Cloud Computing for Legal Eagles

Water Rights

Abirators’ Award

Healthcare Reform

The Government’s Increased Spending on Fraud Enforcement Will Likely Result in the Execution of More Search Warrants

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FROM THE Chair’s Desk

USLAW has come a long way since its inception in 2001. In nine short years, we have evolved into a national and now international resource to provide coordinated and consistent legal services for hundreds if not thousands of our firm’s clients. As legal needs don’t begin and end at the state line, we truly are “National Counsel Right Next Door” for so many important clients of our firms.

In 2011, we will celebrate USLAW’s 10th Anniversary, returning to one of the venues, Chicago, where we were formed in March of 2001. I am truly looking forward to next year as maybe not even our founding fathers could have envisioned USLAW as it now exists. Let’s celebrate the success of USLAW and honor this tradition in 2010 by continuing to provide the results our firm’s clients expect and the most outstanding service they can find in the legal market.

I’m proud to announce a new USLAW Client initiative. To date, membership in USLAW has only been open to law firms. This month, that will change with the introduction of our Client Membership program. Regional/National/Multinational clients can now become more closely affiliated with USLAW NETWORK, allowing them to gain access to important and valuable benefits. The purpose for USLAW Client Membership is to help clients better serve their company; be a source of information/education; potentially decrease overall legal expenses; and enable USLAW to provide a cohesive rapid response to their legal needs.

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USLAW continues to prosper partly because of the relationships attorneys have made with other members. Professional bonds have been developed in our network that will last lifetimes. Beyond that, friendships have been formed that transcend our work and make our events so special. I believe clients should take the opportunity as well to use this client membership program to network with other clients that have been involved with USLAW. You, as a client, can network with others in your industry and areas of expertise, discuss prior experiences in the various judicial arenas, as well as seek recommendations of experts and other litigation support. You can obtain invaluable information to aid you in your legal needs.

Please enjoy our first USLAW Magazine of the new decade. I encourage you to review the publication as it continues to grow with a wide range of timely articles. You’ll surely find something that is interesting and informative. Maybe clients receiving this letter should consider submitting an article.

For those of you joining us at one of our client events in 2010, I look forward to seeing you. I can’t wait for Miami as even our New Orleans area has had an uncommonly bad winter. I am sure I will receive no sympathy from our friends in the North (especially the Orleans area has had an uncommonly bad winter). I am sure I will re-look forward to seeing you. I can’t wait for Miami as even our New Orleans area has had an uncommonly bad winter.

Sincerely,

Michael R. Sistrunk
Chair, USLAW NETWORK, Inc.
Partner, McCranie, Sistrunk, Anzelmo, Hardy, McDaniel & Welch PC
New Orleans, Louisiana
Federal law enforcement activity is on the rise across the nation. With more funding on the way for federal law enforcement agencies, this trend will continue. One of the mainstays of any federal criminal investigation is the execution of search warrants during the early-stages of an investigation. Federal agents arrive at the door of a target company, unannounced, search warrant in hand, and demand access to myriad company records. This tried-and-true law enforcement technique will likely increase as the current administration allocates more money to combating fraud and abuse. It is imperative that every company devise a plan of action for responding to search warrants. While no company wants to believe that they could be the subject of a criminal investigation, given the current enforcement climate, this is no time for a company to bury its head in the sand and hope for the best. Companies can and should prepare for the worst by implementing a few basic and inexpensive pro-active methods for responding to a search warrant.

THE INCREASED FOCUS ON FRAUD ENFORCEMENT

On May 20, 2009 President Barack Obama signed into law the Fraud Enforcement and Recovery Act of 2009 ("FERA"). The principle objective of FERA is to increase government oversight of financial fraud. FERA authorizes substantial funding for federal law enforcement agencies. Specifically, FERA increases law enforcement funding by allocating:

- $165 million for years 2010 and 2011 for the hiring of fraud prosecutors and investigators at the Department of Justice;
- $75 million and $65 million to the FBI for years 2010 and 2011 respectively;
- $80 million for hiring investigators and analysts at the U.S. Postal Inspection Service, the U.S. Secret Service and the Office of Inspector General for the Department of Housing and Urban Development;
- $20 million for the Securities and Exchange Commission for investigations and enforcement.

