F.R.D. 568, 568 (S.D.N.Y. 1964).

[20] *Martin*, 297 F.2d at 52.

[21] *Id.* at 57.

[22] *See* Nicholas A. Kronfeld, *The Preservation and Discovery of Evidence Under Federal Rule of Civil Procedure 27*, 78 Geo. L.J. 593, 595 (1990).

[23] *See, e.g.*, *Martin*, 297 F.2d at 56.

[24] *See, e.g.,* United States v. Morelock, 124 F. Supp. 932, 948 (D. Md.1954).

[25] *See* Lonny Sheinkopf Hoffman, *Access to Information, Access to Justice: The Role of Presuit Investigatory Discovery*, 40 U. Mich. J.L. Reform 217, 226–27 (2007).

[26] *Petition of Ferkauf,* 3 F.R.D. 89, 91 (S.D.N.Y 1943).

[27] *See* Arizona v. California, 292 U.S. 341, 347 (1934); Todd Eng'g Dry Dock & Repair Co. v. United States, 32 F.2d 734, 735 (5th Cir.1929); Hall v. Stout, 4 Del. Ch. 269, 270 (Del. Ch. 1871).

purposes] might be possible."[28] He also remarked that the committee never intended Rule 27 to be utilized for pre-suit discovery.[29] Fellow committee member, Judge William Mitchell, echoed Professor Sunderland's comments and stated that he "should feel badly if [the committee had] admitted for one minute that under Rule 27 a man can juggle around and take a discovery deposition before bringing a suit, when in the provisions on discovery [the committee had] explicitly stated he can't do that until the suit has been started."[30] He further expressed that, "[i]t is certainly clear that the whole scheme of Rule 27 is inappropriate for obtaining information in an ordinary suit to enable one to draw a complaint."[31]

Like the Advisory Committee, courts have followed the lead of the drafters and have never given Rule 27 such a broad interpretation. Instead, the vast majority of courts have routinely refused to grant petitions for pre-suit discovery under Rule 27.[32]

D. *Previous Rule 8 Pleading Standards*

Prior to the adoption of the Federal Rules of Civil Procedure, parties were required to submit "a statement of the facts constituting the cause of action."[33] The implementation of the Federal Rules—in particular, Rule 8—eliminated this practice.[34]

Rule 8 was intended to eliminate "fact pleading," and to instead provide a liberal standard under which a complaint only needed to provide notice. To satisfy Rule 8, a party only needed to submit "a short and plain statement of the claim showing that that pleader is entitled to relief."[35] Rule 8 contemplates that the issues and facts are to be identified and narrowed at the *discovery* stage, not the *pleading* stage.[36] Under this standard, parties rarely needed pre-suit discovery to draft an adequate complaint.[37]

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[28] *Ferkauf*, 3 F.R.D. at 91.

[29] *Id.*

[30] Hoffman, *supra* note 25, at 229, (citing ABA, Federal Rules of Civil Procedure and Proceedings of the Institute on Federal Rules 277-90 (William W. Dawson ed. 1938)).

[31] *Id.*

[32] *See In re* Yamaha Motor Corp., U.S.A., 251 F.R.D. 97, 99 (N.D.N.Y. 2008). *But see In re* Alpha Indus., Inc., 159 F.R.D. 456, 457 (S.D.N.Y. 1995)*;* Gen. Bd. of Global Ministries of the United Methodist Church v. Cablevision Lightpath, Inc., No. CV 06-3669(DRH)(ETB), 2006 WL 3479332, at *4 (E.D.N.Y. Nov. 30, 2006).

[33] Scott Dodson, *New Pleading, New Discovery*, 109 Mich. L. Rev. 53, 57 (2010).

[34] The federal judiciary quickly adopted Rule 8's liberal standard. In *Conley v. Gibson,* the court stated "that the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. Instead, a complaint only needs to provide "fair notice of what the plaintiff's claim is and the grounds upon which it rests." 355 U.S. 41, 47 (1957). Likewise, *Thompson v. Washington* cites *Conley,* noting "[t]he federal rules replaced fact pleading with notice pleading." 362 F.3d 969, 970 (7th Cir. 2004).

[35] *Id.* (*citing* Fed. R. Civ. P. 8).

[36] *See, e.g.,* Swierkiewicz v. Sorema N. A., 534 U.S. 506, 512-13 (2002).

[37] *Id.*

III.
Twombly, Iqbal, and the Demise of Notice Pleading

Twombly and *Iqbal* have raised the pleading bar and require a plaintiff to allege "enough facts to state a claim to relief that is plausible on its face."[38] Whether these cases have created a completely new standard is the matter of some debate. Regardless of whether *Twombly* and *Iqbal* cases have changed the law, it is likely that they will create pressure for courts to enlarge the scope of pre-suit discovery under Rule 27.

A. *Twombly*

In *Bell Atlantic Corp v. Twombly,* consumers brought an action for violations of the Sherman Antitrust Act against several utility carriers.[39] Specifically, the complaint stated the following:

> In the absence of any meaningful competition between the [ILECs] in one another's markets, and in light of the parallel course of conduct that each engaged in to prevent competition from CLECs within their respective local telephone and/or high speed internet services markets and the other facts and market circumstances alleged above, Plaintiffs allege upon information and belief that [the ILECs] have entered into a contract, combination or conspiracy to prevent competitive entry in their respective local telephone and/or high speed internet services markets and have agreed not to compete with one another and otherwise allocated customers and markets to one another.[40]

The federal district court dismissed the complaint for failure to state a claim upon which relief could be granted; the Second Circuit reversed.[41] The United States Supreme Court granted certiorari to determine the applicable pleading standard for antitrust cases.[42]

The Court held that the complaint failed to state enough facts on its face to demonstrate that the utility carriers had actually entered into an agreement. The Court reversed the appellate court's decision and ruled that while Rule 8 does not require detailed factual allegations, the complaint must nonetheless provide sufficient facts "to state a claim to relief that is plausible on its face."[43]

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[38] *Twombly,* 550 U.S. at 570.

[39] *Id.* at 551.

[40] *Id.* (alterations in original).

[41] *Id.* at 553.

[42] *Id.* at 553.

[43] *Id.* at 570.

In *Twombly*, the Court failed to give credence to two of its earlier decisions, *Conley*[44] and *Swierkiewicz,*[45] and left the future of "notice pleading" in question. In *Ashcroft v. Iqbal*,[46] the Supreme Court resolved some of the questions that *Twombly* left unanswered.

B. *Iqbal*

Javaid Iqbal was arrested in November of 2001 and eventually pled guilty to criminal charges related to the September 11, 2001 attacks.[47] Subsequently, Iqbal filed a complaint, alleging that he was designated "a person of high interest on account of his race, religion, or national origin, in contravention of the First and Fifth Amendments to the Constitution."[48]

The defendants moved to have the complaint dismissed for failure to provide sufficient allegations to state a claim, but their motion was denied by the district court.[49] They then filed an interlocutory appeal with the United States Court of Appeals for the Second Circuit.[50] While the appeal was pending, the *Twombly* case was decided, which allowed the appellate court to consider how *Twombly* would affect this matter.[51] The Second Circuit held that the *Twombly* holding was limited to antitrust cases. The court found that the *Iqbal* matter did not fall into that category, and therefore the complaint did not require amplified factual allegations.[52]

Once again, the Supreme Court granted certiorari to consider the sufficiency of the complaint. The Court, citing *Twombly,* observed that "the pleading standard Rule 8 announces does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation."[53] The Court held a complaint that simply asserts legal conclusions without any supporting facts will not suffice.[54] Further, the Court ruled that allegations and facts asserted in a complaint must "plausibly" suggest that unlawful conduct or activity took place.[55]

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[44] Conley, 355 U.S. 41 (1957).

[45] Swierkiewicz, 534 U.S. 506 (2002).

[46] 129 S. Ct. 1937, 1949–1951. (2009).

[47] *Id.* at 1943.

[48] *Id.* at 1944.

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.* at 1949.

[54] *Id.*

[55] *Id.* at 1950.

The Court also rejected the plaintiff's contention that *Twombly* should apply only to antitrust cases, and noted that its ruling in *Twombly* was derived from Rule 8 itself—not antitrust law.[56] After *Iqbal,* it is clear that the *Twombly* plausibility standard applies to *all* civil litigation.

C. *Implications of Twombly and Iqbal*

So what impact will *Twombly* and *Iqbal* have on federal pre-suit discovery practice? Under this heightened pleading standard, parties may find that they do not have enough facts to survive a Rule 12(b)(6) motion to dismiss.[57] Courts will undoubtedly be urged to enlarge the scope of pre-suit discovery to allow parties to determine whether they have a viable claim, and to help parties ascertain enough facts to satisfy the new "plausibility" standard. Commentators still debate the long-term effects that *Twombly* and *Iqbal* will have on Rule 8, and the resulting implications for Rule 27.

Some commentators have argued that these two cases do not change the law.[58] They contend that even in *Twombly,* the Court asserted that it was not creating a heightened pleading standard.[59] Others are adamant that the notice pleading standard is a thing of the past.[60] Regardless of which view is correct, it is clear that "bare-bones" complaints that could satisfy pure "notice" pleadings will no longer be sufficient. This shift may prevent some potential plaintiffs from ever reaching discovery.

Twombly and *Iqbal* may result in more frequent invocations of Rule 27 for pre-suit discovery. Further, courts or Congress may be tempted remove any new barriers to the courthouse by expanding Rule 27 to allow individuals with meritorious claims to engage in pre-suit discovery and thereby ensure the fair administration of justice.

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[56] *Id.* at 1953.

[57] FED. R. CIV. P. 12(b)(6) provides as follows: "Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion: [. . .](6) failure to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6).

[58] *See, e.g.,* Daniel W. Robertson, *In Defense of Plausibility: Ashcroft v. Iqbal and What the Plausibility Standard Really Means*, 38 PEPP. L. REV. 111, 160 (2010). One commentator has observed that the "plausibility" standard imposed by *Twombly* and *Iqbal* is indistinguishable from Rule 9(b), which requires a party to plead fraud with particularity. A. Benjamin Spencer*, Plausibility Pleading*, 49 B.C. L. REV. 431, 473–75 (2008).

[59] *Twombly,* 550 U.S. at 570.

[60] Scott Dodson, *Federal Pleading and State Pre-suit Discovery*, 14 LEWIS & CLARK L. REV. 43, 51 (2010).

IV.
A Push for Change

Even prior to the recent Supreme Court decisions, some commentators were arguing in favor of expanded pre-suit discovery.[61] In the wake of *Iqbal* and *Twombly*, the drum beat for liberalization of pre-suit discovery in federal court has substantially increased. There are several possible mechanisms through which pre-suit discovery may be approached, each with its own advantages and disadvantages.

A. *Expanding Rule 27 to Address the Idiosyncrasies of Electronic Data*

Rule 27 is presently used to preserve evidence only when a petitioner has demonstrated that a witness's testimony or related documents are at risk of imminent loss. Given the technological advances in communications and data management over the past twenty-five years, the "preservation of evidence" policy that originally supported Rule 27 could be enhanced to encompass pre-suit discovery of electronic data.

Electronic data is transient in nature. For example, some organizations routinely purge their data systems, and digital video is typically maintained only for a limited duration of time before it is recorded over.[62] While some of this data can be resurrected, the cost to do so is usually high, and a significant risk exists that some electronic data will be lost forever.[63]

Since electronic data represents critical evidence in many disputes, Rule 27 could be used more frequently as a tool to preserve this data. *General Board of Global Ministries of the United Methodist Church v. Cablevision Lightpath, Inc.,* illustrates this point. In that case, the church, armed only with an IP address, attempted to identify the name of a person who had hacked into the church's computer system.[64] The church's internet provider refused to provide the church with the name of the user associated with the IP address. The church was concerned that, without the user's name, it would not be able to seek recourse; moreover, the internet provider's policies provided that after 90 days, the IP address would be deleted.[65] The church filed a petition to preserve the information relating to the IP address. The court ruled that the church's petition under Rule 27 was appropriate and allowed the church to obtain the identification of the user from the internet provider, reasoning that if it did not grant the petition, the information could be lost forever.[66]

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[61] *See* Kronfeld, *supra* note 22, at 620–23.

[62] For a broad overview of different types of electronic data retention policies, see Gordon M. Shapiro & Brian A. Kilpatrick, *E-Mail Discovery and Privilege*, 23 Corp. Couns. Rev. 201, 209-211 (2004).

[63] *See, e.g.*, Rowe Entm't v. William Morris Agency, Inc., No. 98 Civ. 8272 (RPP), 2002 U.S. Dist. LEXIS 8308, *24–*26, (S.D.N.Y. 2002).

[64] *Gen. Bd.,* 2006 WL 3479332 at *4.

[65] *Id.*

[66] *See id.*

Although using Rule 27 for pre-suit discovery was invaluable for the *Cablevision* plaintiff, that case involved rather unusual circumstances. As a practical matter, there are few situations in which a potential plaintiff who knows the identity of the defendants and is concerned about the preservation of evidence could not simply file a lawsuit and take immediate steps to preserve the evidence sought. So as long as a party can identify the proper defendant who has control over the witness or possession of the data, there is no reason to invoke Rule 27. In fact, the party who is worried about losing some ephemeral piece of digital data would no doubt find a lawsuit to be a much quicker avenue to preservation than a Rule 27 motion.

In sum, the unique issues associated with electronic data are not sufficient to justify expanding the application of Rule 27.

B. *Possible Expansion Under the Existing Federal Rules of Civil Procedure*

As already noted, most federal courts have narrowly construed Rule 27 to authorize pre-suit discovery only when evidence is in danger of imminent destruction. However, this view may be changing, and courts may begin to adopt more liberal interpretations of Rule 27.

The case of *In re Alpha* is illustrative. In that case, a potential plaintiff invoked Rule 27 to obtain pre-trial discovery to determine who should be named as a defendant in a copyright trademark infringement suit.[67] Consistent with most courts' views, the defendant argued that Rule 27 was limited to perpetuation of testimony and therefore could not be used for pre-trial discovery.[68]

Under the traditional, narrow interpretation of Rule 27, there was no reason to think that the petition would be granted. However, the court accepted the plaintiff's argument and permitted the pre-trial discovery. The court reasoned that such discovery was appropriate, since Rule 11 prevented the petitioner from bringing an action against all of its distributors without knowing the identity of the particular distributor who breached the agreement.[69] The court also held that allowing pre-trial discovery would "prevent a failure or delay of justice"[70] because the plaintiff was suffering ongoing economic harm and there was "danger of loss attendant upon all evidence through lapse of time."[71]

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[67] *In re* Alpha Indus., Inc., 159 F.R.D. 456, 457 (S.D.N.Y. 1995).

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] *Id.*

Although such decisions may become more common, currently *In re Alpha* is the exception and not the rule. Indeed, most courts have expressly ruled that Rule 27 cannot be used as a vehicle for pre-suit discovery in order to comply with Rule 11.[72] Therefore, there appears to be very little room within courts' current framework for an expansion of pre-suit discovery to enable a party to draft a "plausible" complaint.

C. *Discovery During the Pendency of a Motion to Dismiss*

It has been suggested that another way to deal with "information asymmetry" is for courts to permit discovery to proceed while a motion to dismiss is pending. Under this scenario, a plaintiff facing a Rule 12(b)(6) motion[73] would be permitted to conduct discovery to remedy specific deficiencies in the complaint. This discovery would take place prior to the hearing date of the motion, and would enable the plaintiff to determine whether the deficiencies could be corrected.

Federal judges have discretion to allow discovery under these circumstances. However, it is unlikely that courts will allow such discovery in light of concerns regarding the skyrocketing costs of discovery and litigation. For example, in *Twombly*, the Supreme Court expressly rejected the suggestion that narrowly-tailored discovery should be allowed to take place on the factually-deficient areas of the plaintiff's complaint prior to the hearing on the motion to dismiss. Speaking for the court, Justice Souter remarked that the potential expense of such discovery and the increasing caseload of federal courts counseled against allowing that practice.[74]

Under *Twombly*, plaintiffs who file a "bare bones" complaint and hope that the judge will allow them to conduct discovery to support the complaint are taking a calculated risk. On the other hand, under the current framework, a prospective plaintiff may have no choice other than to do so.

D. *Guidance from the State Courts*

If expansion of pre-suit discovery is unavailable under our current federal rules, plaintiffs may look to state courts, some of which have adopted more expansive pre-suit discovery models. Though most states have adopted Rule 27's restrictions on pre-suit discovery, Alabama and Texas are two notable exceptions.

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[72] *See In re* Landry-Bell , 232 F.R.D. 266, 267 (W.D. La. 2005); *In re* Ramerez, 241 F.R.D. 595, 597 (W.D. Tex. 2006); *In re* Chester County Electric, Inc., 208 F.R.D. 545, 547–48 (E.D. Pa. 2002); *In re* Ford, 170 F.R.D 504, 507–09 (M.D. Ala. 1997).

[73] Fed. R. Civ. P. 12(b)(6).

[74] *See Twombly*, 550 U.S. at 558–59.

Alabama State Rule 27 authorizes "discovery under Rule 34."[75] There is no limitation on the use of Rule 34 for perpetuation of evidence.[76] The Alabama rule is limited to document production and possible mental or physical examination; it does not include depositions.

Texas has the broadest pre-suit discovery rules. Texas Rule of Civil Procedure 202 authorizes the taking of a pre-suit deposition to perpetuate testimony or to investigate a potential claim.[77] In order to avail oneself of the pre-suit discovery process in Texas, a party is required to petition the court and show that the benefit of pre-suit discovery will outweigh the burden and the expense of the discovery requested.

The results of a Texas survey suggest that expanding pre-suit discovery will not improve the efficient operation of the courts. Practicing lawyers and judges in Texas were surveyed about their experiences with pre-suit discovery. Attorneys responded that about 60% of the time the pre-suit discovery rule was used for investigating a claim before filing suit, while about 40% of the time, the rule was used to perpetuate testimony.[78] Attorneys were queried as to whether pre-suit depositions contributed to early settlement, and 77% responded in the negative.[79] Finally, the survey from Texas suggested that many members of the bar were not satisfied with judicial oversight of the pre-suit discovery process.[80]

Even if it is allowed, invoking pre-suit discovery in order to make a determination as to whether sufficient facts exist to support a potential complaint is not without risk. For example, in one case, a plaintiff alleged in its petition for pre-trial discovery that it suspected former employees had revealed trade secrets to a competitor.[81] The plaintiff argued that the court should allow pre-trial discovery so that it could protect itself against improper disclosures of confidential information. The court rejected this argument and denied the petition.[82]

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[75] Ala. R. Civ. P. 27(a)(3).

[76] *See* Ala. R. Civ. P. 27; *Ex parte Anderson,* 644 So. 2d 961, 962–63 (Ala. 1994).

[77] The Texas rule provides as follows:

> RULE 202. DEPOSITIONS BEFORE SUIT OR TO INVESTIGATE CLAIMS
>
> 202.1 Generally.
>
> A person may petition the court for an order authorizing the taking of a deposition on oral examination or written questions either:
>
> (a) to perpetuate or obtain the person's own testimony or that of any other person for use in an anticipated suit; or
>
> (b) to investigate a potential claim or suit.

Tex. R. Civ. P. 202.1.

[78] Hoffman, *supra* note 25, at 254.

[79] *Id.* at 260.

[80] *Id.* at 272.

[81] *In re* Hewlett Packard*,* 212 S.W.3d 356, 359 (Tex. App. 2006).

[82] *Id.* at 363–364.

Because the plaintiff had already advised the court that it needed the information to determine whether a suit was valid, it would now be difficult to successfully initiate a lawsuit. Hence, in some cases, it may be better for the plaintiff to *sue first and ask questions later*.

E. *New Discovery*

Professor Scott Dodson has suggested a revolutionary framework referred to as "New Discovery."[83] This system recognizes the need for limited pre-suit or pre-dismissal discovery to counteract the information asymmetry and over-screening caused by *Twombly* and *Iqbal*.[84]

New Discovery would allow plaintiffs to seek limited discovery to target the existence of the facts the pleader needs. The plaintiff could thereby determine whether facts exist that support his or her claim; if such facts do not exist, no lawsuit is filed.[85] So long as this process is unobtrusive, it is unlikely that potential defendants would find it objectionable. After all, if a prospective defendant is innocent, merely "showing his cards" to a prospective plaintiff is considerably less expensive and time consuming than defending a lawsuit.[86]

New Discovery proposes two potential mechanisms to reduce the costs of discovery. First, this framework encourages judicial management to limit the scope of discovery.[87] Second, courts could use a cost shifting mechanism—for example, a bond requirement—whereby the plaintiff would bear the burden of all New Discovery costs.[88] Such a mechanism would limit unfocused or aimless requests for information, since the plaintiff would be responsible for footing the bill.[89]

The best way to implement Professor Dobson's New Discovery would be through amendment of Rule 27, as opposed to limited discovery in the face of a motion to dismiss a deficient complaint.[90] Therefore, New Discovery may provide a feasible way to implement the new "plausibility" standard, control costs, and ensure that courts are available to all plaintiffs with meritorious claims.

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[83] Scott Dodson, *New Pleading, New Discovery*, 109 Mich. L. Rev. 53, 72–80 (2010).

[84] *Id*.

[85] *Id.* at 72.

[86] *Id.* at 74.

[87] *Id.* at 80–82.

[88] *Id.* at 82-84.

[89] *Id.* at 82.

[90] *Id.* at 86–88.

V.
Conclusion

As we sit in the dark waiting to find out how the courts and Congress will react to *Twombly* and *Iqbal,* we are reminded of a question asked by another notable Englishman: "Are these the shadows of the things that Will be, or are they shadows of things that May be, only?"[91]

The overall impact of *Twombly* and *Iqbal* is unclear, and we do not know the ultimate effect these two cases will have on Rule 27 or pre-suit discovery. We do know that courts and Congress will be pressured to expand pre-suit discovery in the federal courts. Litigants will no doubt find creative ways to try to get the information they need. Even under the current rules, a properly drafted petition may enable a party to obtain pre-suit discovery to help draft a complaint.[92]

But we will not know of what is to come until all the cards are on the table and "the dealin's done."[93]

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[91] Charles Dickens, A Christmas Carol 99 (1843).