The substantial funding authorized by FERA comes in addition to significant funds which have been allocated by the Obama administration to combat health care fraud, which the administration had stated is a top law enforcement priority. Health and Human Services Secretary, Kathleen Sebelius, recently remarked that HHS is committed to turning up the heat on Medicare fraud, and will employ all the weapons in the federal government’s arsenal to target those who are defrauding the American taxpayers. It has been estimated that Medicare and Medicaid fraud cost taxpayers up to $600 billion a year. To combat such fraud and abuse, the Obama administration created a task force comprised of officials from the Department of Justice and the Department of Health and Human Services, as well as state and local investigators, to identify, investigate and prosecute Medicare fraud throughout the country. This task force, known as the Health Care Fraud Prevention and Enforcement Action Team ("HEAT") has already obtained indictments of more than 293 individuals and organizations across the country that collectively billed Medicaid more than $674 million.

The heightened focus on fraud enforcement activity will likely result in the execution of more search warrants. The execution of a search warrant, which frequently comes as a complete shock to executives and employees of the target company, is a primary tool in the government’s arsenal when investigating fraud and abuse. With more money and more manpower, this favorite investigative technique will no doubt be on the rise. It is now more imper-
ative than ever, therefore, for your company and its employees to be prepared for a potential surprise knock at the door by federal agents with search warrant in hand.

PLAN OF ACTION FOR RESPONDING TO SEARCH WARRANTS

To prepare your company and its employees to effectively respond to a search warrant, as well as to assure your Board of Directors that you have a contingency plan in place should such an unpleasant event arise, we recommend the following practical Plans of Action (POAs) for responding to a search warrant.

While a search warrant scenario is always a fluid situation, our experience has demonstrated that the following POAs should help minimize the inevitable disruption to your business operations, and decrease the risk of your company being perceived by the government as being uncooperative, or even worse, obstructionist. Given the current enforcement climate, all companies, big and small, are best served by devising a plan of action for responding to search warrants well in advance of any hint that it may be the target of a federal investigation.

POA #1: Designate a Manager-in-Charge Who Will Lead the Response Effort

Every company should designate one management-level individual who is tasked with responding to a search warrant. Frequently, this individual is the company’s Chief Compliance Officer, or someone in the legal department. Ideally, this individual will be someone who is not frequently out in the field, but is regularly on site and readily available at a moments’ notice. It is advisable for this manager-in-charge to designate a proxy who can lead the response effort in the absence of the manager-in-charge. Every employee must be trained as to the identity of the manager-in-charge.

POA #2: Dispatch Experienced Legal Counsel to the Scene

Once the manager-in-charge is contacted that law enforcement agents are on the premises, the first thing the manager-in-charge should do is contact the company’s outside legal counsel. Getting experienced white collar criminal attorneys on the scene as soon as possible is the best way for a business to protect itself during the execution of a search warrant. A knowledgeable attorney can best protect the rights of both the company and its employees, and is unlikely to succumb to the intimidation and stress of the search warrant process. In addition, an experienced attorney can expedite the search process by directing agents to the precise documents and data that they are authorized by the search warrant to seize.

With today’s proliferation of cell phones, pagers, blackberries and other PDAs, it is now more likely than ever that experienced legal counsel can be contacted and dispatched to the scene of the search in a matter of minutes. If counsel is reached and the manager-in-charge knows that he or she is on his way, the manager-in-charge should make a verbal request to the lead agent to temporarily delay the search until counsel arrives. To ensure that the manager-in-charge can quickly contact the company’s attorney, the manager must: 1) have all of the contact information for the pertinent attorneys at his/her fingertips; and 2) know that he or she is expected to contact the corporation’s attorneys immediately after law enforcement agents arrive at the scene. A corporation, like an individual, is legally entitled to contact its attorney to seek advice on responding to the search warrant.

In a perfect world, the manager-in-charge will immediately make contact with corporate counsel, and politely ask the agent in charge to delay the search until counsel arrives on the scene. Once the attorney arrives, the manager-in-charge will follow the instructions of counsel for the duration of time that the law enforcement agents are on the scene. The manager-in-charge can then contact a pre-designated senior executive of the company to explain what is going on and reassure the executive that corporate counsel is on the scene dealing with the situation. The manager-in-charge can then take a deep breath, grab a bottle of water, and be ready to assist the attorney as directed.

We all know, however, that things do not always go as planned. Companies should have a contingency plan, therefore, for a situation where, for whatever reason, the manager-in-charge is unable to get corporate counsel on the scene, and must, therefore, deal with the execution of the search warrant internally. Preparing for responding to a search warrant must comprise of more than simply identifying the manager-in-charge and training the manager-in-charge to call counsel. To be truly ready for the surprise and shock of law enforcement agents arriving at your door, we strongly suggest also providing training on the following suggested areas.

POA #3: Obtain a Copy of the Search Warrant

Once the manager-in-charge determines that he or she will have to take charge of the scene, without the aid of experienced counsel, he or she should ask the lead law enforcement agent for a copy of the search warrant. The search warrant is the court order that legally permits the law enforcement officers to enter the premises and to take with them certain enumerated items. The corporation, acting through the manager-in-charge, is legally entitled to receive a copy of the search warrant. In fact, most law enforcement agents will voluntarily hand a copy of the warrant to the manager-in-charge at the outset of the search.

The manager-in-charge should carefully review the search warrant. The warrant must specify the premises to be searched and the items or documents to be seized. The search warrant therefore establishes the boundaries of precisely where the agents can go and what they can take with them. Search warrants authorizing the wholesale seizure of a business’ records, where only a portion of its records involve alleged criminal activity, have routinely been ruled unconstitutional as overbroad. Specificity as to what may be taken is constitutionally necessary so that nothing is left to the discretion of the law enforcement agents executing the warrant.

By understanding what items the law enforcement officers are permitted to seize, the manager-in-charge may be able to expedite the search by directing the agents to the locations likely to contain items covered by the search warrant. In our experience, law enforcement agents generally appreciate such assistance, and it ultimately shortens the time the agents need to spend on the premises. In addition, even though outside counsel is not physically on the scene, it may be possible for the manager-in-charge to fax a copy of the search warrant to corporate counsel so that he or she may assess its validity. The manager-in-charge should also gather the business cards of as many of the agents as possible. It will be important, after the search, for the corporation’s counsel to identify as many of the agents on the scene as possible, and determine which branches of law enforcement were involved.

POA #4: Send Home All Non-Essential Employees

As part of its advance planning, the corporation, in consultation with the designated manager-in-charge, should compile a list of all non-essential employees who may be dismissed from work in the event of the execution of a search warrant. This list should be vetted and blessed by the company’s Human Resources Department. On the day of the search, the manager-in-charge should refer to this pre-determined list, and send those non-essential employees

(Continued on page 32)
Cloud Computing is the buzzword du jour in information-technology circles, and chances are that your company or your clients are contemplating a cloud computing solution to cut IT costs—or soon will be. As is the case with most innovations, the technology has outpaced the law, leaving counsel to grapple with legal, compliance and data-control risks through contract or careful selection of services. This article provides an overview of what cloud computing is, highlights major legal risks associated with a cloud, and outlines some of the best practices for legal eagles addressing these risks.

**THE FOGGY DEFINITION**

Despite all the hype, a straightforward definition for “cloud computing” has proven hard to pin down. In 2008, Larry Ellison, CEO of the cloud-computing service provider Oracle, expressed his frustration with the airy concept, proclaiming, “We’ve redefined cloud computing to include everything that we already do.... It’s complete gibberish. It’s insane. When is this idiocy going to stop?”

Fortunately, two years later, the insane gibberish has given way to an evolving consensus. The National Institute of Standards and Technology has defined cloud computing as “a model for enabling convenient, on-demand network access to a shared pool of configurable computing resources...that can be rapidly provisioned and released with minimal management effort or service provider interaction.” In short, cloud computing refers to Internet-based computing that shares computer resources and enables a company to ramp up or reduce its data storage capacity, computing power, software suites, or programming tools at a fraction of the cost and time associated with doing so in-house.