[92] *See, e.g.* Cablevision Lightpath, Inc., 2006 WL 3479332, at *4; *In re* Alpha Indus., Inc., 159 F.R.D. at 457.

[93] Kenny Rogers, *The Gambler*, on The Gambler (United Artists 1978).

The Five Pillars of E-Discovery

David M. Fuqua
Whitney L. Foster

I.
Introduction

Without discovery, modern litigation would be impossible. In just a few years, discovery has migrated from paper to electronic files, resulting in not only an exponential increase in the volume of information available to litigants but the invention of the term "electronic discovery" or e-discovery. "The more information there is to discover, the more expensive it is to discover all the relevant information until, in the end, 'discovery is not just about uncovering the truth, but also about how much of the truth the parties can afford to disinter.'"[1]

Discovery of electronic files is no longer a novelty but a reality in virtually every case. As e-discovery has become the rule rather than the exception, the principles governing successful e-discovery have solidified. Knowing these principles can allow counsel to conduct a more efficient and effective—as well as less costly—discovery process.

This paper explores in detail the five pillars of e-discovery: (1) the duty of cooperation and the Rule 26 "meet and confer" obligation to help the parties understand and control the scope of discovery at the outset of litigation; (2) search and retrieval of electronic documents that are responsive to the discovery agreement; (3) proportionality between the scope of e-discovery and the magnitude of the litigation; (4) cost shifting between the parties to share

[1] Zubulake v. UBS Warburg LLC (*Zubulake I*), 217 F.R.D. 309, 311 (S.D.N.Y. 2003) (quoting Rowe Entm't, Inc. v. William Morris Agency, Inc., 205 F.R.D. 421, 423 (S.D.N.Y. 2002).

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the expense of the e-discovery process; and (5) the impact of e-discovery on privilege and work-product protection claims. As with most complex topics, these subsets of e-discovery are intertwined and often overlap. These five pillars provide the foundation for good legal analysis and decision-making about e-discovery.

II.
The Five Pillars

Although e-discovery is a relatively new development in the practice of law, it is established enough for courts to expect that today's practitioners will comply with certain guiding principles. In an influential series of cases surrounding the litigation in *Zubulake v. UBS Warburg LLC*, the court offered extensive guidance on the duties parties owe in the course of e-discovery. There, the *Zubulake* court stated,

> The subject of the discovery of electronically stored information is rapidly evolving. When this case began more than two years ago, there was little guidance from the judiciary, bar associations or the academy as to the governing standards. Much has changed in that time. There have been a flood of recent opinions—including a number from appellate courts—and there are now several treatises on the subject. In addition, professional groups such as the American Bar Association and the Sedona Conference have provided very useful guidance on thorny issues relating to the discovery of electronically stored information. Many courts have adopted, or are considering adopting, local rules addressing the subject. Most recently, the Standing Committee on Rules and Procedures has approved for publication and public comment a proposal for revisions to the Federal Rules of Civil Procedure designed to address many of the issues raised by the discovery of electronically stored information.

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> Now that the key issues have been addressed and national standards are developing, parties and their counsel are fully on notice of their responsibility to preserve and produce electronically stored information. The tedious and difficult fact finding encompassed in this opinion and others like it is a great burden on a court's limited resources. The time and effort spent by counsel to litigate these issues has also been time-consuming and distracting. This Court, for one, is optimistic that with the guidance now provided it will not be necessary to spend this amount of time again. It is hoped that counsel will heed the guidance provided by these resources and will work to ensure that preservation, production and spoliation issues are limited, if not eliminated.[2]

As such, attorneys would be well-served to become familiar with the specific issues that can arise during e-discovery to avoid raising the ire of, and triggering possible sanctions by, the courts.

A. *The Duty of Cooperation (Rule 26 — "Meet and Confer" Obligation)*

The "meet and confer" obligation is the first pillar of e-discovery. This obligation is established through Rule 26 of the Federal Rules of Civil Procedure, which requires parties to meet before a scheduling order or conference and to prepare a discovery plan.[3] The purpose of Rule 26 is to make discovery less contentious, less costly, and less dependent on judicial supervision. Ideally, the discovery plan should include, "among other things, the parties' views and proposals on disclosure of electronically stored information ("ESI"), including

[2] Zubulake v. UBS Warburg LLC (*Zubulake V*), 229 F.R.D. 422, 440–41 (S.D.N.Y. 2004).

[3] *See* Fed. R. Civ. P. 26(f).

the form or forms in which it should be produced."[4] Thus, Rule 26 plays an invaluable role in e-discovery.

E-discovery is almost by definition complicated. Experience has proven it can be very expensive, as demonstrated in many cases where searching for and producing such voluminous amounts of documents cannot be accomplished without the supervision of the court. However, the meet and confer requirement of Rule 26 can (and should) be used to defer the involvement of the court on as many issues as possible for as long as possible.

At a Rule 26 conference, the parties' objective may be to "narrow the range of information sought."[5] Or the parties may use the "meet and confer" to reach an agreement on other issues pertaining to their discovery, such as keywords to be used in searches of electronic data. The requesting party must specify how and in what form it desires the requested documents to be produced.

If the parties reach an agreement during a Rule 26 conference, they should clearly document that agreement in the record, either through pleadings or at oral argument. If the record does not reflect that the parties reached an agreement, a court may determine that one party did not reciprocate the other party's efforts to compromise. If no agreement is reached, the court may look to whether the parties were willing to compromise and the number of concessions they made when resolving their disagreements.[6]

Failure to reach an agreement will not necessarily result in failure to comply with Rule 26.[7] In *Bray & Gillespie Management LLC v. Lexington Insurance Co.*, the court found that parties' efforts to prepare a case management report and discuss ESI complied with Rule 26(f), even though they did not reach an agreement.[8] While failure to reach an agreement may be acceptable, however, failure to actively participate in the meet and confer session may result in an unfavorable outcome once the court is involved.[9]

In essence, parties must try to reach an agreement before involving the court. The "meet and confer" obligation necessitates compromise if it is to work as intended, even when compromise seems to be the worst of all options.

B. *Search and Retrieval of Data (and Litigation Hold)*

The process of searching and retrieving the requested discovery documents comprises the second pillar of e-discovery. Good communication between counsel and client is mandatory

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[4] Bray & Gillespie Mgmt. LLC v. Lexington Ins. Co. (*Bray & Gillespie I*), 259 F.R.D. 568, 582 (M.D. Fla. 2009).

[5] Victor Stanley, Inc. v. Creative Pipe, Inc., 269 F.R.D. 497, 511 (D. Md. 2010).

[6] *See, e.g.*, Letter Opinion of Special Discovery Master at 2, Fairfax Financial Holdings Ltd. v. S.A.C. Capital Mgmt. LLC, No. MRS-L-2032-06 (N.J. Super. Ct. Law Div. Mar. 27, 2009).

[7] *See Bray & Gillespie I*, 259 F.R.D. at 582 (M.D. Fla. 2009).

[8] *Id.*

[9] *See* Letter Opinion of Special Discovery Master, *supra* note 6, at 2.

to ensure that the proper files are searched and the proper documents are produced during the complex process of e-discovery. As stated by the court in *Qualcomm Inc. v. Broadcom Corp.*,

> [f]or the current "good faith" discovery system to function in the electronic age, attorneys and clients must work together to ensure that both understand how and where electronic documents, records and emails are maintained and to determine how best to locate, review, and produce responsive documents. Attorneys must take responsibility for ensuring that their clients conduct a comprehensive and appropriate document search.[10]

Courts have established several critical steps in the proper search and retrieval of documents responsive to an e-discovery request: (1) preservation of documents,[11] (2) familiarization with the client's electronic storage and retention system,[12] (3) search and retrieval of preserved documents,[13] (4) collection and review of documents,[14] and (5) separation of privileged and responsive documents. Counsel must give his or her client "clear instructions . . . to preserve [relevant] information and, perhaps more importantly, [counsel must stress] a client's obligation to heed those instructions."[15]

1. Preservation of Documents

The first step in search and retrieval is ensuring that there are preserved documents to search once discovery requests are made.[16] The duty to preserve relevant evidence is a duty owed to the court, rather than to the opposing party.[17]

No hard and fast rule for all jurisdictions establishes when "the duty to preserve potentially relevant evidence" arises.[18] Under the common law, the obligation to preserve evidence begins the moment when litigation is reasonably anticipated, which may occur as

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[10] Qualcomm Inc. v. Broadcom Corp. (*Qualcomm I*), No. 05cv1958-B, 2008 WL 66932, at *9 (S.D. Cal. Jan. 7, 2008) *vacated in part on other grounds*, No. 05CV1958-RMB, 2008 WL 638108 (S.D. Cal. Mar. 5, 2008).

[11] *See* Victor Stanley, Inc. v. Creative Pipe, Inc., 269 F.R.D. 497, 526 (D. Md. 2010).

[12] *See* Qualcomm Inc. v. Broadcom Corp. (*Qualcomm II*), No. 05cv1957-B, 2010 WL 1336937, at *2 (S.D. Cal. Apr. 2, 2010).

[13] *Victor Stanley, Inc.* 269 F.R.D. at 522.

[14] *See* Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC, 685 F. Supp. 2d 456, 465 (S.D.N.Y. 2010).

[15] Zubulake v. UBS Warburg LLC (*Zubulake V*), 229 F.R.D. 422, 424 (S.D.N.Y. 2004).

[16] *See Victor Stanley, Inc.*, 269 F.R.D. at 526 ("While the fact-finder can review only the documents that the parties produce, and production and preservation are not synonymous, production is possible only if documents are preserved.").

[17] *Id*.

[18] *See id*. at 512.

early as when a plaintiff begins contemplating litigation or as late as when the defendant is served with the complaint, or some time in between.[19] However, "[t]he mere existence of a dispute does not necessarily mean that parties should reasonably anticipate litigation or that the duty to preserve arises."[20] The *Zubulake* court found that the duty to preserve arises "when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation."[21] For example, in *Goodman v. Praxair Services*, the court found that the duty arose when the defendants received a demand letter threatening litigation because the letter "provide[d] constructive notice that litigation [was] likely."[22]

Additionally, the duty to preserve "may arise from statutes, regulations, ethical rules, court orders, . . . a contract, or another special circumstance."[23] The *Zubulake* opinions provide the most detailed discussion regarding the duty to preserve sources of "deleted data, data in slack spaces, backup tapes, legacy systems, and metadata," which also may be considered part of the duty to preserve.[24] However, because the circuit courts do not agree on the duty to preserve, the *Zubulake* guidance might not be applied uniformly.[25]

Due to the absence of a national standard for document preservation, corporations operating in multiple jurisdictions are forced to create their own policies. According to the court in *Victor Stanley, Inc. v. Creative Pipe, Inc.*,

> [t]he only "safe" way [for corporations to develop a preservation policy] . . . is to design one that complies with the most demanding requirements of the toughest court to have spoken on the issue, despite the fact that the highest standard may impose burdens and expenses that are far greater than what is required in most other jurisdictions in which they do business or conduct activities.[26]

A party will likely meet its duty to preserve if it acts reasonably and in good faith. For example, the preserving party may act reasonably by "giving out specific criteria on what should or should not be saved for litigation."[27]

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[19] *See id*. at 521–22.

[20] Goodman v. Praxair Services, Inc., 632 F. Supp. 2d 494, 510 (D. Md. 2009).

[21] Zubulake v. UBS Warburg LLC (*Zubulake IV*), 220 F.R.D. 212, 216 (S.D.N.Y. 2003) (quoting Fujitsu Ltd. v. Federal Express Corp., 247 F.3d 423, 436 (2d Cir. 2001)).

[22] *Goodman*, 632 F. Supp. 2d at 511.

[23] Victor Stanley, Inc. v. Creative Pipe, Inc., 269 F.R.D. 497, 521 (D. Md. 2010) (quoting Paul W. Grimm et al., *Proportionality in the Post-Hoc Analysis of Pre-Litigation Preservation Decisions*, 37 U. Balt. L. Rev. 381, 389 (2008)).

[24] *Id*. at 524.

[25] *See id* at 523.

[26] *Id*.

[27] *Id*. at 525 (quoting Jones v. Bremen High Sch. Dist. 228, No. 08-C-3548, 2010 WL 2106640, at *6 (N.D. Ill. May 25, 2010)).

2. Familiarization with the Client's Electronic Document Storage and Retrieval System

Counsel also should learn how the party's computer and electronic storage system is organized. This familiarization with the client's system can include locating the client's e-mail storage system, learning the backup processes for laptops and personal computers, and determining the type of information that the client stores electronically.[28] Counsel should consider the client's retention policies, such as whether e-mails are automatically deleted and network space devoted to storing employee e-mails. But counsel also should realize that a client's policies may not be determinative in court. In *Fairfax Financial Holdings v. S.A.C. Capital Management LLC*, for example, one of the parties contended it was its corporate policy to not delete "substantive business-related e-mails" and that searching backup tapes would thus be a waste of time because "all business-related e-mails for all relevant time periods should be maintained on [the] computers, unless affirmatively deleted in violation of company policy or [they] somehow became corrupt."[29] The court noted, however, that the party had not presented evidence to show that "critical custodians" had followed this policy and that e-mails were not deleted.[30]

Neither a court nor a litigant is "required to simply accept whatever information management practices a party may have"[31] during the e-discovery process. While a party's information management practices may suit its business purposes, "one of those business purposes must be accountability to third parties."[32] This is especially important when considering storage of electronic documents in an accessible format.

3. Search and Retrieval of Preserved Documents

As soon as the duty to preserve attaches in the discovery process, the party is obligated to "identify, locate, and maintain information that is relevant to specific, predictable, and identifiable litigation."[33] Relevant documents include any documents or other tangible items created by or prepared for individuals who are "likely to have discoverable information that the disclosing party may use to support its claims or defenses."[34]

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[28] *See* Qualcomm Inc. v. Broadcom Corp. (*Qualcomm II*), No. 05cv1957-B, 2010 WL 1336937, at *2 (S.D. Cal. Apr. 2, 2010).

[29] Letter Opinion of Special Discovery Master at 2, Fairfax Financial Holdings Ltd., v. S.A.C. Capital Mgmt. LLC, No. MRS-L-2032-06 (N.J. Super. Ct. Law Div. Oct. 29, 2009).

[30] *Id.* at 2–3.

[31] Phillip M. Adams & Assocs., L.L.C. v. Dell, Inc., 621 F. Supp. 2d 1173, 1193 (D. Utah 2009).

[32] *Id*.

[33] Victor Stanley, Inc. v. Creative Pipe, Inc., 269 F.R.D. 497, 522 (D. Md. 2010) (quoting The Sedona Conference, The Sedona Conference Commentary on Legal Holds: The Trigger and the Process 1 (public cmt. ed. Aug. 2007)).

[34] *Id*. (quoting Zubulake v. UBS Warburg LLC (*Zubulake IV*), 220 F.R.D. 212, 217–18 (S.D.N.Y. 2003)).

According to the court in *Pension Committee of the University of Montreal v. Banc of America Securities*,[35] the steps for properly conducting search and retrieval of documents, including ESI, when the duty to preserve has attached are as follows:

1. Issue a written litigation hold;
2. Identify all of the key players and ensure that their electronic and paper records are preserved;
3. Cease deleting email or preserve the records of former employees that are in the party's possession, custody, or control;
4. Preserve backup tapes when they are the sole source of relevant information or when they relate to key players, if the relevant information maintained by those players is not obtainable from readily accessible sources.[36]

When the duty to preserve arises, a party is "obligated to suspend its routine document retention/destruction policy and implement a 'litigation hold' to ensure the preservation of relevant documents."[37] A litigation hold stipulates that a party preserve any data potentially relating to the legal action. If a party cannot meet its duty to preserve because it "does not own or control the evidence, [the party] still has an obligation to give the opposing party notice of access to the evidence or of the possible destruction of the evidence if the party anticipates litigation involving that evidence."[38] Counsel should ascertain quickly whether non-parties, such as former employees, might have relevant documents to which the client does not have access.

In addition to seeking all documents, counsel should meet with all prospective witnesses, including the key players,[39] who are defined as "employees likely to have relevant information."[40] Interviewing everyone involved can prevent the near-impossible task of speculating about who did or did not have knowledge of the subject of the lawsuit.[41] If the corporation

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[35] 685 F. Supp. 2d 456 (S.D.N.Y. 2010).

[36] *Id.* at 471.

[37] Goodman v. Praxair Services, Inc., 632 F. Supp. 2d 494, 511 (D. Md. 2009).

[38] *Id*. at 5–14 (quoting Silvestri v. Gen. Motors Corp., 271 F.3d 583, 591 (4th Cir. 2001)).

[39] *See* Qualcomm Inc. v. Broadcom Corp. (*Qualcomm II*), No. 05cv1958-B, 2010 WL 1336937, at *2 (S.D. Cal. Apr. 2, 2010). "The Court was not presented with any evidence establishing that either in-house lawyers or outside counsel met in person with the appropriate Qualcomm engineers (those who were likely to have been involved in the conduct at issue and who were likely to be witnesses) at the beginning of the case to explain the legal issues and discuss appropriate document collection." *Id*.

[40] Zubulake v. UBS Warburg LLC (*Zubulake V*), 229 F.R.D. 422, 433–34 (S.D.N.Y. 2004) (quoting Zubulake v. UBS Warburg LLC (*Zubulake IV*), 220 F.R.D. 212, 218 (S.D.N.Y. 2003)).

[41] *See, e.g.,* Phillip M. Adams & Assocs., L.L.C. v. Dell, Inc., 621 F. Supp. 2d 1173, 1189 (D. Utah 2009).

is too large and speaking with every key player is not feasible, some sort of keyword search may be run system-wide.[42] Documents only have to be retained at this stage, not reviewed.[43]

When communicating with the key players, counsel should take care to clearly relay their preservation duty.[44] Additionally, all employees, including the key players, "should be periodically reminded that the preservation duty is still in place"[45] to ensure uniformity of preservation as well as to account for changes within the company, such as new hires.

While communication with a client is of great importance, counsel should not rely upon the client's assurances if there is reason to investigate further.[46] In *Qualcomm Inc. v. Broadcom Corp.*, the court found that if the attorneys for the producing party had insisted upon reviewing the locations that had been searched and the terms used for discovering responsive documents, they would have realized the inadequacy of the search efforts and could have produced additional responsive documents.[47]

Counsel should agree upon and appoint an attorney to supervise the discovery process and be responsible for "verifying that the necessary discovery had been conducted[,] including ensuring that all of the correct locations, servers, databases, repositories, and computers were correctly searched for potentially relevant documents."[48] As stated in the *Zubulake* case,

> it is *not* sufficient to notify all employees of a litigation hold and expect that the party will then retain and produce all relevant information. Counsel must take affirmative steps to monitor compliance so that all sources of discoverable information are identified and searched. This is not to say that counsel will necessarily succeed in locating all such sources, or that the later discovery of new sources is evidence of a lack of effort. But counsel and client must take *some reasonable steps* to see that sources of relevant information are located.[49]

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[42] *See Zubulake V*, 229 F.R.D. at 432.

[43] *See id*.

[44] *See id*. at 433–34.

[45] *Id.* at 434.

[46] *See* Qualcomm Inc. v. Broadcom Corp. (*Qualcomm I*), No. 05cv1958-B, 2008 WL 66932, at *13 (S.D. Cal. Jan. 7, 2008) ("[T]he court finds it likely that . . . one or more of the retained lawyers chose not to look in the correct locations for the correct documents, to accept the unsubstantiated assurances of an important client that its search was sufficient, to ignore the warning signs that the document search and production were inadequate, not to press Qualcomm employees for the truth, and/or to encourage employees to provide the information (or lack of information) that Qualcomm needed to assert its non-participation argument and to succeed in this lawsuit. These choices enabled Qualcomm to withhold hundreds of thousands of pages of relevant discovery and to assert numerous false and misleading arguments to the court and jury. This conduct warrants the imposition of sanctions.").

[47] *Id*.

[48] *See* Qualcomm Inc. v. Broadcom Corp. (*Qualcomm II*), No. 05cv1959-B, 2010 WL 1336937, at *2 (S.D. Cal. Apr. 2, 2010).

[49] Zubulake v. UBS Warburg LLC (*Zubulake V*), 229 F.R.D. 422, 432 (S.D.N.Y. 2004).

After the duty to preserve relevant information attaches, the parties must not "delete[ ], destroy[ ], and otherwise fail[ ] to preserve evidence."[50] While this instruction seems obvious, counsel should note ways in which evidence may be lost, such as keeping business data on personal computers, moving data to an external hard drive, exchanging old servers for newer ones, updating software that renders files created on older software unreadable, or the use of programs that permanently delete data.[51] The *Victor Stanley* defendants ran programs such as Disk Cleanup, Disk Defragmenter, Easy Cleaner, and CCleaner,[52] which not only deleted possibly responsive files but emptied computer recycling bins and deleted records of visited websites.[53] Failure to preserve data and other evidence may result in a finding of negligence, or even gross negligence or willfulness, if it "result[s] in the loss or destruction of relevant information."[54]

The search for responsive documents should begin immediately after receiving the requests from the opposing party. In *Bray & Gillespie*, hotel records known as "room folios" were at issue. Specifically, Bray & Gillespie did not even begin to look for the room folios until seven months after the court ordered their production, and then the company presented incomplete information to opposing counsel.[55] The court found that this "deplorable conduct" warranted "severe sanctions . . . for discovery misconduct."[56]

The process of searching should also be documented, in case the requesting party inquires about what was and was not produced and why. Each party also has a duty to adequately prepare knowledgeable witnesses regarding the search methods it used; if those methods are questioned, the witnesses will likely have to testify.[57] Documenting the process of the search also will be helpful if any declarations are required.

Pension Committee of University of Montreal Pension Plan v. Banc of America Securities, LLC offers an excellent example of what not to do during the search and collection phase:

> In addition to failing to institute a timely written litigation hold, one or more of these plaintiffs failed to collect or preserve *any* electronic documents prior to 2007, continued to delete electronic documents after the duty to preserve arose, did not request documents from key players, delegated search efforts without any supervi-

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[50] Victor Stanley, Inc. v. Creative Pipe, Inc., 269 F.R.D. 497, 500 (D. Md. 2010).