That flexibility is leading many to consider a cloud. However, while cloud computing may allow a company to take advantage of cloud providers’ economies of scale and geographic diversity, it also presents significant business and legal hurdles. Depending on where a company does business, a cloud computing solution may implicate various state and federal laws and a number of potential data access and control concerns.

**NAVIGATING THE ISSUES**

At its most elementary, a cloud can be public, private, shared with a limited community of users or designed to utilize a combination of these options. As you would expect, public clouds and shared clouds pool resources and infrastructure, increasing the risk of unauthorized data access and difficulty in pinpointing where data resides. That means privacy and data security issues can pop up—and be subject to the laws—in any jurisdiction where the data might be stored.

From the legal perspective, a variety of privacy and data security laws may be implicated in a cloud. In the United States, these laws typically are based on the type of information stored. As such, the following categories of information may be subject to legal restrictions that could affect your decision as to how or whether to place such information in a cloud:

- **Medical Information:** HIPAA imposes significant restrictions on the disclosure of protected health information on both covered entities and any business associate of a covered entity that
receives PHI. If either a covered entity or business associate were to enter into a cloud arrangement, they would need to execute an agreement with the cloud provider to ensure the PHI was properly protected.

- **Financial Information:** The Gramm-Leach-Bliley Act requires financial institutions and related third parties to safeguard nonpublic personal information by implementing an information security program that includes a risk assessment of information systems. Section 404 of the Sarbanes-Oxley Act requires that companies implement appropriate controls to limit access to sensitive financial information.

- **Employment Information:** The Fair Credit Reporting Act and Fair and Accurate Credit Transactions Act regulate how an employer can handle information used for background checks and the use and disposal of credit reports.

- **Consumer Information:** The Federal Trade Commission requires that any business that collects and stores consumers’ personal information must have adequate security in place, implement appropriate document retention policies, and abide by the commitments they make to safeguard consumer privacy.

- **Trade Secrets:** State laws governing the trade-secret status of certain information may require that they not be transferred to a third party to maintain their protected status.

- **State-Specific Information:** Massachusetts and Nevada require companies storing information about their residents to encrypt the information in electronic transmissions. The Massachusetts law also requires companies to implement an information security program that complies with extensive guidelines.

- **Privileged Information:** Legal work product materials and privileges afforded other categories of information could be waived if shared with third parties.

- **Contractually Restricted Information:** License or nondisclosure agreements may restrict how, when or if information may be transferred.

In addition, numerous state laws expand upon federal requirements or impose additional penalties, such as California’s healthcare privacy laws. Most states also have adopted laws requiring consumer notification in the event of a data breach. In 2009, the average cost of a data breach was nothing to sneeze at, estimated by the Ponemon Institute at $6.75 million, or $204 per compromised customer record. Failure to comply with the other legal requirements outlined above can be even more costly.

From a business perspective, the risks of adopting a cloud solution are even more fundamental. Unauthorized access to proprietary information or loss of access to or control of mission-critical data can instantly negate any advantage to be derived from a cloud solution, so potential users must carefully analyze any program to protect against these risks. For example, unauthorized access to information could compromise a company’s business strategy or reveal trade secrets or essential processes to competitors. A data breach may harm a company’s reputation, impose costly notification requirements, or expose a company to class action or major vendor claims. Loss of access or control could impact a company’s ability to do business or to deal with common access and control requests, such as litigation holds. In sum, from a business perspective, you can’t afford to have your data get lost in the cloud.

**BEST PRACTICES**

In many ways, the risks outlined above are compounded by the fact that cloud computing is so new. For example, many cloud providers’ terms of service are non-negotiable, and the terms within these agreements may be inadequate to meet your business needs. As such, if it is impossible to tailor the cloud to the company’s needs, it may be necessary to restrict use of the cloud.

In implementing a cloud solution, we recommend a four-step process for clients about to take the leap:

1. First, the company needs to engage in a cost-benefit analysis to determine the type of cloud service, if any, that will be used.
2. Many companies first test the viability of a cloud by internally establishing a private cloud to extrapolate the safety and scalability of the solution.
3. Second, if savings or benefits justify moving some data or processes to a cloud, the company then needs to analyze compliance requirements—taking into account business segments, business processes and geography—to determine the standards with which it needs to, and reasonably can, comply in a cloud environment.
4. Third, the company needs to translate these standards into compliance measures that it can impose through agreements with third-party providers or internal restrictions on cloud usage and cloud access. Utilizing these standards, the company can identify appropriate cloud providers, service levels, problem jurisdictions that should be avoided, and other key terms.