[51] *See id.* at 505, 510–12.

[52] *Id*. at 505.

[53] *See id*. at 511.

[54] *See* Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC, 685 F. Supp. 2d 456, 464–65 (S.D.N.Y. 2010).

[55] Bray & Gillespie Mgmt. LLC v. Lexington Ins. Co. (*Bray & Gillespie II*), 259 F.R.D. 591, 594, 603–05 (M.D. Fla. 2009).

[56] *Id.* at 594.

[57] *See Pension Comm. of Univ. of Montreal*, 685 F. Supp. 2d at 477.

> sion from management, destroyed backup data potentially containing responsive documents of key players that were not otherwise available, and/or submitted misleading or inaccurate declarations.[58]

Another obvious instance of failure to conduct a proper search occurred in the *Qualcomm* case when employees deemed knowledgeable enough to testify during deposition were not asked to search their computers for relevant documents or e-mails.[59] Although a discussion concerning sanctions for failing to preserve ESI is outside the scope of this article, counsel should be aware that failure to properly search, collect, and produce data that is both relevant and responsive could result in sanctions regardless of whether the failure was negligent, reckless, or willful.[60]

Although keyword searches can help limit the scope and better focus the process of e-discovery, such efforts can likewise pose problems for parties. After several meet-and-confer sessions, the parties in *Fairfax* agreed to produce certain electronically-stored documents and to use search terms aimed at limiting the number of electronic documents that would need to be reviewed and produced.[61] But the parties could not agree on which search terms to use.[62] The court noted that

> [i]ronically, while the use of computers and search terms has made it infinitely easier to store and retrieve documents, in terms of determining what documents are relevant, they are still no substitute for old-fashioned manual review. Search terms are merely a screening device. They help to identify *potentially* relevant and responsive documents. But only the lawyer's trained eye can determine if they are *actually* so. Any investigation conducted through the use of search terms inevitably runs the risk of being too broad, or too narrow. There is simply no way to predict from the terms themselves—which are formulated in language only a computer can understand—what the search will ultimately yield. Consequently, no set of search terms will perfectly balance the Moving Defendants' right to all relevant non-privileged material and the Plaintiffs' right to be free from overly broad and unduly burdensome discovery.[63]

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[58] *Id*. at 479–80.

[59] *See* Qualcomm Inc. v. Broadcom Corp. (*Qualcomm II*), No. 05cv1958-B, 2008 WL 66932, at *3. (S.D. Cal. Jan. 7, 2008). "If a witness is testifying as an organization's most knowledgeable person on a specific subject, the organization has an obligation to conduct a reasonable investigation and review to ensure that the witness does possess the organization's knowledge." *Id*. at *11.

[60] *See id*. at *7.

[61] Letter Opinion of Special Discovery Master at 1, Fairfax Financial Holdings Ltd. v. S.A.C. Capital Mgmt. LLC, No. MRS-L-2032-06 (N.J. Super. Ct. Law Div. Mar. 19, 2009).

[62] *Id.*

[63] *Id*. at 2 (internal citations omitted).

In determining which list of search terms to use—the plaintiffs' or defendants' original lists or the defendants' revised list—the court selected the defendants' revised list, noting that it "eliminate[d], modifie[d], or combine[d] numerous terms to reduce the number of total hits by a significant percentage" and "ma[de] a realistic effort to accommodate Plaintiffs' concerns about burdensomeness (an effort Plaintiffs did not reciprocate by insisting throughout on their original search term list)."[64] The court allowed the plaintiffs to move for a subsequent modification of the order if they f[ou]nd that "the search [wa]s generating an excessive amount of irrelevant information," but they would have to produce evidence, such as "a sampling of the terms run, the results, and a calculation of the time and money spent," to prove that the search would be unproductive.[65]

In sum, keywords and search terms should be considered only after "careful thought, quality control, testing, and cooperation with opposing counsel."[66] Counsel also would be wise to solicit the advice of the key players for words or abbreviations they actually may have used in the documents being searched.[67]

Finally, the litigation hold is especially important when it comes to backup tapes. Backup tapes are typically used for a specified amount of time (daily, weekly, or monthly) and then deleted and used again. In *Victor Stanley*, the backup tapes were even more problematic because the system was not properly managed, and "the system failed '[a]t least once or twice a week' when someone forgot to replace the backup tape."[68] Additionally, all users had access to the tapes and could alter or delete data.[69] Restoring backup tapes could pose problems for parties responding to discovery requests: software may become obsolete, necessitating conversions to even be able to access the documents; the tapes may be incorrectly labeled; or the records may be kept "in a manner that makes them difficult to retrieve."[70] The *Victor Stanley* case illustrates the importance of a proper litigation hold because, without one, ESI could be lost or modified at any time.[71]

Even hiring an ESI consultant is not enough if that person is not given authority to effectively preserve ESI. For example, in *Victor Stanley*, the defendants retained an ESI consultant for two months for the purpose of preserving "some data" but "did not consult her specifically about implementing an ESI preservation plan or a litigation hold."[72] "No

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[64] *Id*. at 3.

[65] *Id*. at 4.

[66] *See* William A. Gross Const. Assocs., Inc. v. Am. Mfrs. Mut. Ins. Co., 256 F.R.D. 134, 134 (S.D.N.Y. 2009).

[67] *See id*. at 136.

[68] Victor Stanley, Inc. v. Creative Pipe, Inc., 269 F.R.D. 497, 504 (D. Md. 2010).

[69] *See id*. at 505.

[70] Toshiba Am. Elec. Components, Inc. v. Superior Court of Santa Clara County, 21 Cal. Rptr. 3d 532, 536 (Ct. App. 2004).

[71] *See Victor Stanley,* 269 F.R.D. at 505.

[72] *Id*.

reasonable measures were taken to prevent potentially relevant data stored on any of [the defendant's] computer systems from being modified, overwritten, or deleted."[73]

4. Collection and Review of Documents

Once the written litigation hold has been established to ensure relevant information is not lost or destroyed, the information must be collected and reviewed. Documents must be collected from the key players, but they should also be collected from any employee with involvement in the situation that led to (or will lead to) litigation.[74] Failure to collect records from key players may result in a finding of gross negligence or willfulness, while the loss of non-key employees' records may cause a finding of negligence.[75]

The next step is determining which of those documents obtained during the litigation hold is responsive to the opposing party's requests. This inquiry includes considering the format in which the document is preserved and must be transmitted to the opposing party. In *Bray & Gillespie*, Lexington requested that ESI be produced "without deletion or alteration of meta-data, in its native form, and to indicate the computer hardware and the software program(s) needed to translate the information into usable form in the information's native format."[76] Because the request specifically stated format requirements, production of the records in non-native format on a disc failed to comply with the parties' agreement.[77]

The parties should specify the format of the produced documents both to ensure that documents are produced as requested and to confirm that the parties understand their responsibilities. For example, in *Bray & Gillespie*, the producing party scanned all documents, including those in paper form and those in electronic form; the requesting party objected because it interpreted the agreement to scan documents to apply only to paper documents.[78] The scanned electronic documents did not contain metadata, were not in native format, and had no coding, which would allow searching by certain fields "such as creation date, last modification date, author, or subject,"[79] functions that would have been possible if the data had been produced in its native form.

The producing party can object to the form the requesting party specifies, but if the producing party fails to object until after producing the material in a different form than had

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[73] *Id*.

[74] *See* Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC, 685 F. Supp. 2d 456, 465 (S.D.N.Y. 2010).

[75] *See id.*

[76] Bray & Gillespie Management LLC v. Lexington Ins. Co. (*Bray & Gillespie II*), 259 F.R.D. 591, 595 (M.D. Fla. 2009).

[77] *Id*. at 596–97.

[78] Bray & Gillespie Mgmt. LLC v. Lexington Ins. Co. (*Bray & Gillespie I*), 259 F.R.D. 568, 573 (M.D. Fla. 2009).

[79] *Id*. at 575.

been specified, later complaints may be futile.[80] Additionally, if a party produces documents in any format other than that requested or that in which they are stored in the normal course of business, the opposing party may question the motives behind production in a different format and persuade a court that the production does not comply with the Federal Rules of Evidence.[81]

If a court finds that the search, retrieval, or production of documents is inadequate, it may order the party to participate in a Case Review and Enforcement of Discovery Obligations (CREDO) program. CREDO is "a collaborative process to identify the failures in the case management and discovery protocol used by [a party] and its in-house and retained attorneys . . . to craft alternatives that will prevent such failures in the future, to evaluate and test the alternatives, and ultimately, to create a case management protocol which will serve as a model for the future."[82]

The *Qualcomm* court's description of the CREDO program is helpful for instructing clients on how to comply with discovery *before* such a program is necessary. The program recommends sufficient communication between "client and retained counsel, among retained lawyers and law firms, and between junior lawyers conducting discovery and senior lawyers asserting legal arguments."[83] Additionally, CREDO suggests adequate case management and discovery plans with which all clients, employees, and lawyers are familiar. Such plans include considering the experience and expertise of the attorneys involved in the discovery process, describing the frequency of and parties involved in attorney meetings, identifying who should participate in the development of the case management and discovery plans, forecasting potential conflicts and resolutions between the client and retained counsel in the discovery process, and suggesting required ethical and discovery training for the participants. This format should be altered to fit the circumstances of clients with in-house lawyers or several retained law firms. As used in the CREDO program, it is also important to "identify[] and evaluat[e] data tracking systems, software, or procedures that corporations could implement to better enable inside and outside counsel to identify potential sources of discoverable documents,"[84] such as the correct databases or archives.

5. Separation of Privileged and Responsive Documents

Privileged and responsive documents should be segregated once the search and retrieval and review processes of e-discovery have concluded. Counsel should take great care when responding to requests to ensure that the party does not produce irrelevant, unresponsive,

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[80] *See id*. at 586.

[81] *Id*. at 585–86.

[82] Qualcomm Inc. v. Broadcom Corp. (*Qualcomm I*), No. 05cv1958-B, 2008 WL 66932, at *18 (S.D. Cal. Jan. 7, 2008).

[83] *Id.* at *19.

[84] *See id*. at *19.

or even privileged information. While that premise applies to all discovery materials, it is especially prudent with regard to e-discovery because attempting to categorize such large volumes of electronic data could easily result in inadvertent production of data that could have been withheld. If a party agrees to produce documents within a certain category then it must produce all the documents within that category.[85]

In addition to conducting a thorough search, if additional relevant *and responsive* documents are found post-search, counsel should immediately bring those documents to the attention of the opposing party and the court. Counsel also should commence a new search, either in the same place the new data was found or by using new key words that would have produced the data, to ensure that no other responsive data is missing.

Before production, counsel must perform a "reasonable inquiry" to ensure the client has complied with its discovery obligation. If relevant and responsive documents are found during this inquiry, the attorney must either verify that they were previously produced to the opposing party or must produce them immediately.[86] Any documents found should naturally be read or reviewed by counsel, and failure to do so has created avoidable problems in other cases.[87] "At the end of the day, however, the duty to preserve and produce documents rests on the party. Once that duty is made clear to a party, either by court order or by instructions from counsel, that party is on notice of its obligations and acts at its own peril."[88]

C. *Proportionality*

Proportionality is the third pillar of e-discovery. Because of the increasingly large volume of documents involved in a typical case involving e-discovery, counsel should always be mindful of the proportionality requirement of Rule 26(b)(2)(C), which might provide an avenue for decreasing the level of production required. "Whether preservation or discovery conduct is acceptable in a case depends on what is *reasonable*, and that in turn depends on whether what was done—or not done—was *proportional* to that case and consistent with clearly established applicable standards."[89] Rule 26 contains provisions that permit parties to refuse to produce ESI that would be unreasonably burdensome and expensive when compared to the overall scope of the case, including the amount of possible awards.[90]

Factors to be considered in an analysis of whether the costs of production can be justified for a certain case include the following:

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[85] *See id.* at *9.

[86] *Id.* at *14.

[87] *See id*. at *15.

[88] Zubulake v. UBS Warburg LLC (*Zubulake V*), 229 F.R.D. 422, 436 (S.D.N.Y. 2004).

[89] *See* Victor Stanley, Inc. v. Creative Pipe, Inc. 269 F.R.D. 497, 522 (quoting Rimkus Consulting Grp. v. Cammarata, 688 F. Supp. 2d 598, 613 (S.D. Tex. 2010)).

[90] *Id*. at 523 (quoting Fed. R. Civ. P. 26(g)(1)(B)(iii)).

> "(1) the specificity of the discovery requests; (2) the quantity of information available from other and more easily accessed sources; (3) the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources; (4) the likelihood of finding relevant, responsive information that cannot be obtained from more easily accessed sources; (5) predictions as to the importance and usefulness of further information; (6) the importance of the issues at stake in the litigation; and (7) the parties' resources."[91]

While these factors obviously depend on the facts of each case, the *Fairfax* court offers an excellent example of their application. In *Fairfax*, the court considered proportionality after the defendants requested e-discovery from plaintiffs' 666 backup tapes.[92] The plaintiffs estimated that making such a production would cost approximately $10 million.[93] Because of this estimate, plaintiffs argued that the data kept on the tapes was not "reasonably accessible because of undue burden or cost," per Rule 26(b)(2)(B) and New Jersey Rule of Court 4:10-2(f).[94] However, this provision is not foolproof, and a court "'nevertheless may order discovery from such sources if the requesting party establishes good cause.'"[95]

According to the *Fairfax* court, "[t]he analysis starts with determining whether Plaintiffs satisfied their burden of demonstrating that the requested e-mail discovery is 'not reasonably accessible because of undue burden or cost.'"[96] The court found that this burden was met because backup tapes are typically classified as inaccessible.[97] In addition, the plaintiffs provided affidavits from Fairfax's information technology manager and an e-discovery vendor attesting to the high cost.[98] The court also considered the affidavit of the defendants' e-discovery vendor, who stated that the tapes could be obtained at a lower cost, but the court deemed his statement "purely speculative, as [the vendor] ha[d] not seen or analyzed the tapes in question."[99] The court dismissed the defendants' argument that the tapes were reasonably accessible because the same tapes had been produced to the Securities and Exchange

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[91] Letter Opinion of Special Discovery Master, *supra* note 29, at 4 (quoting Major Tours, Inc. v. Colorel, Civil No. 05-3091, 2009 U.S. Dist. LEXIS 97554, at *9 (D.N.J. Oct. 20, 2009)); *see also* N.J. Ct. R. 4:10-2(g) (listing similar factors as FED. R. CIV. P. 26(b)(2)(C)).

[92] *See* Letter Opinion of Special Discovery Master, *supra* note 29, at 3.

[93] *See id*.

[94] *See id*.

[95] *Id*. at 4 (quoting N.J. CT. R. 4:10-2(f)).

[96] *Id.* (quoting N.J. CT. R. 4:10-2(g)).

[97] *Id*.

[98] *See id*. at 4–5.

[99] *Id*. at 5.

Commission in prior litigation.[100] Because of these findings, the court concluded that "the weight of the evidence favor[ed] the conclusion that the information stored on Plaintiffs' backup tapes [wa]s not reasonably accessible."[101]

The *Fairfax* court did not end its inquiry after determining the backup tapes were not reasonably accessible. Instead, the court next considered whether the requesting party had established such "good cause" to justify production, considering the aforementioned factors.[102] The court provided the caveat, however, that "a court should not treat the 'good cause' factors as a checklist and determine which party has the most checks," but instead should weigh the factors by importance.[103]

Regarding the first factor—specificity of the discovery requests—counsel should use caution in agreeing to search terms based only upon accessible media, as those same terms may be used if media they consider inaccessible is deemed otherwise. In *Fairfax*, the defendants argued that the search terms were "sufficiently narrowly tailored." The plaintiffs complained that the search terms would yield too many false hits. The court, however, already had approved those search terms, and "[s]ince the keyword search criteria already approved by [the court] ha[d] been used in the collection, review, and production of information stored on Plaintiffs' accessible media, the same terms [we]re sufficiently specific for use on information stored on Plaintiffs' inaccessible media."[104] The court held that this factor weighed in the defendants' favor.[105]

The second factor—the quantity of information available from other and more easily accessed sources—is also subject to interpretation. While the 47,000 e-mails that the plaintiffs in *Fairfax* already had produced without the backup tapes may seem like a large number, the length of the litigation and the number of "corporate parties, their officers, directors, employees, and representatives, and individual parties" involved could lead a court to determine that the number could be considerably higher.[106] In *Fairfax*, however, the court ultimately held that without evidence of the contents of the backup tapes, it would be "impossible to decide this factor without resorting to rank speculation."[107]

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[100] *Id*.

[101] *Id*.

[102] *Id.*

[103] *Id*. (quoting Major Tours, Inc. v. Colorel, Civil No. 05-3091, 2009 U.S. Dist. LEXIS 97554, at *14–15 (D.N.J. Oct. 20, 2009)).

[104] *Id.* at 5–6.

[105] *Id*.

[106] *See id.* at 6.

[107] *Id*.

The *Fairfax* court noted that the third and fourth factors—"the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources" and "the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources"—was similarly hindered by lack of evidence.[108] Although deleted e-mails might have existed on backup tapes, no evidence pointed to whether they actually existed or contained relevant information.[109]

The fifth factor—predictions as to the importance and usefulness of further information—allows both parties to speculate. The plaintiffs in *Fairfax* asserted that the backup tapes would not contain relevant material that could not be found elsewhere,[110] while the defendants argued that the e-mails that would support their claims were exactly the type that would have been deleted and, therefore, found in such a search.[111] The court determined that this factor was a "draw" for both sides as neither side's argument could be supported without actually accessing the tapes.[112]

The sixth factor—the importance of the issues at stake in the litigation—was described in *Zubulake v. UBS Warburg LLC*, as "one that will rarely be invoked."[113] The *Fairfax* court stated that "[t]his factor should come into play if a case has 'the potential for broad public impact,' such as 'toxic tort class actions, environmental actions, so-called 'impact' or social reform litigation, cases involving criminal conduct, or cases implicating important or constitutional questions.'"[114] The court then concluded that the impact of this case was only on the parties, and the amount of potential damages d[id] not alter that impact.

The seventh factor—the parties' resources—does not rest solely on the coffers of the parties but is more focused on "whether the burden or expense of the proposed discovery outweighs its likely benefit."[115] However, evidence of what the media in question contain is still necessary to determine any benefit.[116]

If a court cannot reach a conclusion as to proportionality by applying the above factors, a court may order "staged discovery or sampling" of the medium in question "to determine whether there is good cause to order a more expansive search of the information."[117] An

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[108] *Id.*

[109] *See id*.

[110] *Id.*

[111] *Id.* at 6–7.

[112] *Id*. at 7.

[113] Zubulake v. UBS Warburg LLC (*Zubulake I*), 217 F.R.D. 309, 321 (S.D.N.Y. 2003).

[114] Letter Opinion of Special Discovery Master, *supra* note 29, at 7.

[115] *Id.*

[116] *Id*. ("Both parties to this litigation have substantial financial resources. But this does not mean that a well-funded litigant must expend burdensome sums of money to produce data on inaccessible media as a matter of course.").

[117] *Id*. at 7–8.

actual sample removes speculation in applying the factors because "there will be tangible evidence of what the backup tapes may have to offer . . . [and] tangible evidence of the time and cost required to restore the backup tapes."[118] Applying this strategy to the *Fairfax* case, the court ordered the defendants to choose one of the "critical custodians" and ordered the plaintiffs to "restore and produce all responsive and non-privileged e-mails pertaining to that custodian for the requested time periods," omitting all e-mails already produced.[119]

D. *Cost Shifting*

Cost shifting is the fourth pillar of e-discovery. Cost shifting occurs when the court requires the party requesting discovery documents to bear some of the financial burden that the answering party incurs in producing the requested documents. Depending on the accessibility of the discovery documents requested, the cost of searching for and producing such a high volume of electronic documents may increase exponentially. Costs can be further driven up by near-automatic objections by the parties to discovery requests. As one court noted, "[t]he failure to engage in discovery as required . . . is one reason why the cost of discovery is so widely criticized as being excessive—to the point of pricing litigants out of court."[120]

Discovery of electronic documents is considerably more complicated and costly "because otherwise discoverable evidence is often only available from expensive-to-restore backup media."[121] Courts have relied on "creative solutions" to balance rules that honor the broad scope of discovery requests against those that are more cost-conscious.[122] Cost sharing has emerged as a method that can offset the often unequal financial burdens upon the parties.

As already noted in Part C, courts and the Federal Rules of Civil Procedure provide some escape from overly burdensome and expensive discovery requests. In addition, the Federal Rules of Civil Procedure provide that parties do not have to produce documents in the discovery process when

> (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.[123]

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[118] *Zubulake I*, 217 F.R.D. at 324.

[119] Letter Opinion of Special Discovery Master, *supra* note 29, at 8.

[120] Mancia v. Mayflower Textile Servs. Co., 253 F.R.D. 354, 359 (D. Md. 2008).

[121] *Zubulake I*, 217 F.R.D. at 316.

[122] *See id*.

[123] Fed. R. Civ. P. 26(b)(2)(C).

Thus, although the presumption is that the responding party will bear the costs associated with complying with discovery requests, if a request fails to meet these proportionality requirements, the requesting party could be called upon to bear some of the costs of its burdensome request. But courts will consider such cost shifting only in response to a motion by the responding party, who must justify the request with "just cause."

Because "cost-shifting may effectively end discovery" in cases where the parties are not financial equals, the *Zubulake* court cautioned that courts must closely adhere to the above guidelines laid out in the federal rules.[124] Using such an analysis, the *Zubulake* court determined that whether electronic data posed an undue burden or expense on the responding party depended largely on whether the format in which the electronic data is kept rendered it accessible or inaccessible.[125]

The *Zubulake* opinion identified five categories of data, ordered by most to least accessible:

1. *Active, online data:* "On-line storage is generally provided by magnetic disk. It is used in the very active stages of an electronic records [sic] life—when it is being created or received and processed, as well as when the access frequency is high and the required speed of access is very fast, *i.e.,* milliseconds." Examples of online data include hard drives.