Finally, the company will need to revise information security policies and adopt protective measures to reflect the terms and restrictions on cloud usage. These measures can be practical, legal, or technological. From a practical standpoint, the company should determine the scope of cloud usage, implement disaster and business continuity plans, and arrange for backup of data with a party other than the cloud provider. From a technological perspective, the company should strongly consider encrypting all data that is placed in the cloud and, for the most important data, implement two-factor authentication (which requires both a password and a physical credential such as a card or token to gain access). And last, from a legal standpoint, the limited negotiability of terms requires that the company review multiple provider contracts to determine the most appropriate solution. Any agreement should be carefully reviewed for terms regarding control of data, data access, monitoring, updates, remedies and indemnification. Provisions for conducting due diligence, monitoring services levels, getting out of the relationship and getting your data back also should be addressed up front.

Like any business decision, the question of whether to implement a cloud solution is likely to turn on the ultimate goals of your client or company. If a cloud fits with the corporate vision, the decision to use a cloud will likely save money, provided that you look at all the issues before you make the leap.

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A gallon of gasoline is currently hovering around the $3 mark. Twelve ounces of bottled water costs you 69 cents or more. Since one gallon equals 128 fluid ounces, arguably “designer” drinking water costs more than twice as much as a gallon of gasoline. Forgetting about global warming for a moment, the real issues seem to be: do we have enough clean water for personal consumption, agricultural/industrial uses, and recreation? And how do we protect our clean water interests?

BACKGROUND

In general, the common law and statutory law that developed with respect to water law and water rights seemed to divide the country in two. The eastern half of the United States was believed to have plentiful sources of water whereas the west was much more arid with clean water being less plentiful. In general, surface water rights were distinguished from ground water rights.

RIPARIAN RIGHTS

Riparian rights are based upon a land owner’s property being adjacent to a water course. The riparian right is a right to the natural flow of a water course. A meandering river undoubtedly has many adjacent land owners who have riparian rights. Upstream and downstream are extremely important concepts in water law. An upstream adjacent land owner who has never exercised any riparian right to the water adjacent to the property may have his riparian rights subordinated to longstanding downstream “appropriative” rights that have been in existence for many years.

In general, one riparian right holder does not have any priority over others who also have riparian rights. Issues and lawsuits arise when one riparian arguably takes more water than that riparian’s “reasonable share” of the total water available in the water course.

In California, a comprehensive permit system to establish appropriative water rights was adopted in 1914. Appropriative water rights involve water that is diverted for use on non-riparian land, or land that is not adjacent to the water course.

Those with appropriative rights in existence before 1914 have to establish a continuous use of the water course that has been diverted to non-riparian land or the “right” to this water is lost. Establishing a right to the diversion of water from a water course after 1914 requires an application to the State Water Resource’s Control Board (SWRCB) for approval. Post-1914 appropriative rights can also be lost if the water course is not continually used as a source of water for non-riparian land.

GROUND WATER RIGHTS

The English common law rule was that a landowner owned all that was between the “depths of the earth and up to the heavens.” In 1903, the California Supreme Court established different ownership concepts. An “overlying user” has the right to use as much ground water as is necessary for that user’s overlying land. Of course, other “overlying users” could be tapping into the same basin or underground water supply, in which case disputes between overlying users are decided on a case-by-case basis. Each “overlying user” is entitled to a reasonable share of the ground water in the common ground water basin. Getting to the water first does not create a preference. Ground water used for a public use does not create a greater right to the water in a municipality as compared to other “overlying users.”

“Appropriative rights” are also allowed in the ground water context as long as the water is being used by the appropriator for beneficial use inside or outside the basin so long as the water constitutes “surplus” water. Of course, this definition invites disputes between appropriators and overlying users.