2. *Near-line data:* "This typically consists of a robotic storage device (robotic library) that houses removable media, uses robotic arms to access the media, and uses multiple read/write devices to store and retrieve records. Access speeds can range from as low as milliseconds if the media is already in a read device, up to 10–30 seconds for optical disk technology, and between 20–120 seconds for sequentially searched media, such as magnetic tape." Examples include optical disks.

3. *Offline storage/archives:* "This is removable optical disk or magnetic tape media, which can be labeled and stored in a shelf or rack. Off-line storage of electronic records is traditionally used for making disaster copies of records and also for records considered 'archival' in that their likelihood of retrieval is minimal. Accessibility to off-line media involves manual intervention and is much slower than on-line or near-line storage. Access speed may be minutes, hours, or even days, depending on the access-effectiveness of the storage facility." The princip[al] difference between nearline data and offline data is that offline data lacks "the coordinated control of an intelligent disk subsystem," and is, in the lingo, JBOD ("Just a Bunch Of Disks").

4. *Backup tapes:* "A device, like a tape recorder, that reads data from and writes it onto a tape. Tape drives have data capacities of anywhere from a few hundred

[124] *Zubulake I*, 217 F.R.D. at 318.

[125] *Id*.

kilobytes to several gigabytes. Their transfer speeds also vary considerably . . . The disadvantage of tape drives is that they are sequential-access devices, which means that to read any particular block of data, you need to read all the preceding blocks." As a result, "[t]he data on a backup tape are not organized for retrieval of individual documents or files [because] . . . the organization of the data mirrors the computer's structure, not the human records management structure." Backup tapes also typically employ some sort of data compression, permitting more data to be stored on each tape, but also making restoration more time-consuming and expensive, especially given the lack of uniform standard governing data compression.

5. *Erased, fragmented or damaged data:* "When a file is first created and saved, it is laid down on the [storage media] in contiguous clusters... As files are erased, their clusters are made available again as free space. Eventually, some newly created files become larger than the remaining contiguous free space. These files are then broken up and randomly placed throughout the disk." Such broken-up files are said to be "fragmented," and along with damaged and erased data can only be accessed after significant processing.[126]

Categories one through three are generally considered to be accessible, while categories four and five are inaccessible.[127] Accessible data, or data in a "readily usable" format, includes data that "does not need to be restored or otherwise manipulated to be usable."[128] Inaccessible data, or data that is "not readily usable," must be restored or reconstructed before it can be used by either party.[129] For example, if the data is contained in an active file or on an easily searchable optical disc, "it would be wholly inappropriate to even consider cost-shifting."[130] If the producing party can produce the data cheaply and quickly, that party should bear the associated costs.[131] If the data is stored in an inaccessible format, however, and the process of restoring the data would be costly and time-consuming, it is appropriate to at least consider cost shifting.[132]

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[126] *Id.* at 318–19 (alterations other than "princip[al]" in original) (internal citations omitted).

[127] *Id.* at 319–20.

[128] *Id.* at 320.

[129] *Id*.

[130] *Id.*

[131] *Id*. "For these sources of e-mails—active mail files and e-mails stored on optical disks—it would be wholly inappropriate to even consider cost-shifting. UBS maintains the data in an accessible and usable format, and can respond to Zubulake's request cheaply and quickly. Like most typical discovery requests, therefore, the producing party should bear the cost of production." *Id*.

[132] *See id*.

The *Zubulake* court used these data categories to help further analyze the cost-shifting request of a plaintiff in a gender discrimination lawsuit. Building upon—but also rejecting—the cost-shifting test developed by the district court in *Rowe Entertainment, Inc. v. William Morris Agency, Inc.*,[133] the *Zubulake* court developed its own set of factors to consider in deciding a cost-shifting request. The court also provided some guidance to future courts and parties in ranking the factors:

> The first two factors—comprising the marginal utility test—are the most important. These factors include: (1) The extent to which the request is specifically tailored to discover relevant information and (2) the availability of such information from other sources.
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> . . .
>
> The second group of factors addresses cost issues: "How expensive will this production be?" and, "Who can handle that expense?" These factors include: (3) the total cost of production compared to the amount in controversy, (4) the total cost of production compared to the resources available to each party and (5) the relative ability of each party to control costs and its incentive to do so.
>
> The third "group"—(6) the importance of the litigation itself—stands alone, and . . . will only rarely come into play. But where it does, this factor has the potential to predominate over the others. Collectively, the first three groups correspond to the three explicit considerations of Rule 26(b)(2)(iii).
>
> Finally, the last factor—(7) the relative benefits of production as between the requesting and producing parties—is the least important because it is fair to presume that the response to a discovery request generally benefits the requesting party. But in the unusual case where production will also provide a tangible or strategic benefit to the responding party, that fact may weigh *against* shifting costs.[134]

In *Zubulake*, after the backup tapes were sampled and the trial court reviewed the data found and the defendant's affidavit regarding the time and money spent, the court held that all remaining backup e-mails would be produced with some (but not the bulk) of the costs shifted to the plaintiff, Zubulake.[135] The total cost of restoring and producing relevant documents from the five backup tapes was $19,003.43.[136] In considering whether to shift

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[133] 205 F.R.D. 421 (S.D.N.Y. 2002).

[134] *Zubulake I*, 217 F.R.D. at 323.

[135] Zubulake v. UBS Warburg LLC (*Zubulake III*), 216 F.R.D. 280, 289–91 (S.D.N.Y. 2003).

[136] *Id*. at 283.

any of the costs to Zubulake, the court "emphasiz[ed] again that cost-shifting is potentially appropriate only when *inaccessible* data is sought."[137]

The court looked to the e-mails Zubulake had already produced, which, "taken together, . . . [p]resumably . . . are reasonably representative of the seventy-seven backup tapes."[138] Though the e-mails were hostile to Zubulake, they did not provide evidence of gender discrimination.[139] The court also noted UBS's increase in production, from 100 pages of e-mails (which UBS had deemed a complete set) to 853 pages of e-mails after searching the five sampled backup tapes.[140] The court concluded that these numbers "lead to the unavoidable conclusion that there are a significant number of responsive e-mails that now exist only on backup tapes."[141] Additionally, evidence existed that one of UBS's employees may have concealed or deleted "especially relevant e-mails" after imposition of the litigation hold. The court found that while some of the new e-mails or their contents could be found in other places, "a good deal of [the data] is only found on the backup tapes."[142]

As to factors one and two—that is, the extent to which the request is specifically tailored to discover relevant information and the availability of the information from other sources—the court found that the sample restoration demonstrated that "Zubulake's discovery request was narrowly tailored to discover relevant information."[143] The court further found that, because certain relevant e-mails were only available on the backup tapes, "direct evidence of discrimination may only [have] be[en] available through restoration."[144] The court concluded that the existence of such evidence was speculative, but "because UBS b[ore] the burden of proving that cost-shifting [wa]s warranted, the marginal utility test tip[ped] slightly against cost-shifting."[145]

In considering the next three factors—the cost of production compared to the amount in controversy and the resources of each party as well as the relative ability and incentive of each party to control costs—the court noted that both parties' damage estimates suggested a potential verdict of several million dollars.[146] The court concluded that a cost of $165,954.67 for restoring the remaining seventy-two backup tapes was "surely not 'significantly disproportionate' to the projected value of th[e] case."[147]

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[137] *Id*. at 284.

[138] *Id*. at 285.

[139] *See id.* at 286.

[140] *See id*. at 286–87.

[141] *Id*. at 287.

[142] *Id*.

[143] *Id*.

[144] *Id*.

[145] *Id.*

[146] *Id*. at 288.

[147] *Id*. at 287–88.

With regard to the resources of the parties, the court noted that Zubulake was an individual while UBS was a large corporation. Additionally, the court pointed out that, while Zubulake's former salary was incredibly high, at the time of the opinion she had been unemployed for two years and was suing her former employer, likely rendering her "not . . . particularly marketable."[148] The court also considered the fact that Zubulake valued her claim at $19 million, suggesting she could "have the financial wherewithal to cover at least some of the cost of restoration[,]" and the likelihood that her attorneys would be willing to front larger expenses in light of the possible multi-million dollar verdict.[149] The court held that this factor weighed against, but did not rule out, cost shifting.

The court also made note of the fact that UBS was allowed to choose the vendor charged with restoring the tape, and that it was possible that a less-expensive vendor could have been selected instead.[150] Once the vendor is hired, however, "costs are not within the control of either party."[151] Therefore, this factor was determined to be neutral to both parties.[152]

Factor six, which considers the importance of the issues at stake in the litigation, very rarely comes into play. The court noted that discrimination issues in the workplace are "hardly unique." The court then found that this factor also was neutral. The court found that the seventh factor, concerning the benefits of the information to each party, weighed in favor of cost shifting. While the court agreed with Zubulake's assertion that UBS would possibly find evidence favorable to its arguments at trial or for summary judgment, "there can be no question that Zubulake stands to gain far more than does UBS, as will typically be the case."[153]

Ultimately, the *Zubulake* court determined that "[b]ecause some of the factors cut against cost shifting, but only *slightly so*—in particular, the possibility that the continued production will produce valuable new information—some cost-shifting [wa]s appropriate in this case, although UBS should pay the majority of the costs."[154] The court based this finding on the fact that there was "plainly relevant evidence that [wa]s only available on UBS's backup tapes."[155]

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[148] *Id*. at 288.

[149] *Id.*

[150] *Id*.

[151] *Id*.

[152] *Id*. The court also noted that "because these backup tapes are relatively well-organized—meaning that UBS knows what e-mails can be found on each tape—there is nothing more that Zubulake can do to focus her discovery request or reduce its cost. Zubulake has already made a targeted discovery request and the restoration of the sample tapes has not enabled her to cut back on that request." *Id*.

[153] *Id.* at 289.

[154] *Id*.

[155] *Id*.

In considering how much of the cost of restoration should be shifted to Zubulake, the court noted that the results of the seven-factor test required UBS to pay the bulk of the costs. "A share that is too costly may chill the rights of litigants to pursue meritorious claims," the *Zubulake* court reasoned.[156] The court also considered the speculative nature of whether the search would produce any relevant documents of value before ultimately concluding that twenty-five percent of the cost should be assigned to Zubulake.[157] The court required Zubulake to pay for only that portion of the discovery costs that involved searching and restoring the inaccessible backup tapes sought in the discovery request. It further clarified that once the backup tapes had been restored, an act defined as "making inaccessible material accessible,"[158] then the responding party bore the cost of reviewing and producing the electronic data. The court explained its decision with an eloquent analogy:

> Documents stored on backup tapes can be likened to paper records locked inside a sophisticated safe to which no one has the key or combination. The cost of accessing those documents may be onerous, and in some cases the parties should split the cost of breaking into the safe. But once the safe is opened, the production of the documents found inside is the sole responsibility of the responding party. The point is simple: technology may increasingly permit litigants to reconstruct lost or inaccessible information, but once restored to an accessible form, the usual rules of discovery apply.[159]

The court ordered UBS to produce, at its own expense, "*all* responsive e-mails that exist[ed] on its optical disks or on its active servers" (data in accessible format), and all responsive e-mails "from any five backup tapes selected by Zubulake."[160] UBS was directed to document its search in detail as to time and money spent and relevant material found so that the trial court could apply its cost-shifting analysis to determine whether further discovery of the backup tapes was needed and whether cost-shifting would be appropriate.[161]

Efforts to encourage a cost-sharing order should never affect the quality of ESI produced. In *Bray & Gillespie Management LLC v. Lexington Insurance Co.*, the court found that because Bray & Gillespie caused problems with its production of ESI, Bray & Gillespie would have to "'bear the burden of whatever it takes to get' the ESI produced in a usable format," a sanction that effectively eliminated any possibility of cost sharing.[162]

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[156] *Id.*

[157] *Id*.

[158] *Id.* at 290.

[159] *Id.* at 291.

[160] Zubulake v. UBS Warburg LLC (*Zubulake I*), 217 F.R.D. 309, 324 (S.D.N.Y. 2003).

[161] *See id.* at 324.

[162] Bray & Gillespie Mgmt. LLC v. Lexington Ins. Co (*Bray & Gillespie I*), 259 F.R.D. 568, 579 (M.D. Fla. 2009) (quoting from an earlier court order).

Once cost shifting has been allowed, however, the court will not reallocate the distribution of costs on a whim. In a later proceeding of the *Zubulake* case concerning spoliation sanctions, the court declined Zubulake's request that the court reallocate the costs shifted to her in the prior proceeding because her basis for this request—missing tapes and e-mails—was already considered in the earlier proceeding in which the court had allocated the costs between the parties.[163]

E. *Privilege and Work-Product Protection Claims*

The fifth pillar of e-discovery involves the production of privileged and protected documents. Due to the large volume of material involved and the ease with which documents can be mistakenly transmitted, erroneous disclosure of privileged communications is a risk in the e-discovery process. So great is this risk, in fact, that the Federal Rules of Evidence have been altered to provide additional protections for privileged communications. As noted by the court in *Coburn Group, LLC v. Whitecap Advisors LLC*, "'[w]here discovery is extensive, mistakes are inevitable.'"[164] Therefore, the importance of privilege in e-discovery cannot be understated.

Federal Rule of Evidence 502 states that "when privileged information is inadvertently disclosed, 'the disclosure does not operate as a waiver in a Federal or State proceeding if: (1) the disclosure is inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify the error.'"[165] Rule 502 "specifies the circumstances under which a privilege is waived despite the claim that the privileged document was inadvertently produced."[166] To determine whether waiver has occurred, a court must first determine whether the document is privileged and then whether the privilege has been waived.[167]

Rule 502 brought "uniformity across the circuits to their once differing treatment of the effect of certain inadvertent disclosures of privileged materials"[168] and established the aforementioned three-part test to determine if the inadvertent disclosure constitutes a waiver.[169] The emergence of e-discovery contributed significantly to the development of this new rule; the large volume of electronic documents led to higher costs of production due to the many hours spent "analyzing every piece lest the inadvertent production of one be deemed

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[163] *See* Zubulake v. UBS Warburg LLC (*Zubulake IV*), 220 F.R.D. 212, 219 (S.D.N.Y. 2003).

[164] Coburn Group, LLC v. Whitecap Advisors LLC, 640 F. Supp. 2d 1032, 1039 (N.D. Ill. 2009) (alteration in original) (quoting Judson Atkinson Candies, Inc. v. Latini-Hohberger Dhimantec*,* 529 F.3d 371, 388 (7th Cir. 2008)).

[165] Amobi v. D.C. Dep't of Corr., 262 F.R.D 45, 49 (D.D.C. 2009) (quoting FED. R. EVID. 502(b)).

[166] *Id*. at 51.

[167] *See id*.

[168] *Id*. at 52 (citing FED. R. EVID. 502 advisory committee's note).

[169] *Id.*

a waiver not only as to the piece inadvertently disclosed but as to all others that relate to the same subject matter."[170] However, Rule 502 does not grant a free pass to parties who choose not to take reasonable precautions against disclosure of such privileged documents. Furthermore, while Rule 502 does not indicate specifically who has the burden of proving waiver, the prior rule placed the burden on the party claiming privilege to show that it did not waive attorney-client privilege.[171]

1. Is the Information Privileged?

When analyzing whether a party has waived protection from discovery for a privileged document, a court will first consider whether the document was privileged in the first place. Attorney-client privilege has traditionally been viewed as a way to protect a client's confidential communications to a representing attorney, encouraging openness, honesty, and, ultimately, better representation.[172] In certain jurisdictions, a court also might conclude that communication from an attorney to a client is privileged, so long as the party claiming privilege "'demonstrate[s] with reasonable certainty that the attorney's communication' . . . 'rested in significant and inseparable part on the client's confidential disclosure.'"[173]

Like attorney-client privilege, the work-product doctrine protects those documents created by an attorney in the course of the representation of a client, with the purpose aimed at ensuring the best possible representation. The test for whether a document can be considered work product and qualify for protection "is 'whether the material sought to be protected from discovery was prepared in anticipation of litigation.'"[174] For example, the *Coburn* court, in considering whether an e-mail released in the course of discovery was work product, considered not only the content and title of an e-mail—"Requests on Coburn Filing"—but that it was sent four months after the lawsuit was filed.[175] The court noted that even though the e-mail did not contain "opinion work product [and] there [was] no disclosure of an attorney's mental impressions, conclusions, opinions or theories," the e-mail was work product because it contained an attorney's responses to questions regarding the lawsuit and "[i]n order to formulate those responses, [the attorney] collected, selected and organized certain information."[176] The court also noted that the manner in which the documents are prepared, not necessarily the contents of those documents, governs whether the work-product privilege attaches; if the same content is found in documents that are not

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[170] *Id*. at 52 n.1 (citing Fed. R. Evid. 502 advisory committee's note).

[171] *Id*. at 53.

[172] *See id.* at 51.

[173] *Id*. (quoting *In re* Sealed Case, 737 F.2d 94, 99 (D.C. Cir. 1984)).

[174] Coburn Group, LLC v. Whitecap Advisors LLC, 640 F. Supp. 2d 1032, 1036 (N.D. Ill. 2009) (quoting Allendale Mut. Ins. Co. v. Bull Data Sys., Inc., 145 F.R.D. 84, 86 (N.D. Ill. 1992)).

[175] *Id.* at 1037.

[176] *Id.*

work product, those documents are discoverable.[177] The court therefore concluded that the e-mail would be protected unless the privilege was waived or the opposing party "made the showing of 'substantial need' required by Rule 26(b)(3)(A)(ii)."[178]

2. Inadvertent Disclosure

If a document is found to be protected from disclosure by attorney-client privilege or the work-product doctrine but is disclosed anyway during the discovery process, a court will next consider whether that disclosure was inadvertent rather than a waiver of the privilege. "Inadvertent disclosure" is not defined by Rule 502. Prior to the rule, however, courts considered the number of documents produced, "the level of care with which the review for privilege was conducted and even the actions of the producing party after discovering that the document had been produced."[179]

Some courts have found that the new rule simply considers "if the party intended to produce a privileged document or if the production was a mistake."[180] In *Amobi v. District of Columbia Department of Corrections*, for example, the court refused to consider the amount of information reviewed or the time taken to prevent the disclosure to establish whether disclosure was inadvertent, viewing such an approach as melding two distinct concepts: inadvertence and reasonable efforts taken to prevent disclosure. "One speaks to whether the disclosure was unintended while the other speaks to what efforts were made to prevent it."[181] The *Amobi* court instead interpreted "inadvertent" to mean "an unintended disclosure."[182]

In analyzing inadvertence, the *Coburn* court asked only "whether the party intended a privileged or work-product protected document to be produced or whether the production was a mistake."[183] In applying this test, the court noted sections (a)(1) and (b)(1) of Rule 502, which contrast a waiver that is "intentional" with a disclosure that is "inadvertent."[184] The court found that production of an e-mail protected by the work-product doctrine was a mistake, and thus, inadvertent.[185] The number of documents produced during discovery in the *Coburn* case—40,000—qualified as substantially large.[186]

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[177] *See id.*

[178] *Id.*

[179] Amobi v. D.C. Dep't of Corr., 262 F.R.D 45, 53 (D.D.C. 2009); *see also* Coburn Group, LLC v. Whitecap Advisors LLC, 640 F. Supp. 2d 1032, 1037–38 (N.D. Ill. 2009).

[180] *Amobi*, 262 F.R.D. at 53.

[181] *Id.*

[182] *Id*.

[183] Coburn Group, LLC v. Whitecap Advisors LLC, 640 F. Supp. 2d 1032, 1038 (N.D. Ill. 2009).

[184] *Id.*

[185] *Id*. at 1038.

[186] *See id*. at 1039.

The *Coburn* court also did not adopt an approach advocated by the receiving party that would have found a waiver due to the use of non-lawyers in reviewing discovery documents. The process utilized in *Coburn* involved the lead attorney supervising two experienced paralegals, who worked subject to a protocol that required them to take extensive steps to segregate responsive and privileged documents.[187] The opposing party criticized giving such an important task to paralegals, but the court "declin[ed] to hold that the use of paralegals or non-lawyers for document review is unreasonable in every case," and specifically found that because of the large volume of documents, "use of experienced paralegals who were given specific direction and supervision by a lawyer who is lead counsel in the case was not unreasonable."[188]

Because the e-mail contested in *Coburn* was protected work product and the court found no waiver, the plaintiff's only avenue for retaining the e-mail was to prove that it "ha[d] 'substantial need for the materials to prepare its case and c[ould not], without undue hardship, obtain their substantial equivalent by other means.'"[189] But the court found that the plaintiff was seeking the e-mail as a way to seek sanctions and impeach its opponents rather than for the e-mail's contents, and so determined the plaintiff had not made a proper showing to meet the requirements of Rule 26(b)(3)(A)(ii).[190]

Although Rule 502 resolved some of the major disputes over what constitutes inadvertent disclosure, issues still remain for courts to resolve over what constitutes an inadvertent disclosure that can protect a privilege from being waived in the discovery process. One consistency is the courts' reluctance to adopt a bright-line rule one way or the other. For example, the defendants in *Amobi* disclosed to the opposing side an attorney's memorandum regarding arbitration proceedings.[191] The *Amobi* plaintiffs argued that if a lawyer disclosed the allegedly privileged document, "then it clearly was not mistaken and not inadvertent," and if it was produced by a non-lawyer, then the defendants "did not take reasonable steps to protect privilege."[192] The court, however, dismissed this argument because "[c]oncluding that a lawyer's mistake never qualifies as inadvertent disclosure . . . would essentially reinstate the strict waiver rule in cases where lawyers reviewed documents, and it would create a perverse incentive not to have attorneys review documents for privilege."[193]

On the other hand, courts have been equally reluctant to adopt a wholesale stance against waivers of the privilege, especially when based on arguments that they need to consider the hardship that permitting waivers would create for a party. "Every waiver of the attorney-client

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[187] *See id*.

[188] *Id*.

[189] *Id* at 1041 (quoting Fed. R. Civ. P. 26(b)(3)(A)(ii)).

[190] *See id*. at 1042.

[191] Amobi v. D.C. Dep't of Corr., 262 F.R.D 45, 48–49 (D.D.C. 2009).

[192] *Id.* at 54.

[193] *Id.*

privilege produces unfortunate consequences for the party that disclosed the information," stated the court in *Victor Stanley*. "If that alone were sufficient to constitute an injustice, there would never be a waiver."[194]

3. Reasonable Efforts

Following a determination that a disclosure was inadvertent, a court will next consider whether the party claiming the privilege took reasonable steps to protect release of the privileged document.[195] When addressing an e-discovery waiver, this factor is of great importance. Factors that may be considered include "the reasonableness of precautions taken, the time taken to rectify the error, the scope of discovery, the extent of the disclosure, the number of documents to be reviewed, the time constraints for production, and the overriding issue of fairness."[196] However, these factors were intentionally not codified in the rule "because the analysis should be flexible and should be applied on a case by case basis."[197]

Due to the case-by-case nature of a possible court review, the importance of documenting the process cannot be overstated when the party is reviewing responsive material for privileged information. If a party cannot describe its efforts, a court cannot determine whether those efforts were reasonable.[198] When large quantities of ESI data are involved, even the software used can become crucial.[199] The document inadvertently produced in *Amobi* was a four-page paper document.[200] The court noted that, in arguing for the document's protection, the defendants failed to inform the court of the total number of documents produced, "so the court cannot determine the magnitude of the error in producing this one document."[201] The *Amobi* defendants also failed to explain "what they did when they got the documents, how they segregated them so that the privileged documents were kept separate from the non-privileged, and how, despite the care they took, the privileged document was inadvertently produced."[202]

Use of text searches to distinguish privileged from non-privileged information also may pose problems in convincing a court that reasonable precautions were taken to prevent privileged information from reaching the opposing party. The plaintiffs in *Victor Stanley*, not

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[194] Victor Stanley, Inc. v. Creative Pipe, Inc., 250 F.R.D. 251, 263 (D. Md. 2008).

[195] *See Amobi*, 262 F.R.D at 54.

[196] *Id*. (citing FED. R. EVID. 502 advisory committee's note at Subdivision (b)); *see also* Coburn Group, LLC v. Whitecap Advisors LLC, 640 F. Supp. 2d 1032, 1038–39 (N.D. Ill. 2009).

[197] *Amobi*, 262 F.R.D. at 54 (citing FED. R. EVID. 502 advisory committee's note at Subdivision (b)).

[198] *Id*. at 54–55.

[199] *See id*. at 54.

[200] *Id*.

[201] *Id.*

[202] *Id*.

the defendants, noted that the documents produced to them contained potentially privileged or work-product protected documents. The plaintiffs properly segregated those documents and notified defense counsel, who promptly claimed that the documents were produced inadvertently.[203] Defendants' privilege review involved subjecting text-searchable documents to a keyword search while non-text-searchable documents were manually reviewed. But, due to time constraints, only the titles of the non-text-searchable documents were reviewed for indications of privilege.[204] The court was skeptical of this argument because the defendants did not indicate which documents inadvertently produced slipped through because of errors in the keyword search versus human error in the title-page review.[205]

The *Victor Stanley* court noted the lack of information regarding the keywords used during the privilege review, how those keywords were developed, "how the search was conducted, and what quality controls were employed to assess their reliability and accuracy."[206] The individuals who developed the keywords did not present any qualifications for "designing a search and information retrieval strategy that could be expected to produce an effective and reliable privilege review."[207] The defendants also failed to provide the court with other information, such as "whether the search was a simple keyword search, or a more sophisticated one, such as one employing Boolean proximity operators; or whether they analyzed the results of the search to assess its reliability, appropriateness for the task, and the quality of its implementation."[208]

As demonstrated above, "all keyword searches are not created equal."[209] The *Victor Stanley* defendants also failed to sample any of the files that the keyword search yielded to determine if the search results were reliable and did not contain privileged information.[210] "Common sense suggests that even a properly designed and executed keyword search may prove to be over-inclusive or under-inclusive, resulting in the identification of documents as privileged which are not, and non-privileged which, in fact, are."[211]

Moreover, the *Victor Stanley* plaintiffs disputed the contention that the files were not easily searchable.[212] The court agreed with this assertion and found that the defendants

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[203] Victor Stanley, Inc. v. Creative Pipe, Inc., 250 F.R.D. 251, 255 (D. Md. 2008).

[204] *Id*. at 256.

[205] *Id*.

[206] *Id.*

[207] *Id*.

[208] *Id*. at 259–60.

[209] *Id*. at 256–57.

[210] *Id*. at 257.

[211] *Id.*

[212] *Id.*

waived their claims to protection for 165 produced in discovery by performing an incomplete privilege review that missed so many documents.[213] The court therefore concluded that

> [i]n this case, the Defendants have failed to demonstrate that the keyword search they performed on the text-searchable ESI was reasonable. Defendants neither identified the keywords selected nor the qualifications of the persons who selected them to design a proper search; they failed to demonstrate that there was quality-assurance testing; and when their production was challenged by the Plaintiff, they failed to carry their burden of explaining what they had done and why it was sufficient.[214]

The court also reminded defendants that if they had sought a court-approved non-waiver agreement, or clawback agreement, as they initially planned when negotiating the discovery agreement, "they would have been protected from waiver."[215] A clawback agreement allows the parties to enter an agreement with the court allowing production of certain documents to the opposing party with the understanding that if privileged or work-product protected documents are produced, the producing party will be able to "claw back" those documents. However, the parties should give careful thought before entering into such an agreement in order to avoid agreeing to produce documents (or relinquish a privileged document in-

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[213] *See id*. at 263. The court also provided advice to future parties:

> While keyword searches have long been recognized as appropriate and helpful for ESI search and retrieval, there are well-known limitations and risks associated with them, and proper selection and implementation obviously involves technical, if not scientific knowledge. . . . To address this known deficiency, the Sedona Conference suggests as best practice points, *inter alia:*
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> Practice Point 3. The choice of a specific search and retrieval method will be highly dependent on the specific legal context in which it is to be employed.
>
> Practice Point 4. Parties should perform due diligence in choosing a particular information retrieval product or service from a vendor.
>
> Practice Point 5. The use of search and information retrieval tools does not guarantee that all responsive documents will be identified in large data collections, due to characteristics of human language. Moreover, differing search methods may produce differing results, subject to a measure of statistical variation inherent in the science of information retrieval.
>
> Practice Point 6. Parties should make a good faith attempt to collaborate on the use of particular search and information retrieval methods, tools and protocols (including as to keywords, concepts, and other types of search parameters).
>
> Practice Point 7. Parties should expect that their choice of search methodology will need to be explained, either formally or informally, in subsequent legal contexts (including in depositions, evidentiary proceedings, and trials).

Id. at 260–62 (internal citations omitted).

[214] *Id*. at 262.

[215] *Id*.

advertently produced) when doing so would be detrimental to their case. Additionally, at least one court has noted that "[s]imply turning over all ESI materials does not show that a party has taken 'the reasonable steps' to prevent disclosure of its privileged materials."[216]

4. Prompt Response to Rectify the Error

In addition to using the foregoing factors to evaluate whether a party has waived privilege in the release of ESI, courts will consider a party's prompt response to the inadvertent disclosure of privileged information in its favor. In *Coburn*, the plaintiffs tried to use the defendant's actions against the defendant where there was a four-month lag time between the inadvertent production and the defendant's discovery of the mistake, and the defendant delayed filing a motion to challenge the plaintiff's refusal to return the document.[217] The court dismissed the first contention by stating that the relevant time is "how long it took the producing party to act after it learned that the privileged or protected document had been produced."[218] The court noted the defendants' immediate objection to use of the protected document during deposition and the written request the following day for the document's return. The court also found a five-week delay in challenging the plaintiff's refusal to return the documents, during which counsel for both sides investigated "the facts and law surrounding the documents," was not unreasonable.[219]

III.
Conclusion

Because of the volume of information produced through e-discovery, the process of collecting, sorting, reviewing, and producing ESI is increasingly outsourced to non-lawyer professionals. The world in which complex litigation arises is dominated by computers, which in turn are ruled (if they do not in fact live autonomously among us) by technical experts. The management of e-discovery, therefore, cannot be fully accomplished without computer and data management experts. The fundamental decisions, however, about process and substance remain the province of lawyers. This article attempts in a small way to define the five pillars of e-discovery that support and inform a lawyer's fundamental decision-making when tasked with the job of managing e-discovery.

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[216] Spieker v. Quest Cherokee, LLC, No. 07-1225-EFM, 2009 WL 2168892, at *3 (D. Kan. July 21, 2009).

[217] Coburn Group, LLC v. Whitecap Advisors LLC, 640 F. Supp. 2d 1032, 1040 (N.D. Ill. 2009)

[218] *Id.* at 1041.

[219] *Id.*

The Ins and Outs of Trying the Bellwether Case in Multidistrict Litigation[†]

Edward B. Ruff, III
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I.
Introduction

In federal courts, the preferred way to handle mass tort lawsuits is for the Judicial Panel on Multidistrict Litigation to transfer and consolidate the case to a single federal court for proceedings.[1] As recently as August 10, 2010, the Judicial Panel on Multidistrict Litigation consolidated and transferred to the Eastern District of Louisiana claims arising out of the explosion that destroyed the Deepwater Horizon offshore drilling rig.[2] Given the pervasiveness of multidistrict litigation (MDL) in the area of mass torts, it is necessary to understand the importance of litigating an MDL bellwether case. To this end, this article discusses the

[†] Submitted by the authors on behalf of the FDCC Class Action and Multidistrict Litigation section.

[1] Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 Vand. L. Rev. 107, 108 (2010) (citing Deborah R. Hensler, *Revising the Monster: New Myths and Realities of Class Action and Other Large Scale Litigation*, 11 Duke J. Comp. & Int'l L. 179, 185–86 (2001); Deborah R. Hensler, *The Role of Multi-Districting in Mass Tort Litigation: An Empirical Investigation*, 31 Seton Hall L. Rev. 883, 895 (2001)).

[2] *In re* Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010, MDL No. 2179, 2010 U.S. Dist. LEXIS 83268 (J.P.M.L. Aug. 10, 2010).

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events occurring after consolidation and before remand. Specifically, it focuses on the trial of a bellwether case in an MDL proceeding. Part II serves as an introduction to multidistrict litigation by focusing on the creation of an MDL. Part III discusses what is meant by a bellwether case and its purpose in the MDL proceeding. Part IV discusses various examples of bellwether cases. Part V addresses the determination of the bellwether Plaintiff. Part VI discusses practical considerations for trying a bellwether case. Part VII addresses the effect of a positive verdict in a bellwether case. Finally, Part VIII provides a short summary and concludes the article.

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II.
Introduction To Multidistrict Litigation

In 1968, Congress enacted section 1407 of the Judicial Code to rectify the problem of duplicative discovery and conflicting contemporaneous pretrial rulings common to mass litigation.[3] Today, section 1407 provides as follows:

> When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated: *Provided, however*, That the panel may separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded.[4]

[3] Multidistrict Litigation Act, Pub. L. No. 90-296 (codified as amended at 28 U.S.C. § 1407 (2006)).

[4] 28 U.S.C. § 1407(a) (2006).

Thus, to remedy the issues plaguing the court system as a result of proliferating mass litigation, section 1407 authorized the creation of a the Judicial Panel on Multidistrict Litigation ("MDL Panel") and authorized it to transfer federal cases pending in different districts that involve common questions of fact for consolidated or coordinated pretrial proceedings.[5]

The MDL Panel consists of "seven circuit and district judges designated from time to time by the Chief Justice of the United States, no two of whom shall be from the same circuit."[6] The purpose of the MDL Panel "is to (1) determine whether civil actions pending in different federal districts involve one or more common questions of fact such that the actions should be transferred to one federal district for coordinated or consolidated pretrial proceedings; and (2) select the judge or judges and court assigned to conduct such proceedings."[7]

The MDL Panel, on its own initiative or via motion, may order consolidation.[8] Should the MDL Panel find that consolidation is appropriate, it will issue a transfer order, whereby the MDL Panel will assign a title and number to the MDL and will identify the related actions that are being transferred under section 1407. These cases constitute the MDL. Should the MDL Panel later become aware of additional related actions, the "tag-along actions" can at that time be consolidated into the MDL. A "tag-along action" refers to "a civil action pending in a district court which involves common questions of fact with either (1) actions on a pending motion to transfer to create an MDL or (2) actions previously transferred to an existing MDL, and which the Panel would consider transferring under Section 1407."[9] A party seeking transfer of such an action must file a Notice of Tag-Along Action with the MDL Panel. The MDL Panel may then issue a conditional transfer order transferring the

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[5] Mary H. Cronin, et al., *Multidistrict Litigation: Technical and Practical Considerations*, 59 Fed'n Def. & Corp. Couns. Q. 391, 391 (2009).

[6] 28 U.S.C. § 1407(d). The current Chairman of the Judicial Panel is the Honorable John G. Heyburn II, from the United States District Court for the Western District of Kentucky. The other members include the Honorable Kathryn H. Vratil from the District of Kansas, the Honorable Frank C. Damrell, Jr. from the Eastern District of California, the Honorable Marjorie O. Rendell from the Third Circuit U.S. Court of Appeals, the Honorable Barbara S. Jones from the Southern District of New York, the Honorable W. Royal Furgeson, Jr. from the Northern District of Texas, and the Honorable Paul J. Barbadoro from the District of New Hampshire. United States Judicial Panel on Multidistrict Litigation, Panel Judges, http://www.jpml.uscourts.gov/General_Info/Panel_Judges/panel_judges.html (last visited August 12, 2011).

[7] United States Judicial Panel on Multidistrict Litigation, An Overview of the United States Judicial Panel on Multidistrict Litigation, available at http://www.jpml.uscourts.gov/General_Info/Overview/overview.html (last visited August 12, 2011).

[8] 28 U.S.C. § 1407(c); *In re* Midwest Milk Monopolization Litig., 379 F. Supp. 989, 990 (J.P.M.L. 1974) (noting that the Panel acted pursuant to statutory authority when it sought centralization for actions arising out of antitrust allegations in the milk industry); John G. Heyburn, II, *A View from the Panel: Part of the Solution*, 82 Tul. L. Rev. 2225, 2231 n.35 (2008).

[9] Rules of Procedure of the Judicial Panel on Multidistrict Litigation, available at http://www.jpml.uscourts.gov/Panel_Rules-Amended-7-6-2011.pdf, at 1.1(h) [hereinafter the "MDL R.P."].

action to the MDL Court.[10] If no objection to the conditional transfer order is filed, and the Clerk of the Panel determines that the tag-along case is appropriate to join the other consolidated cases, the order becomes final, and the tag-along actions are transferred to the MDL.[11] However, should an objection be filed, the MDL Panel applies the standards applicable to motions to consolidate under section 1407 to resolve the objection.[12]

As an MDL is employed primarily to streamline pretrial proceedings, upon completion of the pretrial proceedings, the MDL Panel remands cases to their transferor courts for trial.[13] Remand, however, is not necessary where a constituent case terminates during the pendency of the MDL.[14] In practice, however, few cases are remanded for trial; the majority of constituent cases are settled in the transferee court.[15]

III.
What Is A Bellwether Case, And What Is Its Purpose?

The term bellwether is "derived from the ancient practice of belling a wether (a male sheep) selected to lead his flock."[16] The success of the bellwether, the sheep selected to wear the bell, was determined by whether the flock had confidence that the wether would not lead them astray.[17] In the context of an MDL, a bellwether trial refers to a trial of a select group of plaintiffs whose verdicts are then used to aid in facilitating settlement of the remaining cases.[18] As the Manual for Complex Litigation explains,

> [t]est cases . . . enable the parties and the court to determine the nature and strength of the claims, whether they can be fairly developed and litigated on a group basis[] and what range of values the cases may have if resolution is attempted on a group

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[10] *Id.* at 7.1(b).

[11] *Id.*

[12] *Id.*

[13] 28 U.S.C. § 1407(a).

[14] *Id.*

[15] *See* United States Judicial Panel on Multidistrict Litigation, *Annual Statistics of the United States Judicial Panel on Multidistrict Litigation (2009)*, available at http://www.jpml.uscourts.gov/Statistics/JPML_Statistical_Analysis_of_Multidistrict_Litigation_2009.pdf (Since the creation of the Panel in 1968, there have been 323,258 civil actions centralized for pretrial proceedings. As of September 30, 2009, a total of 11,737 actions have been remanded for trial, 395 actions have been reassigned within the transferee district, and 223,126 actions had been terminated in the transferee court.).

[16] *In re* Chevron U.S.A., Inc., 109 F.3d 1016, 1019 (5th Cir. 1997). *See also* Oxford English Dictionary (2d Ed. 1989) (the term is used contemptuously when referring figuratively to individuals).

[17] *Chevron*, 109 F.3d at 1019.

[18] Alexandra D. Lahav, *Bellwether Trials*, 76 Geo. Wash. L. Rev. 576, 577–78 (2008).

> basis. The more representative the test cases, the more reliable the information about similar cases will be.[19]

The original bellwether and its modern litigation counterpart are not dissimilar; each serves as a leader of its "flock" and is typical of its members.[20] Trial judges and litigators utilize the bellwether plaintiff to inform the process and aid in the valuation of cases to facilitate settlement.[21] Thus, like its Middle English counterpart, today, in courts across the nation, bellwether plaintiffs attempt to guide mass litigation to a just and proper result. As explained by the Manual for Complex Litigation, a bellwether trial can achieve this goal only if it is composed of representative cases.[22] Thus, it is paramount that the parties and the judge work together to choose representative cases to populate any bellwether trial.

IV.
Types Of Bellwether Cases

There is no blueprint for what is a proper bellwether case. Historically, litigants have attempted both binding and non-binding bellwether trials. As explained *infra*, binding bellwether trials should be avoided because of concerns relating to the constitutional rights of the plaintiffs not selected to participate in the bellwether trial. For this reason, even a successful bellwether trial will not be binding upon those plaintiffs not selected to participate. Within the non-binding bellwether trials, there are a variety of different approaches that have been put into practice. Examples of some of those shall be discussed *infra*.

A. *Binding Bellwether Trials are of Dubious Constitutionality.*

In its infancy, the bellwether trial was used seemingly in lieu of a class action where class certification could not be obtained.[23] It is important to note, however, that unlike a class action, consolidating multiple actions in an MDL "does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties

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[19] Manual for Complex Litigation § 22.315 (4th ed. 2004).

[20] *Id.*

[21] *See, e.g.*, Silivanch v. Celebrity Cruises, Inc., 333 F.3d 355, 359–360 (2d Cir. 2003) (affirming use of bellwether plaintiffs to aid in settlement of twenty-two cases involving Legionnaire's disease on a cruise ship); Dodge v. Cotter Corp., 203 F.3d 1190, 1194 (10th Cir. 2000) (affirming use of bellwether trials in cases involving uranium contamination in a community). *See* Lahav, *supra* note 18, at 577–78 n.6.

[22] Manual for Complex Litigation § 22.315 (4th ed. 2004) ("If individual trials, sometimes referred to as bellwether trials or test cases, are to produce reliable information about other mass tort cases, the specific plaintiffs and their claims should be representative of the range of cases.").

[23] Eldon E. Fallon, et al., *Bellwether Trials in Multidistrict Litigation*, 82 Tul. L. Rev. 2323, 2331 (2008) (citing Cimino v. Raymark Indus., Inc., 151 F.3d 297, 318 (5th Cir. 1998)).

in another."[24] For this reason, courts have found certain approaches to bellwether trials inappropriate. Specifically, the Fifth Circuit has held that the nonconsensual sampling and extrapolation of causation and damages in personal injury cases violated litigants' Seventh Amendment right to a jury trial and due process rights.[25] Judge Edith H. Jones explained these concerns in a special concurrence to the Fifth Circuit's decision in *In re Chevron U.S.A., Inc.*[26] Judge Jones wrote,

> The use of statistical sampling as a means to identify and resolve common issues in tort litigation has . . . been severely criticized. Among other things, the technique may deprive nonparties of their Seventh Amendment jury trial right. In *Matter of Rhone-Poulenc Rorer Inc.*, Judge Posner observed that bifurcating liability and causation questions may require the same issue to be reexamined by different juries. That is, even if the bellwether jury found liability on the part of Chevron, later juries could be called upon to reassess that decision when faced with questions of comparative causation or comparative negligence. That all the plaintiffs are here represented by a single set of attorneys does not, in my view, alleviate Seventh Amendment concerns; to the contrary, it compounds them with potential ethical problems. Additionally, as Judge Higginbotham cautioned in *In re Fibreboard Corp.*, there is a fine line between deriving results from trials based on statistical sampling and pure legislation. Judges must be sensitive to stay within our proper bounds of adjudicating individual disputes. We are not authorized by the Constitution or statues to legislate solutions to cases in pursuit of efficiency and expeditiousness. Essential to due process for litigants, including both the plaintiffs and Chevron in this non-class action context, is their right to the opportunity for an individual assessment of liability and damages in each case.[27]

In essence, in the absence of consent, utilizing a bellwether trial to determine the rights and liabilities of MDL constituents other than the bellwether plaintiffs raises due process and Seventh Amendment issues. In order to avoid these issues, a better approach is to use a non-binding bellwether trial, the results of which will provide guidance to the parties to facilitate settlement.

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[24] *In re* TMI Litig., 193 F.3d 613, 724 (3d Cir. 1999) (quoting Johnson v. Manhattan Ry. Co., 289 U.S. 479, 497 (1933)).

[25] *In re* Fibreboard, 893 F.2d 706, 711–12 (5th Cir. 1990) (holding that, as a matter of Texas product liability law, plaintiffs must show specific causation and individual injuries to establish a claim)); Manual for Complex Litigation § 22.93 (4th ed. 2004) (citing Cimino v. Raymark Indus., 151 F.3d 297, 319–22 (5th Cir. 1998) (holding that individual determinations of liability, injury, and damages are required by the Seventh Amendment in an asbestos mass tort personal injury context)).

[26] 109 F.3d 1016 (5th Cir. 1997).

[27] *Id.* at 1023 (Jones, J. specially concurring) (internal citations omitted).