Unlike overlying users, appropriator’s rights to ground water can be decided based upon the timing of the commencement of the appropriator’s use of the water. Get to the water first, and your appropriative rights are better than those who take ground water at a later date.

PRESCRIPTIVE RIGHTS

The concept of prescriptive rights in California only comes into play after ground
water has reached an “overdraft” condition. In other words, there is not enough ground water or surplus ground water to accommodate all of the needs of the overlying users and the appropriators. As might be expected, once this condition is observed, no new appropriative users are allowed. Overlying users have priority over appropriators if there is not enough water to go around. The last appropriator to use the water source is the first to be restricted if there is an overdraft condition. An overlying user may not have a paramount right to the water if the appropriation is done for a municipal purpose.

This system of determining who has the priority right to ground water has obviously resulted in considerable litigation. So called “adjudicated” water rights are based upon decisions made by the SWRCV and the California courts.

COLORADO RIPARIAN WATER RIGHTS
Riparian rights in Colorado are similar to riparian rights in California. Obviously, no one can divert a water source to their benefit and to the detriment of others downstream. If diverting a portion of a water source does not harm those downstream, arguably that small of a diversion might be allowed. The question is for how long.

The historical concept of riparian water rights might now be better classified as “regulated” riparian water rights. Colorado has a statutory scheme just like California. Determining what is a reasonable use of water from a water course or water from a ground water source is increasingly subject to state and local regulations as well as federal regulations that pertain to drinking water standards.

ENVIRONMENTAL PROTECTION AGENCY
The United States Environmental Protection Agency (EPA) sets specific standards for approximately 90 contaminants in drinking water. The EPA regulates chemicals, microorganisms, disinfectants, disinfection by-products, copper, acrylamide, and epichlorohydrin. Federal, state, and local authorities all have a responsibility to monitor water quality and enforce quality standards.

UN WATER QUALITY EFFORT
The United Nations, in designating March 22, 2010 as World Water Day, did so in promoting the 2010 theme “Water Quality: Clean Water for a Healthy World.” In releasing information about water quality around the world, the United Nations suggested the 1.1 billion people worldwide do not have access to safe, clean, drinking water. The United Nations estimated that every person needs between 20 and 40 liters of fresh water per day for drinking, cooking, and sanitation needs. According to the World Health Organization (WHO), half of the world’s hospital beds are filled with people suffering from waterborne diseases. The WHO also estimates that 4 billion people get sick annually because of drinking unsafe water. In excess of 2 million people a year die because of contaminated drinking water.

CONTAMINATION
Research into state efforts to control the quality of water raises significant examples of contaminated water sources: acid rain, caused primarily by the burning of fossil fuels by coal-burning power plants, factories and automobiles, adversely affects surface water and the eventual runoff of water through fertilized fields into ground water supplies; the Florida Everglades was previously endangered by significant mining activities adjacent to the Everglades National Park; industrial pollutants have caused irreparable damage to water sources throughout the country.

In Illinois, two recent lawsuits raise significant questions about the public’s right to clean water. In May 2009, it was discovered that Crestwood, Illinois Well No. 1 (located near the Cal-Sag shipping Channel), was being used by Crestwood to provide water to its residents. Before 1986, the Illinois EPA allegedly told the Village of Crestwood that the water from Well No. 1 was contaminated and that it should not be used for drinking water. The Illinois EPA apparently believed that Crestwood was using contaminated ground water to supplement Lake Michigan drinking water between 1986 and 2007. Illinois EPA sued Crestwood and personal injury suits quickly followed.