B. *Bellwether Trials That Are Not Binding on the Remaining MDL Constituents Provide a Useful Guide to Value and Settle the Remaining Cases.*

Although a nonbinding bellwether case alleviates the majority of constitutional concerns, the issue of structuring the bellwether case remains. The Manual for Complex Litigation recognized that both courts and litigants have "experimented with various trial structures" in resolving the mass tort cases.[28] The Manual for Complex Litigation provides the following examples:

- A *series of individual trials against one or more defendants on all issues.* The verdicts in representative cases inform the parties as to a likely range of verdicts in other similar cases. For the most part, the silicon gel breast implant litigation and the diet drug litigation have followed this model, with most of the individual trials conducted at the state level.
- *A series of consolidated trials on all issues, if they are sufficiently common.* Each trial involves defined groups of similarly situated plaintiffs (e.g., a manageable number of coworkers from the same job site or homeowners who had the same type of siding installed by the same contractor) against one or more defendants, with special procedures, if necessary, to assist the jury in comprehending multiple claims against multiple parties.
- *A consolidated common issues trial with some plaintiffs presenting claims against defendants on all issues, yielding findings on common issues*. This works in a single-incident mass tort case, a property damage case, or a narrowly defined aspect of a dispersed mass tort (e.g., a case involving a single product and injuries allegedly incurred in a single work site or in a single state, within a limited time period). The remaining plaintiffs would have to prove specific causation and damages in later proceedings in which the findings on common issues from the first trial would apply. The individual issues may also be resolved through the procedures discussed immediately below involving trials of representative cases. Certain issues relating to liability may be severed under Federal Rule of Civil Procedure 42(b) from issues relating to causation or damages, and then consolidated as to multiple parties under Rule 42(a) for a joint trial. Federal courts have frequently concluded that dispersed mass tort personal injury claims, particularly those involving the law of different states, cannot generally be tried on a consolidated or aggregated basis.
- *A consolidated trial on common issues followed by a stipulated binding procedure (such as arbitration or mediation) agreed to by the parties to resolve individual issues*. This type of approach to the individual issues encompasses possible test-case trials or special master adjudications. Such an approach is more feasible in a single incident mass tort than in a dispersed mass tort.

[28] Manual for Complex Litigation § 22.93 (4th ed. 2004).

- *A stipulated resolution of all elements of individual claims according to a formula or by a hearing before an arbitrator, special master, or magistrate judge.* The court should ensure that the parties' waiver of the right to a jury trial is knowing and intelligent.[29]

Although a discussion of each of the various approaches contemplated by the Manual on Complex Litigation is beyond the scope of this article, the article discusses two types as examples—*In re Vioxx Products Liability Litigation* and *In re Stand 'n Seal Products Liability Litigation*. These cases are most akin to the Manual for Complex Litigation's category of "*A series of consolidated trials on all issues, if they are sufficiently common.*"[30]

1. *In re Vioxx Products Liability Litigation* (MDL 1657)

On February 16, 2005, the Judicial Panel on Multidistrict Litigation created the *In re Vioxx Products Liability Litigation* MDL.[31] Vioxx is a prescription drug that belongs to a class of pain killers known as non-steroidal anti-inflammatory drugs ("NSAIDs").[32] Merck & Company, Inc. ("Merck") manufactured Vioxx.[33] In 1999, the FDA approved Vioxx as a safe and effective treatment for osteoarthritic pain, primary dysmenorrhea (menstrual pain), and acute pain based on the data that had been supplied by Merck.[34] Vioxx is the result of a discovery by scientists in the early 1990s that cylooxygenase ("COX"), an enzyme that stimulates synthesis of prostaglandins, which are chemicals produced in the body that promote certain effects, had two forms— COX-1 and COX-2.[35] Scientists believed that NSAIDs that selectively targeted COX-2 enzymes would be able to offer the traditional pain relief associated with NSAIDs and also offer a reduced risk of debilitating gastrointestinal perforations, ulcers, and bleeds ("PUBs").[36] The plaintiffs in the Vioxx MDL brought state law products liability claims against Merck as a result of their use of Vioxx.[37] Generally, the plaintiffs alleged failure-to-warn, fraud, and warranty claims.[38]

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[29] *Id.* (footnotes and internal cross-references omitted). Note the concerns relating to the Seventh Amendment right to a jury trial. Again, resolution of the individual claims through a bellwether trial involving other plaintiffs or through a formula poses due process and Seventh Amendment concerns that need to be addressed prior to adopting any such binding resolution.

[30] *Id.*

[31] *In re* Vioxx Prods. Liab. Litig., 360 F. Supp. 2d 1352 (J.P.M.L. 2005).

[32] *In re* Vioxx Prods. Liab. Litig., 501 F. Supp. 2d 776, 778 (E.D. La. 2007).

[33] *Id.* at 778.

[34] *Id.* at 778–79.

[35] *Id.* at 778.

[36] *Id.*

[37] *Id.* at 779.

[38] *Id.*

Faced with the prospect of twenty million plaintiffs bringing suit based on their Vioxx use,[39] the transferee court recognized the necessity of conducting bellwether trials in the Vioxx MDL. The transferee court conducted six bellwether trials,[40] only one of which resulted in a verdict for the plaintiffs.[41] Ultimately, the six bellwether trials proved fruitful for the court and the litigants. After the trials, all parties, with the assistance of the courts, began to engage in serious discussions regarding a global settlement. The discussions resulted in a partial settlement of all Vioxx-related personal injury suits pending in state and federal courts.[42] Under the settlement, Merck agreed to pay $4.85 billion to eligible claimants.[43] The terms of the settlement specified that individual awards would vary depending on an objective evaluation by an independent administrator.[44]

2. *In re Stand 'n Seal Products Liability Litigation* (MDL 1804)

In re Stand 'n Seal Products Liability Litigation was created by the MDL Panel on January 5, 2007.[45] Stand 'n Seal "Spray-On" Grout Sealer ("SNS") is a consumer product used to seal ceramic tile grout in kitchens, bathrooms, and similar areas.[46] SNS represented an innovation in the field of grout sealants because it allowed the user to easily stand and spray the sealant onto the grout without the strain of using a brush and having to manu-

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[39] *Id.* ("It is estimated that 105 million prescriptions were written for Vioxx in the United States between May 20, 1999 and September 20, 2004. Based on this estimate, it is thought that approximately 20 million patients have taken Vioxx in the United States.").

[40] Although the court conducted six trials, the first bellwether trial resulted in a mistrial. Thus, the six trials consisted of trials in only five cases.

[41] *In re* Vioxx Prods. Liab. Litig., 239 F.R.D. 450, 452 n.4 (E.D. La. 2006) ("The first bellwether trial, Evelyn Irvin Plunkett v. Merck & Co., Inc., No. 05-4046 (E.D. La. filed Aug. 23, 2005), was conducted while the Court was temporarily located in Houston, Texas because of Hurricane Katrina, and resulted in a hung jury. The case was subsequently retried in New Orleans and resulted in a verdict for Merck. The second bellwether trial, Gerald Barnett, et al. v. Merck & Co., Inc., No. 06-485 (E.D. La. filed Jan. 31, 2006), resulted in a $ 51 million verdict for the Plaintiff. The Court has ordered a new trial on the issue of damages in *Barnett*, finding the $50 million compensatory damage award excessive. However, the parties have asked the Court to reconsider its decision in *Barnett*. The third bellwether trial, Robert Smith v. Merck & Co., Inc., No. 05-4379 (E.D. La. filed Sept. 29, 2005), resulted in a verdict for Merck. The fourth bellwether trial, Charles Mason v. Merck & Co., Inc., No. 06-810 (E.D. La. filed Feb. 16, 2006), also resulted in a verdict for Merck. The fifth bellwether trial, Anthony Dedrick v. Merck & Co., Inc., No. 05-2524 (E.D. La. filed June 21, 2005), is scheduled to begin on November 27, 2006.")) (internal citations omitted).

[42] Heather Won Tesoriero, et al., *Merck's Tactics Largely Vindicated as it Reaches Big Vioxx Settlement*, Wall St. J., Nov. 10, 2007, at A1.

[43] *Id.*

[44] *Id.*

[45] *In re* Stand 'n Seal Prods. Liab. Litig., 469 F. Supp. 2d 1351 (J.P.M.L. 2007).

[46] *In re* Stand 'n Seal Prods. Liab. Litig., No. 07-MD-1804, 2009 U.S. Dist. LEXIS 63540, at *5 (N.D. Ga. July 15, 2009).

ally apply the sealant.[47] In *In re Stand 'n Seal Products Liability Litigation*, the plaintiffs alleged that problems with SNS began when its manufacturer, SLR, Inc., changed SNS's chemical components.[48] SNS had originally been manufactured using a fluoropolymer[49] chemical named Zonyl 225, but from April to May of 2005, and again in July 2005, SLR manufactured SNS with a fluoropolymer chemical known as Flexipel S-22WS.[50] Prior to SLR's unilateral decision to reformulate SNS, approximately 1.3 million cans of SNS had been sold with almost no incidents of consumer complaints.[51] However, the plaintiffs alleged that as a result of the reformulation, they began experiencing respiratory problems such as chemical pneumonititis and Reactive Airways Dysfunction Syndrome as a result of their exposure to SNS.[52] Consumers all over the country filed lawsuits alleging various state law claims, including negligence, strict products liability, and breach of warranty, as well as a federal action for violation of the Consumer Product Safety Act.[53]

The transferee court in *In re Stand 'n Seal Products Liability Litigation*, like the court in *In re Vioxx Products Liability Litigation*, determined that the case was appropriate for bellwether trials. The court planned for three bellwether trials. The first two bellwether trials settled on the eve of trial.[54] The third bellwether trial resulted in a verdict in favor of all defendants.[55] Shortly after the defense verdict, the parties settled all but three of the remaining cases.

V.
Determining the Bellwether Plaintiffs

As explained *supra*, there are a number of methods to structure a bellwether trial. Regardless of the method chosen, the most critical determination is who will serve as bellwether plaintiffs. For the verdict in a bellwether case to serve as a useful guide to the litigants and

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[47] *Id.*

[48] *Id.*

[49] *See id.* at *5–6 n.1 ("Fluoropolymers are known for exceptional chemical resistance and high temperature stability. The most commonly known fluoropolymer is probably the DuPont brand Teflon. Teflon is used in hundreds of products including coating of non-stick frying pans.").

[50] *Id.* at *5.

[51] *Id.* at *26.

[52] *Id.* at *5.

[53] *Id.* at *6-7.

[54] Order, Adams v. Roanoke Cos. Grp., Inc., No. 07-cv-0686 (N.D. Ga. Jan. 1, 2011), Doc. No. 288.

[55] Judgment, Housekeeper v. Roanoke Cos. Grp, Inc., Nos. 07-CV-687, 07-MD-1804 (April 28, 2010), Doc. No. 723; Judgment, Leatham v. Roanoke Cos. Grp., Inc., Nos. 07-CV-687, 07-MD-1804 (April 28, 2010), Doc. No. 2918; Judgment, Marshall v. Roanoke Cos. Grp., Inc., Nos. 07-CV-687, 07-MD -1804 (April 28, 2010), Doc. No. 725; Judgment, Mork v. Roanoke Cos. Grp., Inc., Nos. 07-CV-687, 07-MD-1804 (April 28, 2010), Doc. No. 726; Judgment, Paddock v. Roanoke Cos. Grp., Inc., Nos. 07-CV-687, 07-MD-1804 (April 28, 2010), Doc. No. 727.

the court, the plaintiffs must be representative of the MDL's remaining constituents. As commentators have recognized, "the representativeness of the bellwether sample will affect the validity of the outcome of consolidated trial."[56] For example, "if the sample chosen includes a disproportionate number of severely injured plaintiffs, then the awards made to the non-trial plaintiffs will be artificially inflated."[57] Recently, the Fifth Circuit, in *In re Chevron U.S.A., Inc.*, granted Chevron's writ of mandamus seeking relief from the district court's trial plan to utilize thirty out of 3,000 plaintiffs as bellwethers because they were not representative of the 2,970 non-bellwether plaintiffs.[58] Thus, it is paramount to develop a comprehensive database of the key characteristics of the MDL's constituents prior to selecting the bellwether plaintiffs. Next, the parties and the court must work together to select bellwether plaintiffs who resemble the population and will provide a useful result. The next sections will outline the steps needed to ensure a proper representative sample of bellwether plaintiffs.

A. *Step 1 — Developing the Composition of Cases*

The first step in designing a successful bellwether trial is ascertaining the makeup of the MDL's constituent plaintiffs by cataloguing the entire universe of cases.[59] As commentators have explained,

> [a] bellwether trial is most effective when it can accurately inform future trends and effectuate an ultimate culmination to the litigation; therefore, it is imperative to know what types of cases comprise the MDL. Otherwise, the transferee court and attorneys risk trying an anomalous case, thereby wasting substantial amounts of both time and money. Thus, to ensure that the cases ultimately tried are emblematic of all the cases comprising the MDL, the transferee court and the attorneys must determine the composition of the MDL prior to engaging in any further trial-selection steps.[60]

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[56] Kenneth S. Bordens & Irwin A. Horowitz, *The Limits of Sampling and Consolidation in Mass Tort Trials: Justice Improved or Justice Altered?*, 22 Law & Psychol. Rev. 43, 47 (1998).

[57] *Id.*

[58] *In re* Chevron U.S.A, Inc., 109 F.3d 1016, 1020 (5th Cir. 1997).

[59] Fallon et al., *supra* note 23, at 2343–44.

[60] *Id.* at 2344; *see also* Meranus v. Gangel, No. 85 Civ. 9313 (WK) consolidated with Nos. 86 Civ. 8542 (WK), 87 Civ. 3823 (WK), 88 Civ. 2449 (WK), 1991 U.S. Dist. LEXIS 8731, at *3–4 (S.D.N.Y June 26,1991) ("The choice of representative plaintiffs for bellwether discovery cannot be made in a vacuum, however. Choosing an appropriate sampling technique will depend upon the extent to which the plaintiffs differ from one another with respect to characteristics relevant to this litigation. For example, some plaintiffs might have been so eager for the tax advantages that they were willing to take any risk. Some may have relied on the same investment advisor. Because clusters of plaintiffs may have different attributes, then, stratified random sampling rather than pure random selection may be necessary. This, in turn, requires identification of the pertinent characteristics and categorization of the plaintiffs according to those factors.") (internal citations omitted).

In essence, the parties should aim to conduct a "census" of all plaintiffs in the case to identify all major variables. For example, in the Vioxx MDL, the "census" was conducted through limited case specific discovery utilizing plaintiff and defendant profile forms.[61] Similarly, in *In re Stand 'n Seal Products Liability Litigation*, the parties used plaintiff profile forms in order to streamline case specific discovery and catalog the characteristics relevant to the litigation including personal information, purchase information, exposure information, medical history, and work history. In short, the plaintiff profile forms offer the parties an efficient method of obtaining information necessary to develop a picture of the characteristics of the MDL's constituent plaintiffs.

The plaintiff profile forms then allow the parties to group the plaintiffs according to the most relevant categories. In *In re Vioxx Products Liability Litigation*, the major variables were (1) type of injury (heart attack, stroke, or other), (2) period of ingestion (short-term versus long term), (3) age group (older or younger than sixty-five), (4) prior health history (previous cardiovascular injuries or not), and (5) date of injury (before or after a certain label change).[62] For example, consider the case of *In re Stand 'n Seal Products Liability Litigation*. In that case, not all of the plaintiffs were injured by the same product, purchased the product at the same time, suffered the same injuries, and had the same medical background.[63] Each of these characteristics became important for categorizing the plaintiffs in the *Stand 'n Seal* MDL.

The plaintiff profile forms are important for several reasons. First, the plaintiff profile forms allowed the plaintiffs to be broken down according to the type of product they alleged exposure to. Generally, the plaintiffs claimed that they had been injured as a result of SNS' manufacturer's decision to replace SNS' original and benign active ingredient with another fluoropolymer, Flexipel.[64] However, not all SNS containing Flexipel was identical; two distinct formulations existed. From April to May 2005, SLR manufactured SNS with Flexipel; in July 2005, after being specifically instructed to return to the original Zonyl-

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[61] *In re* Vioxx Prods. Liab. Litig., 501 F. Supp. 2d 789, 790–91 (E.D. La. 2007) ("Second, in an effort to streamline case-specific discovery in thousands of individual cases, the Court has required every plaintiff who alleges a cardiovascular injury to submit to Merck a Plaintiff Profile Form, which contains biographical and medical information, and authorizations for the release of medical records. Upon receipt of these materials, Merck is then required to provide a Merck Profile Form, which discloses contacts Merck has had with plaintiffs' doctors and any other relevant information Merck may have about individual plaintiffs.").

[62] Fallon et al., *supra* note 23 at 2345 (citing similar case of *In re* Propulsid Prods. Liab. Litig., MDL Docket No. 1355, 2003 WL 22023398, at *1 (E.D. La. Mar. 11, 2003) ("The Court further noted that it wished to proceed to trial on three types of cases involving Propulsid: wrongful death cases, personal injury cases, and the sustained prolonged QT cases seeking medical monitoring.").

[63] *See In re* Stand 'n Seal Prods. Liab. Litig., 07-MD-1804, 2009 U.S. Dist. LEXIS 63540, at *5–7 (N.D. Ga. July 15, 2009).

[64] *Id.* at *5.

based formula, SLR produced batches of SNS containing Flexipel that had been mixed with another chemical — n-Butyl acetate.[65] Thus, in the Stand 'n Seal MDL, there were four classes of Plaintiffs: (1) plaintiffs exposed to SNS containing Zonyl; (2) plaintiffs exposed to SNS containing Flexipel; (3) plaintiffs exposed to SNS containing Flexipel plus n-Butyl acetate; and (4) plaintiffs exposed to unknown batches of SNS.[66] Based on the batch numbers printed on the bottom of the SNS cans, it was possible to determine which type of SNS each plaintiff had been exposed to. Thus, by using plaintiff profile forms, the parties were able to quickly ascertain the batch numbers for the SNS in question and break the plaintiffs down into the four categories listed above.

Second, the plaintiff profile forms allowed the plaintiffs to be broken down by time of purchase. As explained above, not all plaintiffs were injured by the same type of SNS. The timing of the purchase was important for three reasons. First, the different types of SNS were produced at different times. Thus, depending on when a plaintiff purchased SNS, certain types of SNS exposure could potentially be eliminated. This fact proved especially important with respect to plaintiffs who could not produce a batch number because they had lost or disposed of the can of SNS they claim to have used. Second, the timing of a plaintiff's purchase was relevant to allegations of failure to warn since the defendants were not initially aware of the hazards. Third, the timing of purchases was relevant to allegations of negligent recall. As some plaintiffs purchased SNS before an initiation of the SNS recall, they could not maintain an action for negligent recall. Again, the plaintiff profile forms helped to quickly establish a timeline of SNS purchases and helped to break plaintiffs down by significant dates.

Third, plaintiff profile forms are important to classify the plaintiffs' injuries into categories. The injuries in the *Stand 'n Seal* MDL consisted primarily of inhalation injuries, the most damaging of which was the allegation that SNS caused chemically induced asthma or Reactive Airways Dysfunction Syndrome.[67] The plaintiff profile forms allowed the plaintiffs to be characterized by the type of injury alleged and consequently grouped by potential severity of injury. As to the injury alleged, the plaintiff profile forms facilitated the discovery of any potential minimizing factors or alternative causation. As the *Stand 'n Seal* MDL dealt primarily with inhalation injuries, the plaintiffs' smoking history became particularly relevant. The plaintiff profile forms allowed the parties to quickly obtain this information.

In sum, using the *In re Stand 'n Seal Products Liability Litigation* as an example, it is apparent how plaintiff profile forms facilitate the "census" of the constituent plaintiffs. In that case, the plaintiff profile form allowed the parties to quickly determine the population's makeup based on the type of product used, the timing of purchase, the seriousness of inju-

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[65] *See id.* at *11 (explaining the addition of n-butyl acetate).

[66] In many instances, the plaintiffs had discarded the can of SNS subsequent to use; therefore, it was not possible to directly determine the type of SNS the plaintiff had been exposed to.

[67] *In re Stand 'n Seal,* 2009 U.S. Dist. LEXIS, at *5.

ries, and the potentially significant mitigating factors. After establishing such a profile of the population, the parties and the court are better able to select cases that are representative of the MDL as a whole and therefore would serve as a good bellwether trial.

B. *Step 2 — Selecting the Plaintiffs*

After ascertaining the pertinent characteristics of the MDL class and breaking the population down by characteristic, the parties and the court must determine which plaintiffs will serve as the bellwether plaintiffs. There are different schools of thought regarding how to select the bellwether plaintiffs.[68] The Sixth Circuit has noted that

> [t]here are essentially four basic approaches to selecting representative plaintiffs: plaintiffs' counsel selects all representatives; each side selects an equal number of representatives; plaintiffs' counsel or both sides nominate plaintiffs and the judge selects the representatives; or representatives are randomly selected from the established categories of plaintiffs.[69]

An additional approach also exists—requiring the attorneys to agree on the cases jointly.[70] Commentators who have addressed the various approaches have found that none is perfect—each has its benefits and problems.[71]

The first three approaches mentioned by the Sixth Circuit, all of which allow the attorneys to choose the plaintiffs, run the risk of not being representative of the whole group. In selecting plaintiffs to serve as bellwether plaintiffs, each party has an incentive to suggest the plaintiffs strongest for their side.[72] Allowing one side to select all of the bellwether plaintiffs will result in an "inequitable stacking of overtly unfavorable and possibly unrepresentative cases, as well as creating an atmosphere of antagonism."[73] Surely, such a collection of plaintiffs would not represent the population as a whole. The concerns are not remedied solely by allowing each side the opportunity to select an equal number of plaintiffs.[74] As the Fifth

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[68] Richard O. Faulk et al., *Building a Better Mousetrap? A New Approach to Trying Mass Tort Cases*, 29 TEX. TECH. L. REV. 779, 792 (1998).

[69] Sterling v. Velsicol Chem. Corp., 855 F.2d 1188, 1196 n.6 (6th Cir. 1998); Faulk et al., *supra* note 68 at 792.

[70] Fallon et al., *supra* note 23, at 2349.

[71] *See id.* at 2348–49; R. Joseph Barton, *Utilizing Statistics and Bellwether Trials in Mass Torts: What do the Constitution and the Federal Rules of Civil Procedure Permit?*, 8 WM. & MARY BILL RTS. J. 199, 211 (1999).

[72] Barton, *supra* note 71, at 211.

[73] Fallon et al., *supra* note 23, at 2350.

[74] *Id.*

Circuit recognized in *In re Chevron*, if each side selects an equal number of plaintiffs, the resulting trial will simply be a trial of the "best" and "worst" cases.[75] In essence, allowing attorneys to select the cases will result in cases from the ends of the spectrum, but in no way representative of the population as a whole.

The fourth option, selection by random sampling, also raises concerns. Whereas allowing attorneys to select the bellwether plaintiffs will likely result in a trial of the best and worst cases, random sampling does the opposite—it ignores the best and worst cases.[76]

The final option, requiring the plaintiffs and the defendants to agree on the bellwether plaintiffs, likely leads to the best result. In that instance, the plaintiffs selected will most likely be representative of the population as a whole and be fair to both sides.[77] Although difficult to effectuate, it will likely provide the most accurate picture of the litigation as a whole and therefore best serve the purpose of bellwether trial.

VI.
Practical Trial Considerations

Once the bellwether plaintiffs have been determined, the defense must develop a trial strategy that will keep the case focused on those plaintiffs. It can do so, in part, by utilizing motions *in limine* to maintain the focus on only those cases selected to serve as bellwethers. In addition to keeping the narrow focus before the jury, the defense must ensure the jury considers each plaintiff individually rather than allowing the plaintiffs' attorneys to bootstrap weaker cases to the stronger ones.

A. *Motions in Limine Are an Effective Way to Limit the Universe of Information Available to the Jury.*

As in any trial, in a bellwether case it is important to limit the universe of information presented to the jury. Although the concern is not unique, it is more pressing in the MDL context because MDL cases generally involve mass torts that have affected significantly more people than a traditional case and for this reason have likely received attention in the media. As such, experience dictates that certain motions *in limine* are particularly valuable in the context of litigating a bellwether case. Laboratory studies have indicated that punitive damages awarded to plaintiffs are significantly affected by the size of the non-trial plaintiff

[75] *In re* Chevron, U.S.A., Inc., 109 F.3d 1016, 1019 (5th Cir. 1997) ("Whatever may be said about the trial contemplated by the district court's December 19, 1996 order, one thing is clear. It is not a bellwether trial. It is simply a trial of fifteen (15) of the "best" and fifteen (15) of the "worst" cases contained in the universe of claims involved in this litigation. There is no pretense that the thirty (30) cases selected are representative of the 3,000 member group of plaintiffs.").

[76] Barton, *supra* note 71, at 211.

[77] Fallon et al., *supra* note 23, at 2350.

population.[78] Specifically, "bellwether" plaintiffs received higher punitive damages when the jury was told that there were hundreds of plaintiffs.[79] Conversely, where jurors were not informed as to the size of the plaintiff population, punitive damages were found to be significantly lower.[80] One way to avoid this result is to file motions *in limine* to bar any media accounts and to bar evidence of similar incidents.

Defendants in a bellwether case should move to bar evidence of media coverage because it is inadmissible hearsay and not subject to any exceptions. News articles are inadmissible hearsay when offered "primarily to establish the truth of their contents."[81] News stories are generally hearsay and inadmissible as evidence of the facts stated in the articles.[82] Unsupported newspaper statements provide no firsthand evidence of the reporter's perception, memory, or sincerity. Articles therefore lack circumstantial guarantees of trustworthiness and risk unfair party prejudice, such as the potential for differing punitive damages awards as explained in Section VI(A) *supra*.[83] Additionally, media coverage is excluded when other probative non-hearsay evidence is available to prove the fact at issue.[84]

In addition to attempting to bar media accounts, defendants in a bellwether trial should seek to bar evidence of similar incidents. Again, efforts to bar evidence of similar incidents aim to limit the universe of information available to the jury to solely the facts of bellwether plaintiffs' cases and prevent the jury from being apprised of the extent of the population of plaintiffs in the MDL.

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[78] Bordens & Horowitz, *supra* note 56, at 58.

[79] *Id.*

[80] *Id.*

[81] United States v. Baker, 432 F.3d 1189, 1211–12 (11th Cir. 2005) (holding that newspaper articles are inadmissible hearsay because they were offered to prove the truth of their contents—the identity of the gunman in the incident); Dallas County v. Commercial Union Assur. Co., 286 F.2d 388, 392 (5th Cir. 1961) (a "newspaper article is hearsay, and is almost all circumstances inadmissible"); Sklar v. Clough, No. 1:06-CV-0627-JOF, 2007 U.S. Dist. LEXIS 49248, at *8 (N.D. Ga. Jul. 6, 2007).

[82] *See* Marous Bros. v. Ala. State Univ., No. 2:07cv384-ID, 2008 U.S. Dist. LEXIS 10867, at *9–10 (M.D. Ala. Feb. 11, 2008) (holding that newspaper articles regarding defendants' unfinished building of dormitories and displaced students were hearsay and did not satisfy any hearsay exception); *Sklar*, 2007 U.S. Dist. LEXIS, at *8 (excluding newspaper articles on defendant university's funding to student organizations as hearsay not within any exceptions).

[83] Larez v. Los Angeles, 946 F.2d 630, 643–44 (9th Cir. 1991); *Baker*, 432 F.3d at 1212 (holding that even in the absence of any non-hearsay evidence concerning gunmen's description, prejudice from a newspaper article substantially outweighed its probative value to prove the murder's publicity).

[84] *See, e.g.*, *Larez*, 946 F.2d at 644 (barring three independent newspaper articles attributing similar quotations to defendant as not the "best evidence").

Regardless of plaintiffs' purpose for offering evidence of allegedly similar incidents, in order for the proffered incidents to be deemed relevant, plaintiffs must demonstrate that such incidents are "substantially similar" to the incidents at issue.[85] The requisite degree of similarity is the same regardless of what the offering party is attempting to prove.[86] "This doctrine applies to protect parties against the admission of unfairly prejudicial evidence, evidence which, because it is not substantially similar to the accident or incident at issue, is apt to confuse or mislead the jury."[87] To demonstrate that conditions substantially similar to the occurrence caused other incidents, the party cannot merely state that such incidents involved the same product. Rather, the court "must be apprised of the specific facts of previous accidents."[88] Likewise, "[t]o simply state that an accident occurred, a lawsuit was filed and the lawsuit was concluded in some manner or other fails entirely to meet plaintiffs' evidentiary burden."[89] Not only must the conditions that caused the other incidents be substantially similar, but the injuries themselves must also be sufficiently similar.[90]

Importantly, demonstrating similarity of causation requires "exclusion of all reasonable secondary explanations for the cause of the other incidents."[91] If the third parties' medical histories are unknown, then the evidence must be excluded.[92]

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[85] Gibson v. Ford Motor Co., 510 F. Supp. 2d 1116, 1123 (N.D. Ga. 2007).

[86] Martin v. Altec Indus., Inc., No. 1:03-CV-0331-BBM, 2005 WL 6038744, at *9 (N.D. Ga. Dec. 30, 2005).

[87] Heath v. Suzuki Motor Corp., 126 F.3d 1391, 1396 (11th Cir. 1997).

[88] Barker v. Deere & Co., 60 F.3d 158, 163 (3d Cir. 1995). *See also* Soldo v. Sandoz Pharm. Corp., 244 F. Supp. 2d 434, 550 (W.D. Pa. 2003) (quoting Gumbs v. Int'l Harvester, Inc., 718 F.2d 88, 98 (3d Cir. 1983) (stating that the evidence of other injuries allegedly involves the same product "is not enough to make the [evidence] admissible even under the liberal standard of admissibility of Fed. R. Evid. 401")).

[89] J.B. Hunt Transport., Inc. v. G.M. Corp., 52 F. Supp. 2d 1084, 1089 (E.D. Mo. 1999).

[90] Peters v. Nissan, No. 06-2880, 2008 WL 2625522, at *2 (E.D. La. Feb. 1, 2008) (pointing out the differing injuries and accident types in ruling that the reports lacked sufficient information to demonstrate substantial similarity); Wolf by Wolf v. Procter & Gamble Co., 555 F. Supp. 613, 621–22 (D.N.J. 1982) (finding that other consumer complaints regarding the product at issue were not similar to the alleged injury at issue).

[91] Buckman v. Bombardier Corp., 893 F. Supp. 547, 552 (E.D.N.C. 1995).

[92] *See* Amatucci v. Delaware & Hudson Ry. Co., 745 F.2d 180, 183 (2d Cir. 1984) (finding that testimony of other alleged heart attacks suffered at the same place of business had no probative value on the issues of the employer's negligence, notice, or causation and was irrelevant where the circumstances surrounding the other alleged heart attacks, including the personal and family medical histories of the victims, were unknown).

Moreover, plaintiffs can demonstrate substantial similarity of causation only through expert testimony.[93] Courts have routinely excluded evidence of allegedly similar incidents when they lack sufficient information for determining similarity to the incidents at issue.[94]

As explained above, although Rule 401 provides for a broad standard of relevancy, the requirements to meet this burden in the context of similar incidents are exacting. Prior to the trial, the defendants in a bellwether case should seek to exclude evidence of any similar incidents to preclude the plaintiffs from offering such evidence and to limit the scope of the information presented to the jury.

In sum, in defending a bellwether trial, it is paramount to limit the universe of information presented to the jury to solely the information related to the bellwether plaintiffs' cases. Doing so will avoid the prejudice that results from informing the jury as to the size of the plaintiff population. It will also maintain the representative nature of the bellwether plaintiffs and allow the verdict to serve as a useful tool in facilitating settlement of the remaining cases.

B. *It Is Paramount to Keep the Jury Focused on the Distinctions among the Bellwether Plaintiffs' Cases While Presenting a Straightforward and Concise Defense.*

In addition to limiting the information presented at trial to the facts of the bellwether plaintiffs' cases, it is paramount to keep the cases separate in the minds of the jury. This clarity can be difficult should the bellwether trial consist of a number of plaintiffs representing different portions of the population of plaintiffs.

For instance, in the recent bellwether trial in *In re Stand 'n Seal Products Liability Litigation*, the bellwether case consisted of five plaintiffs.[95] The plaintiffs presented different purchase scenarios, were exposed to different batches, incurred different damages,

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[93] *See* Burke v. U-Haul Int'l, Inc., No. 3:03CV-32-H, 2007 WL 403588, at *2 (W.D. Ky. Jan. 31, 2007) (holding that lay witnesses cannot give an opinion about the cause of their accident because "[n]o expert has compared their experiences to those of the driver here, nor has any expert analyzed these other accidents to determine an actual cause" rendering the testimony as having "almost no probative value on the issue of the cause of the accident").

[94] *See* Jones v. Ford Motor Co., 204 Fed. Appx. 280, 285–87 (4th Cir. 2006); Bryan v. Emerson Elec. Co., Inc., No. 87-6027,1988 WL 90910, at *5 (6th Cir. Sept. 1, 1988); Cameron v. Otto Bock Orthopedic Indus., Inc., 43 F.3d 14, 16 (1st Cir. 1994); C.A. Assocs. v. Dow Chem. Co., 918 F.2d 1485, 1489–90 (10th Cir. 1990); Peters v. Nissan Forklift Corp., No. 06-2880, 2008 WL 2625522, at *2–3 (E.D. La. Feb. 1, 2008); Guild v. GM Corp., 53 F. Supp. 2d 363, 368 (W.D.N.Y. 1999); Wilson v. Bradlees of New England, Inc., No. Civ. 93-47-JD, 1999 WL 816817, at *7 (D.N.H. Feb. 3, 1999); Wolf by Wolf v. Procter & Gamble Co., 555 F. Supp. 613, 621–22 (D.N.J. 1982); Verchot v. GM Corp., 812 So. 2d 296, 304–05 (Ala. 2001); Mercer v. Pittway Corp., 616 N.W.2d 602, 616–17 (Iowa 2000).

[95] *In re* Stand 'n Seal Prods. Liab. Litig., No. 07-MD-1804, 2009 U.S. Dist. LEXIS 63540, at *1 (N.D. Ga. July 15, 2009).

and had different medical histories.[96] In such a situation, it is important to streamline the defense while making the case as straightforward and clear as possible. This strategy will help prevent the jury from being overwhelmed with information. In the *Stand 'n Seal* MDL, the parties were forced to simplify the cases as a result of a court-ordered twenty-hour time limit imposed on the plaintiffs collectively as well as the defendants collectively.[97] Although each case will present its own nuances, one strategy that proved effective in the *Stand 'n Seal* MDL was the presentation of a video montage of the plaintiffs' treating physicians' video-evidence depositions immediately prior to the close of evidence. For the first time, the jury saw, in no more than ten- minute blocks, testimony from the individual plaintiffs' treating physicians addressing their lack of continuing symptoms or preexisting conditions. Such a straightforward and concise presentation resonated with the jury and was easily committed to the jurors' memories. The defense was able to turn to this evidence in closing. In the closing, the lead defense counsel presented brief timelines of each individual plaintiff that demonstrated their medical histories, including their preexisting conditions and the resolution of their complaints. The streamlined effort with emphasis on the individual nature of the claims was successful, resulting in a jury verdict against all five plaintiffs.[98]

VII.
The Effect of a Bellwether Verdict

The effect of a bellwether verdict is to educate the parties and the court about the strength and value of the MDL's constituent cases. The parties can then use the result to facilitate settlement of the remaining cases. The practice has been extremely successful in the past. For instance, as discussed above, after the conclusion of the six bellwether trials in the *Vioxx* MDL, the parties reached a partial global settlement of all *Vioxx*-related personal injury suits pending in state and federal courts.[99] Similarly, after the defense verdict in the bellwether trial in the *Stand 'n Seal* MDL, all but three of the remaining cases settled. These are not exceptions; rather these results appear to be the rule. Since the creation of the Panel in 1968, there have been 323,258 civil actions centralized for pretrial proceedings. As of

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[96] *Id.*

[97] *See* Minute Sheet for Proceedings Held in Chambers on 1/5/2010, *In re* Stand n' Seal Prods. Liab. Litig., No. 07-MD-1804 (N.D. Ga. Jan. 5, 2010), Doc. No. 396.

[98] Judgment, Housekeeper v. Roanoke Cos. Grp, Inc., Nos. 07-CV-687, 07-MD-1804 (April 28, 2010), Doc. No. 723; Judgment, Leatham v. Roanoke Cos. Grp., Inc., Nos. 07-CV-687, 07-MD-1804 (April 28, 2010), Doc. No. 2918; Judgment, Marshall v. Roanoke Cos. Grp., Inc., Nos. 07-CV-687, 07-MD -1804 (April 28, 2010), Doc. No. 725; Judgment, Mork v. Roanoke Cos. Grp., Inc., Nos. 07-CV-687, 07-MD-1804 (April 28, 2010), Doc. No. 726; Judgment, Paddock v. Roanoke Cos. Grp., Inc., Nos. 07-CV-687, 07-MD-1804 (April 28, 2010), Doc. No. 727.

[99] Tesoriero et al., *supra* note 42, at A1.

September 30, 2009, a total of 11,737 actions have been remanded for trial, 395 actions have been reassigned within the transferee district, and 223,126 actions had been terminated in the transferee court.[100] Thus, the practical effect of the result in a bellwether trial is to effectuate settlement of the remainder of the MDL's constituent cases.

VIII.
Conclusion

It is tempting to view a bellwether trial as just an isolated incident—one trial among the potential hundreds or thousands of potential trials arising out of a mass tort. However, the effects of the bellwether trial, if the trial is properly constructed, reach far beyond the scope of any individual case. A positive result can potentially end the litigation in its entirety. For this reason, it is paramount to select a representative bellwether plaintiff who can serve as the archetype for potential future litigation. The defense attorneys must also ensure that the trial is limited to the facts of that plaintiff or those bellwether plaintiffs by limiting the universe of information presented to the jury. Finally, attorneys should distill their defense of the case into a streamlined effort that will remain manageable for the jury. Doing so should provide a positive result for both the attorney and the client.

[100] United States Judicial Panel on Multidistrict Litigation, *Annual Statistics of the United States Judicial Panel on Multidistrict Litigation (2009)*, available at http://www.jpml.uscourts.gov/Statistics/JPML_Statistical_Analysis_of_Multidistrict_Litigation

Electronic Privacy Concerns in Single-Plaintiff Employment Litigation and Employment Class Actions[†]

David A. Schooler

I.
Introduction

The situation is inevitable: employees use company e-mail for personal business. Normally, this practice is discouraged but ignored. Problems can arise, however, when an employee contemplating litigation communicates with an attorney and later becomes embroiled in a lawsuit as a plaintiff. In a less common but similar scenario, an employee who had access to privileged communication before a class-action lawsuit was commenced can run into trouble when subsequently becoming a class member in the lawsuit.

Such use of the company e-mail system might constitute waiver of attorney-client privilege, but it also could subject those involved to civil or criminal liability. This Article, therefore, explores the issues that arise in single-plaintiff and class-action litigation when an employer or employee has access to e-mail constituting attorney-client communications. Being aware of these pitfalls can spare the attorney grief, and possible sanctions, when representing a client in court.

[†] Submitted by the author on behalf of the FDCC Class Action and Multidistrict Litigation section.

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II.
Issues in Single-Plaintiff Employment Litigation

The scenario is common. An unhappy employee is considering filing a lawsuit against his employer. The employee decides to use the computer he sits in front of all day to find an attorney. The employee then starts e-mailing this attorney from the employee's work account. Things get worse, and the employee quits, is terminated, or files a charge of discrimination while still employed.

Months later, the company's counsel starts reviewing the employee's old e-mails. The question now presents itself: how does the attorney proceed when the attorney discovers that the company possesses arguably privileged communications between the employee and his counsel?

A. *Are the E-Mails Privileged?*

The first inquiry is whether the communication is truly privileged. To simplify a complex area, privilege exists where there is a confidential communication within the attorney-client relationship.

1. Traditional Considerations for Privilege to Attach

As a threshold matter, the communications must meet the traditional definitions of privilege. For example, under Minnesota law, "communications that seek to elicit legal advice from an attorney acting in that capacity, that relate to that purpose, and that are made in confidence by the client are protected from disclosure, unless the privilege is waived."[1]

[1] Nat'l Texture Corp. v. Hymes, 282 N.W.2d 890, 895 (Minn. 1979).

Thus, in *National Texture Corp. v. Hynes*, the Minnesota Supreme Court found that an attorney who had originally filed for a patent in the name of a company president could not represent the company in a legal dispute over the patent against the president after he had left the company.[2] The court reasoned that the attorney's previous relationship with the former president risked the disclosures that his former client had made under the privilege. The court reasoned that "[t]he purpose of the privilege is to encourage the client to confide openly and fully in his attorney without fear that the communications will be divulged and to enable the attorney to act more effectively on behalf of his client."[3]

Other states have defined attorney-client privilege similarly. Furthermore, the federal common law privilege extends to "'confidential communications made for the purpose of facilitating the rendition of professional legal services to the client,' between the client's lawyer (or certain representatives of the client and the lawyer)."[4]

2. The Asia Global Factors

Once the privilege has been established, the issue turns to whether the privilege has been waived. Interestingly, to date the seminal case in this arena, *In re Asia Global Crossing, Ltd.*, arises out of bankruptcy litigation.[5] In the case, the appointed trustee managing Asia Global's bankruptcy issued subpoenas for e-mails sent over company accounts and retained in company computers. Asia Global's officers resisted, claiming the e-mails were privileged communications made in the course of seeking legal advice with their personal attorneys. The trustee contended that the officers had waived the privilege by using the company e-mail system.[6]

The case set forth the most widely used test to determine if an e-mail constitutes a privileged communication. Those factors require the court to consider the following:

> (1) does the corporation maintain a policy banning personal or other objectionable use [of the employee's computer or e-mail], (2) does the company monitor the use of the employee's computer or e-mail, (3) do third parties have a right of access to the computer or e-mails, and (4) did the corporation notify the employee, or was the employee aware, of the use and monitoring policies?[7]

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[2] *Id.* at 896.

[3] *Id.* at 896.

[4] *In re* Asia Global Crossing, Ltd., 322 B.R. 247, 255 (Bankr. S.D.N.Y. 2005) (quoting Sup. Ct. Standard 503).

[5] *In re Asia Global Crossing*, 322 B.R. 247.

[6] *Id.* at 252–53.

[7] *Id.* at 257 (footnote omitted).

In the end, the *Asia Global* court determined that most of the documents at issue in the case were still protected by attorney-client privilege. Privilege was waived only for documents that had been purposely e-mailed to an adversary.[8]

The *Asia Global* test is used when confidential client communication and the existence of an attorney-client relationship have been either presumed for summary judgment purposes or established in a case. Essentially, the court in *Asia Global* presented a practical test for courts to use to weigh an employee's expectation of privilege against an employer's disclaimer of privilege. An employee's reasonable intent to retain confidentiality in the communication with his attorney is closely correlated to that employee's expectation of privacy in an e-mail sent over a company computer.[9] The test thus can be divided into examining the intent of two parties: the employee and the employer.

a. The Employee's Intent

The first and fourth *Asia Global* factors examine the employee's subjective intent to keep private his or her communications with counsel. Specifically, those factors ask whether the employee communicated with his or her attorney while aware that the employer objected to the communication and could potentially review the communication.

Consider an example involving the U.S. mail system where an employee for a defense contractor is aware that personal correspondence is banned and that all incoming and outgoing letters are monitored. If that employee were to send a letter from work discussing law-related matters with his attorney, it would be difficult to later claim a reasonable expectation of privacy.

The same scenario applied to the e-mail context, in which the employee has been notified that any electronic communications can be subject to review, likewise can establish that the employee could not reasonably believe that communications with an attorney would remain private. This action, therefore, can be seen as constituting a waiver of the privilege.

b. The Employer's Intent

The second and third *Asia Global* factors examine the objective indicia of an expectation of privacy. Specifically, those factors ask whether the circumstances were such that a reasonable person could not have expected the communication to remain confidential.

To use the previous analogy, the defense contractor now has a well-known policy in place where all letters are opened and read before delivery, and photocopies of the letters are stored in a generally accessible manner. Here, the company has created an environment in which it would be unreasonable to expect that one's personal correspondence would be confidential or read only by the identified recipient.