The Cal-Sag Channel surfaced in other, perhaps more interesting litigation, when the states of Wisconsin, Minnesota, Ohio, and Pennsylvania joined the states of Michigan and New York in suing the state of Illinois and the Metropolitan Sanitary District of Greater Chicago. This petition for a preliminary injunction against the state of Illinois, the Sanitary District and the Army Corps of Engineers, involves the allegation that Asian carp have migrated up the Mississippi River into a position where they are dangerously close to entering the Great Lakes and affecting the commercial fishing rights in the lake, recreational fishing, transportation on Illinois rivers and the general enjoyment of the Great Lakes. The Plaintiffs wanted Illinois, the Sanitary District, and the Army Corps of Engineers to prevent the possibility of Asian carp getting into the Great Lakes through the complicated Chicago Waterway System. Michigan estimated that the economic damage to the freight industry in and around Chicago would be $70 million on an annualized basis. Illinois responded by suggesting that the proposal suggested by the state of Michigan and other plaintiffs would result in increased freight expenses of $190 million on an annualized basis. The waterways around Chicago provide a direct connection between the Mississippi River and the Great Lakes. The argument is that Asian carp destroy the ecosystem by eating 40 percent of their body weight in a single day. Due to the large size, growth rate, food consumption rate, and high reproductive rate of Asian carp, migration into the Great Lakes from the Mississippi River through waterways located in Northern Illinois will be an ecological disaster in the Great Lakes. Ironically, on World Water Day, March 22nd, 2010, the US Supreme Court denied Michigan’s Motion for a preliminary injunction.

CONCLUSION
As a Chicagoan, I like the taste of Lake Michigan water. I also don’t like paying 69 cents for a bottle of “free” water. There are at least two lessons to be learned: 1) don’t take anything for granted and 2) water rights litigation is certain to increase.

Lawrence R. Smith, a founding partner of SmithAmundsen in Chicago, Illinois, focuses his practice on risk management consulting, case monitoring, mediation, arbitration, and implementing successful trial strategies. Having tried over 120 jury cases, his experience covers many areas including product liability, transportation, aviation, employment, insurance services, and commercial litigation.
There was a time when you could be confident in most federal court circuits that if your arbitrators deliberately ignored the law when they rendered an award, you would be able to challenge the decision on that basis. However, the Supreme Court’s decision in Hall Street Associates, L.L.C. v. Mattel, Inc., 552 U.S. 576 (2008) has left many wondering whether this remains a valid basis for a party to challenge an arbitration award. This is because some federal courts have viewed the Supreme Court’s decision in Hall Street as not allowing a party to challenge an arbitration award if the arbitrators “manifestly disregarded” the law. Instead, these courts have concluded that a party is limited to only challenging an arbitration award in federal court if the arbitrators violated one of the specifically enumerated offenses listed in the Federal Arbitration Act (“FAA”). Since “manifest disregard” of the law is not one of these specifically enumerated offenses in the FAA, some courts now consider it to no longer be a valid basis for a challenge.

But the potential impact of Hall Street did not just stop there. In addition to potentially eliminating “manifest disregard” as a basis for seeking to challenge an arbitration award, the Hall Street decision also called into question the very ability of parties to come up with their own enforceable limitations on arbitrator authority. Now, just because your arbitration clause in your contract says that the arbitrators cannot issue an award that disregards the law, it does not mean that you can necessarily enforce that limitation in federal court.

While Hall Street left many questions unanswered and caused much debate: one thing is clear—it is now more important than ever that every company and party engaged in arbitrations know the specific statutory rules you might need to rely upon to enforce your rights and seek to challenge a bad arbitration award. After Hall Street those parties challenging awards in federal court will need to be especially mindful of the specific FAA statutory basis for seeking to challenge an arbitration award. But, you should also be mindful of any potentially applicable state arbitration acts which may also provide additional grounds for seeking to challenge an award.

In doing so, the Court rejected the assertion that an earlier Supreme Court decision, Wilko v. Swan, 436 U.S. 427 (1953), added “manifest disregard of the law” as an additional ground to vacate an arbitration award under § 10 of the FAA. Rather, it stated that the Wilko Court’s reference to “manifest disregard” was vague: “Maybe the term ‘manifest disregard’ was meant to name a new ground for review, but maybe it merely referred to the § 10 grounds collectively, rather than adding to them.” The Court ultimately concluded §§ 10 and 11 of the FAA provided the exclusive grounds for vacating an arbitration award under federal law.

However, in holding that parties may not contractually expand judicial review for legal error, the Court explicitly preserved the rights of parties to pursue review of an arbitration award under state law alternatives to the FAA, stating “we do not purport to say that §§10 and 11 exclude more searching review based on authority outside the statute as well.” Accordingly, enforcement of arbitration awards may be sought under state statutory or common law.