[8] *See id.* at 263.

[9] *Id.* at 258–59.

Translated into an e-mail context, it would be less obvious to an employee that his or her e-mail was read before delivery; therefore, implementing such a policy would be less likely to put the employee on notice than when mail arrives that has obviously been opened by company mail handlers. But there are still opportunities for such intrusions to give notice to the employee, such as when a third party or company representative might discuss the contents of an employee's e-mail that has been reviewed by another. Thus, such practices also would give notice to a reasonable observer that correspondence was not private and that, therefore, use of the system constituted waiver of any privilege.

3. Tips for the Employer

For traditional business reasons, and with an eye toward potential litigation, most large corporations have become sensitive to their employees' use of electronic resources. Accordingly, many employers now maintain policies and procedures banning or discouraging the use of e-mail for personal business.

This is a useful safeguard, however, only when it is coupled with complementary policies regarding the review and retention of all incoming and outgoing e-mails. It might not be sufficient just to ban private e-mail. Rather, employers should consider affirmative steps to discourage the misconception of privacy in workplace correspondence.

For instance, conspicuous statements both in the employee handbook and when an employee logs on to a work computer can serve to remind employees that communications using the company equipment may be monitored. The court in *Asia Global* mentioned such a possibility to alert employees and put them on notice of their employers' computer use and monitoring policies.[10] Otherwise, it can prove difficult to establish that employees waived their attorney-client privilege by using company e-mail systems.

B. *Proceed with Caution*

Despite the most comprehensive warning, employees will still use e-mail for personal reasons. When an employee-attorney e-mail is subsequently found, the hint of impropriety that results from reviewing this correspondence without proper protection can quickly derail otherwise straightforward litigation.

1. The Lesson from *Stengart v. Loving Care Agency*

Stengart v. Loving Care Agency, Inc.[11] has created a buzz in the world of workplace privacy. To summarize the facts of *Loving Care*, attorneys for the employer discovered that (1) they had access to a former employee's personal e-mail account by virtue of her having logged into this account from her work-issued computer and (2) the employee's personal

[10] *Id.* at 261.

[11] 990 A.2d 650 (N.J. 2010).

e-mail account contained correspondence with her attorney, who had filed a constructive discharge lawsuit on the employee's behalf against the company. The question of whether the company's access to these e-mails constituted waiver of the privilege between the employee and her counsel made its way to the New Jersey Supreme Court, which ruled that the privilege remained intact.

The court based its ruling on the inadequacy of the notice that the company provided employees to warn that e-mails sent on company computers would not be considered private and on the important public policy concerns protected by the attorney-client privilege.[12] The court found that the former employee had a reasonable expectation of privacy that, in taking care to use a private and password-protected e-mail account on her company computer, her communications with her attorney would not be read by her employer.[13] This finding was supported by the rather vague policy instituted by the company warning that e-mail messages were considered company business records and that the company reserved the right to review "all matters on the company's media systems and services at any time."[14] The court determined that, because the company's policy did not address personal e-mail accounts or warn that the company might forensically retrieve and read such e-mails on company-owned computers, the former employee was reasonable in expecting that her communication would remain private[15] and did not thus waive the attorney-client privilege protecting them.

For attorneys, the case is a cautionary tale. The final holding was aimed squarely at the company's counsel: "We leave to the trial court to decide whether disqualification of the Firm, screening of attorneys, the imposition of costs, or some other remedy is appropriate."[16]

The attorneys for Loving Care were able to access the former employee's web-based personal e-mail with the help of a computer forensic expert because she had previously accessed her account from her work laptop in apparent derogation of the company's acceptable use policy. The threat of discipline arose not because the company's attorneys decided to access the former employee's e-mails but because they did not segregate the "arguably privileged messages" and "fail[ed] either to notify [their] adversary or seek court permission before reading further."[17]

2. Be Very Aware of Rule 4.4(b)

Rule 4.4(b) of the American Bar Association Model Rules of Professional Conduct instructs that if an attorney "knows or reasonably should know that the document was inadvertently sent" then that attorney should "promptly notify the sender."[18] The rule does not,

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[12] *Id.* at 659.

[13] *Id.* at 663.

[14] *Id.* at 659.

[15] *Id.* at 663.

[16] *Id.* at 666.

[17] *Id.*

[18] Model Rules of Prof'l Conduct R. 4.4(b) (2010).

however, address a situation in which there is no "inadvertent" receipt, but rather, ongoing possession in the employee e-mail setting.

This argument did not sway the *Loving Care* court, however. The court noted that, in order to retrieve e-mails that the former employee had unwittingly left on her work computer, her former employer had had to hire a computer forensic expert to find copies of each webpage that she viewed from the computer's "cache" folder of temporary Internet files. "We find that the Firm's review of privileged e-mails between [the former employee] and her lawyers, and the use of the contents of at least one e-mail in responding to interrogatories, fell within the ambit of RPC 4.4(b) and violated that rule," the New Jersey Supreme Court wrote.[19]

C. *Using What You Have*

The safest course of conduct when arguably privileged communications are discovered by an attorney is full disclosure. If the e-mail is discovered during review of an employee's or former employee's work account, the attorney should proceed in the same manner as if inadvertently receiving the correspondence from opposing counsel. Specifically, the attorney should notify opposing counsel of the existence of these e-mails.

From a litigation standpoint, doing so does not concede much. If the e-mails are relevant and support the company's position, they eventually will need to be disclosed to the other side anyway if they are to be used in court proceedings.[20] Including the e-mails on an exhibit list on the eve of trial or attaching them to a summary judgment brief instead of a more overt method of disclosure would simply be an invitation to sidetrack litigation. On the other hand, if the e-mails are irrelevant to the case, disclosure to opposing counsel should not affect litigation. In such a case, surprise will inevitably backfire.

Numerous courts have held that e-mails sent and received using employer-provided computers or e-mail accounts are not subject to a reasonable expectation of confidentiality and are not protected by attorney-client privilege. These decisions are based on findings that any expectation of confidentiality had been erased either as the result of an employer's monitoring policy or a computer notice that is viewable each time an employee logs on to a work computer that states the employee had no expectation of privacy. When an employee has no expectation of privacy due to either of these circumstances, then he can have no confidential communication with his attorney and privilege does not attach. The cases of *Alamar Ranch, LLC v. County of Boise*[21] and *United States v. Etkin*[22] are examples of how courts have approached such circumstances.

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[19] *Loving Care*, 990 A.2d at 666.

[20] *See* Fed. R. Civ. Proc. 26(a)(3).

[21] No. CV-09-004-BLW, 2009 WL 3669741, at *4 (D. Idaho Nov. 2, 2009).

[22] No. 07-CR-913 (KMK), 2008 WL 482281, at *3 (S.D.N.Y. Feb. 20, 2008).

1. Employer's Monitoring Policy

In *Alamar Ranch, LLC v. County of Boise,* the court addressed a situation in which an employer's policy notified employees that their e-mails (1) would become the employer's property; (2) would be subject to monitoring, storage, access, and disclosure by the company; and (3) should not be assumed to be confidential.[23] The case involved an employee of the Idaho Housing and Finance Association who used her work account to communicate with an attorney who was representing her and other neighbors in opposing a project before the Boise County Planning and Zoning Commission.[24] Attorneys for the project subpoenaed e-mails sent through the employee's work e-mail address, including those to her attorney.[25]

The court held that the e-mails sent from the employee to her attorney were not privileged, stating as follows:

> It is unreasonable for any employee in this technological age—and particularly an employee receiving the notice [the employee] received—to believe that her e-mails, sent directly from her company's e-mail address over its computers, would not be stored by the company and made available for retrieval. Accordingly, the Court finds that [the employee] waived the privilege for those messages she sent from her work computer.[26]

Distinguishing the case from *Loving Care* based on the employee's use of her employer's e-mail account, the court indicated it would "leave[ ] for another day whether there is waiver when the employee attempts to protect work-based e-mails through a personal password-protected web site."[27] But the court held that the e-mails sent from the attorney to the employee's work e-mail address were not privileged. The court stated that

> [w]ith regard to the e-mails [the attorney] sent to [the employee], there [wa]s no question that [the employee's] address—"JeriK@IHFA.org"—clearly put [the attorney] on notice that he was using her work e-mail address. Employer monitoring of work-based e-mails is so ubiquitous that [the attorney] should have been aware that the [employer] would be monitoring, accessing, and retrieving e-mails sent to that address. Given that, the Court finds that [the attorney's] e-mails sent to [the employee's] work e-mail [we]re likewise unprotected by the privilege.[28]

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[23] *See Alamar Ranch*, 2009 WL 3669741, at *4.

[24] *Id.* at *1–*2.

[25] *Id.* at *2.

[26] *Id.* at *4.

[27] *Id.*

[28] *Id.*

2. Notice Advising at Log On of "No Legitimate Expectation of Privacy"

In *United States v. Etkin*, the court addressed a situation involving the waiver of the marital communications privilege via use of a New York State Police-issued work computer in which the employer provided a log-on notice that appeared whenever the employee turned on his laptop.[29] Like attorney-client privilege, the marital communications privilege prevents the use of confidential communications between spouses as court-sanctioned evidence. Also like the attorney-client privilege, the marital communications privilege is waived when the communications sought to be protected are made in the presence of a third party, at which point they no longer can be claimed to have been made in confidence.[30]

In *Etkin*, the employee argued any e-mail communications on his work computer retained their privilege despite the automatic warning because he did not intend to waive his privilege by using his work computer.[31] He also claimed not to have read the notices, even though he was required to click an "OK" button or hit the Enter key acknowledging the cautionary statement before he could access his computer. The court was not persuaded, holding that

> the issue … [wa]s whether the notices that appeared each time the Defendant logged onto his work computer sufficiently notified Defendant that any email he sent to his wife from that computer might be read by a third party. The Court f[ou]nd[ ]—without hesitation—that it did. Defendant's claim that he actually did believe that the March 13, 2007 email to his wife would remain confidential therefore [wa]s entirely unreasonable.[32]

III.
Issues in Class-Action Litigation

What happens when the unhappy employee has access to correspondence between the employer and its counsel? Now imagine that this unhappy employee has made copies of sensitive communications regarding employment litigation the employer has settled recently. This situation, while less common, puts the employer on the other side of the ball. Here, there is a dangerous possibility for a serious breach of attorney-client privilege.

Notably, this scenario is reminiscent of whistle-blower litigation involving in-house counsel.

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[29] *See* United States v. Etkin, No. 07-CR-913 (KMK), 2008 WL 482281, at *3 (S.D.N.Y. Feb. 20, 2008).

[30] *Id.*

[31] *Id.* at *4.

[32] *Id.* at *5.

A. *Where Are the Pitfalls?*

For plaintiffs who receive the materials from the disgruntled employee, the potential pitfalls created by the illicit interception of communications are twofold: (1) circumvention of discovery rules resulting in sanctions and (2) both civil *and* criminal liability.

1. Bypassing Discovery Rules Can Lead to Serious Sanctions

Courts have not looked kindly upon obtaining an adverse party's materials outside the discovery process. In a federal district court opinion from Minnesota, *Arnold v. Cargill Inc.*, attorneys for the plaintiff in an employment suit were disqualified because they obtained Cargill's documents that had been marked privileged and confidential from another former employee.[33]

The district court judge was clear in his admonishment of the disqualified attorneys. He stated,

> At a minimum, [counsel's] behavior recklessly disregarded the risks associated with playing fast and loose with the rules protecting against disclosure of privileged and confidential material. At worst, [counsel] is guilty of a serious deception with respect to its role in the disclosure and retention of Cargill's privileged and confidential information. Either way, these proceedings have been tainted by the mishandling of Cargill's privileged and confidential material.[34]

In a similarly sharp rebuke for gathering an adverse party's documents outside the discovery process, a Nebraska federal court in *Speckman v. Minnesota Mining & Manufacturing Co.* not only required the appointment of a co-counsel, but threatened harsh discovery sanctions and referred the matter to the Nebraska State Bar Association Counsel for Discipline.[35] Counsel in that case, without authorization or permission, took a non-privileged job posting from a bulletin board located in the defendant's facility after a deposition. The court in *Speckman* was clear in stating that "[c]ircumventing the discovery process is not to be taken lightly; in fact, such actions have resulted in serious sanctions . . . . Not only is it a violation of the rules, but it is also a violation of this court and its process."[36]

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[33] Arnold v. Cargill Inc., No. 01-2086, 2004 WL 2203410, at *13 (D. Minn. Sept. 24, 2004).

[34] *Id.* at *10.

[35] *See* Speckman v. Minn. Mining & Mfg. Co., 7 F. Supp. 2d 1030, 1033 (D. Neb. 1997).

[36] *Id.* at 1032.

2. Obtaining E-mail Without Authority Can Lead to Severe Consequences for Former and Current Employees

On top of the problems of possibly accessing privileged information, obtaining electronically stored information without permission may expose an employee to civil and criminal liability. Federal and state statutes governing privacy in communications and in electronic settings may apply when an employee accesses attorney-client communications belonging to an employer. Issues involved in cases based on these statutes have revolved around whether accessing an e-mail stored in a company server qualifies as interception the same way that using a wiretap to eavesdrop on a private telephone conversation would; whether the person who accessed the e-mail had authorization to do so; and whether e-mails kept on a server qualify as stored documents.

a. Violation of State Privacy of Communications Acts

To use Minnesota law as an example, states may have statutes that prohibit the interception and disclosure of wire communications. The Minnesota Privacy of Communications Act provides that

> any person who:
>
> (a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, electronic, or oral communication;
>
> . . .
>
> (c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, electronic, or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire, electronic, or oral communication in violation of this subdivision; or
>
> (d) intentionally uses, or endeavors to use, the contents of any wire, electronic, or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire, electronic, or oral communication in violation of this subdivision; shall be punished.[37]

Covertly intercepting an e-mail message likely falls within the prohibitions of the statute; an e-mail message is a "wire communication," and surreptitiously diverting one certainly comes within the statutory definition of "intercept," which includes the "aural or other acquisition" of electronic communications.[38] Although the Minnesota law is a criminal

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[37] Minn. Stat. Ann. § 626A.02, Subd. 1 (West 2009).

[38] *Id.* § 626A.01, Subds. 3, 5.

statute, the statute also provides for civil liability, including the possibility of equitable relief, damages (both compensatory and punitive), and attorneys' fees and other litigation costs.[39]

In an unpublished opinion, the Minnesota Court of Appeals considered both the statute and the common law tort of intrusion upon seclusion in upholding an injunction against a businessman who accessed his former business partner's e-mails from a company server.[40] The court noted that the business partner had to employ an information technology contractor to help him retrieve the e-mails, which included communications between the partner and his attorneys as well as the partner's reminders to himself about litigation between the two partners.[41] The court found that enjoining the partner from "using or disclosing any confidential, proprietary, or attorney-client privileged information" from the e-mails[42] was an appropriate exercise of judicial control over "dubious discovery tactics."[43]

b. Violation of the Federal Wire and Electronic Communications Interception and Interception of Oral Communications Act

The federal Wire and Electronic Communications Interception and Interception of Oral Communications Act (Wiretap Act) mirrors the Minnesota statute, but applies only to the interception of electronic communications.[44] Similar to the state statute, the federal act is primarily criminal in nature. There is civil liability in the federal act as well, providing many of the same remedies as the Minnesota statute: equitable relief, damages (compensatory and punitive), and attorneys' fees and other litigation costs.[45]

The Wiretap Act may apply to any person who received the intercepted e-mails and knew they were intercepted. There has been considerable debate among federal courts, however, about what constitutes interception in the context of e-mails. Some courts require that the e-mail be received "in flight" to constitute a violation of the statute.[46] Such an interpretation "finds that, unless an e-mail is actually acquired in its split second transmission over a computer network, it cannot be 'intercepted' as that term is reasonably understood."[47] Under this definition, a violation would be difficult to find.

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[39] *Id.* § 626A.13.

[40] Gates v. Wheeler, No. A09-2355, 2010 Minn. App. Unpub. LEXIS 1136, at *14–*19 (Minn. Ct. App. Nov. 23, 2010).

[41] *Id.* at *15–*17.

[42] *Id.* at *3.

[43] *Id.* at *7.

[44] *See* 18 U.S.C. § 2511(1) (2006).

[45] *Id.* § 2520 (a), (b).

[46] *See* Cardinal Health 414, Inc. v. Adams, 582 F. Supp. 2d 967, 979 (M.D. Tenn. 2008).

[47] *Id.*

Other courts, however, view the interception requirement more broadly to implicate "any acquisition of information using a device."[48] The Seventh Circuit reasoned that the statute's original application would have extended to an individual who was able to access recorded phone messages that had been left on a tape recorder attached to a phone line, even though that person did not listen to the messages until afterward and was not listening to the message contemporaneously to when it was placed.[49] "There is no timing requirement in the Wiretap Act and judges ought not add to statutory definitions," the court wrote.[50]

c. Violation of the Federal Stored Wire and Electronic Communications and Transactional Records Access Act

The federal Stored Wire and Electronic Communications and Transactional Records Access Act (Stored Communications Act) specifically prohibits the storage or retention of unlawfully obtained electronic communications. The language used by the statute, which centers on a person who intentionally accesses without authorization or in excess of authorization "and thereby obtains, alters, or prevents authorized access to a wire or electronic communication while it is in electronic storage"[51] has caused some problems for the courts. The Stored Communications Act too is criminal in nature but contains a civil liability provision.[52]

In applying the Stored Communications Act to a case where a party in commercial litigation got access to the other party's e-mails through an impermissibly broad subpoena, the Ninth Circuit compared the protections of the statute to those provided by the tort of trespass: "Just as trespass protects those who rent space from a commercial storage facility to hold sensitive documents, the Act protects users whose electronic communications are in electronic storage with an [Internet Service Provider] or other electronic communications facility," the court wrote.[53]

Theofel v. Farey-Jones should warn parties who think that they can use subterfuge to gain consent to another's e-mail communications.[54] In that case, one party in the litigation served a subpoena on the opposing party's Internet Service Provider (ISP) that sought all of the other party's e-mail communication without limitation on subject or time and then viewed a "free sample" of 339 messages, many of which could have been considered privileged or

[48] United States v. Szymuszkiewicz, 622 F.3d 701, 706 (7th Cir. 2010).

[49] *See id.*

[50] *Id.*

[51] 18 U.S.C. § 2701(a).

[52] *See id.* § 2707(a), (b).

[53] *Id* at 1072.

[54] Theofel v. Farey-Jones, 359 F.3d 1066, 1072 (9th Cir. 2003).

personal.[55] The Ninth Circuit determined that the subpoena was deceptive, and therefore nullified any consent that would have allowed the requesting party to escape liability.[56] The court also determined that the e-mails remaining on the ISP's server after they had been delivered to the other party fell within the statute's prohibited access provisions because they served as a backup in case the client mistakenly erased its copy of the e-mail.[57]

A California district court, however, rejected an argument that e-mails kept on a company's server met the requirements for "electronic storage" under the Stored Communications Act.[58] That court also narrowly interpreted the statute's requirement for "intentional" action in denying a motion for summary judgment against a former employee who had deleted e-mails before she left the company, an action that also automatically deleted copies saved to the company's server.[59] The court reasoned that the "[p]laintiff ha[d] presented no evidence that [the employee] was aware of the e-mail system's configuration or knew that [his or her] conduct would result in the deletion of data on [the employer's] server."[60]

Courts also have stated that having access to a company's computer system does not automatically grant access to others' e-mail accounts on that system.[61] But they have reasoned that the law applies when an individual gains access to private information that he is not authorized to see, rather than using that information in an unauthorized way.[62] As such, even if a company has a policy restricting how an employee can use the information accessed on a company computer, violating those restrictions would not translate into a statutory violation.[63] The law does not "proscribe authorized access for unauthorized or illegitimate purposes."[64] Thus, a party receiving and using information that has been procured by another who was not authorized to access that information would not violate the statute.[65]

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[55] *See id.* at 1071.

[56] *See id.* at 1074.

[57] *See id.* at 1075.

[58] *See* KLA-Tencor Corp. v. Murphy, 717 F. Supp. 2d 895, 904 (N.D. Cal. 2010).

[59] *See id.* at 905.

[60] *Id.*

[61] *See* Penrose Computer Marketgroup, Inc. v. Camin, 682 F. Supp. 2d 202, 210 (N.D.N.Y. 2010).

[62] *See* Int'l Ass'n of Machinists & Aerospace Workers v. Werner-Matsuda, 390 F. Supp. 2d 479, 497 (D. Md. 2005) (citing Educational Testing Service v. Stanley H. Kaplan, Educational Center, Ltd., 965 F. Supp. 731, 740 (D. Md. 1997)).

[63] *See id.* at 498.

[64] *Id.* at 499.

[65] *See* Cardinal Health 414, Inc. v. Adams, 582 F. Supp. 2d 967, 978–79 (M.D. Tenn. 2008).

B. *Tips for the Employer*

Although the employee who unlawfully accesses privileged communications electronically may be civilly and criminally liable, the employer should be careful before pursuing such remedies lest a straightforward matter spiral into trench warfare over the meaning of the term "intercept."

Moreover, and equally importantly, an employer should take great caution in raising the specter of criminal liability during ongoing civil litigation.

If an employer learns that its privilege has been compromised, however, recourse is available. First, an employer may always seek a protective order barring the use of the privileged documents that were surreptitiously obtained. Second, an employer may consider obtaining a temporary restraining order if any of the plaintiffs are still employed.

IV.
Conclusion

If e-mails between an adverse party or his counsel are found on a company's e-mail system and this fact has been disclosed to opposing counsel, an attorney is likely out of the dangerous ethical territory posed by reviewing an adversary's privileged communications.

If the e-mails are relevant, the next step is to establish that they are admissible as evidence. Since the existence of these arguably non-privileged e-mails is now known by all parties, the company is free to argue to the court that the privilege has been waived under the *Asia Global* factors.

E-mails are unfortunately like roaches: it takes drastic measures to ever truly be rid of them, and if you don't address them upfront, they can become a nightmare. *Loving Care* began as a fairly straightforward employment discrimination matter. The case was likely destined for determination at summary judgment. However, because of the e-mail review issue, after two years of litigation, the underlying claim in *Loving Care* only now will be addressed.

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