The Supreme Court’s decision, with all of its equivocations, left many courts unequivocally confused about the ongoing viability of “manifest disregard” as a basis for challenging arbitration awards. Adding to the uncertainty, Hall Street appeared to indicate that the answer to whether “manifest disregard” was available might turn on whether one were reviewing an arbitration award under federal common law or state law. This confusion leaves the rights of parties uncertain. But, it leaves open the ability of parties to creatively select alternative avenues for seeking to vacate an arbitration award.

The following is a recap of the decision and the arguments:

**The Hall Street Decision**

In Hall Street, the Supreme Court addressed whether the FAA statutory grounds for challenging an award (typically called “vacatur”) may be supplemented by contract. The Court concluded that, despite the fact that arbitration is a creature of contract, the statutory grounds for vacatur expressly provided by the FAA are exclusive and not allowed to be amended or supplemented by contract.

**The Status of “Manifest Disregard” in Federal Common Law After Hall Street**

In the wake of Hall Street, lower courts...
are split on the continuing role, if any, of “manifest disregard of the law” as a basis for vacating arbitration awards. Some courts suggest that the Supreme Court avoided the issue completely, while others view the Court’s decision that the FAA provided exclusive means for vacating an award, eliminated manifest disregard as a valid ground for challenging an award.

The Hall Street decision, therefore, in attempting to resolve one split in authority, succeeded in creating another. Prior to the Supreme Court’s ruling, nearly all federal courts considered “manifest disregard of the law” to be a valid grounds for vacating an arbitration award. Now, courts are sharply divided.

In light of the federal circuit court split on whether manifest disregard may be used as a means of obtaining a more searching judicial review it is important for a party seeking to vacate an award to assess how their particular jurisdiction has interpreted Hall Street. This initial assessment can enable a party to determine how best to seek to vacate a bad arbitration award. If the jurisdiction continues to review awards for “manifest disregard,” the assessment may end there. If, however, the jurisdiction does not, or if the party hopes to obtain an even more searching review, it may wish to consider a state law alternative to the FAA.

**AVAILABILITY OF EXPANDED REVIEW UNDER STATE ARBITRATION STATUTES OR STATE COMMON LAW**

Hall Street’s explicit recognition that parties may seek judicial review of an arbitration award under state common and statutory law provides another avenue through which parties may be able to obtain an expanded review of the arbitration award, even if the FAA would not allow such a review. Arbitration agreements which contain clearly worded choice of law provisions may enable parties to contractually allow judicial review for “manifest disregard of the law” if the chosen state law supports such review.

In addition, even if parties fail to include a choice of law provision, recent decisions suggest a party may obtain expanded review by simply seeking to confirm or challenge the award in the courts of a state that recognizes the availability of such expanded review. For a party seeking such a review, it is important to review the state arbitration laws to find whether or not the statute explicitly provides for expanded judicial review, or if the law allows parties to contract for such a review. For example, the California Arbitration Act expressly permits parties to contractually expand judicial review. Again, knowing the particular contours of the potentially applicable state arbitration act is critical to understanding the scope of your rights to challenge a bad arbitration award.

**CONCLUSION: WHERE HALL STREET LEAVES US**

In the wake of Hall Street, parties must become more creative in either (1) selecting an appropriate jurisdiction in which to seek to challenge an arbitration award, or (2) contracting for expanded judicial review under state law. The circuit split in whether “manifest disregard of the law” is still a valid means to challenge an arbitration award provides parties with the opportunity to select a favorable forum in which to seek to vacate an arbitration award.

In addition, Hall Street left open a significant avenue for parties to obtain expanded judicial review under state arbitration statutory and common law. Given the ability of states, interpreting their own arbitration laws, to deviate from Hall Street’s reasoning, it remains possible for parties to obtain heightened judicial scrutiny within the confines of each state’s arbitration act. Therefore, one way parties may ensure more searching scrutiny is to designate a state arbitration law and venue that permits such review, and carefully provide for expanded judicial review in their arbitration agreement.

If you do not want your arbitrators to “manifestly disregard the law” in reaching an award, leaving you with no recourse— you need to carefully consider the provisions of your arbitration clause in your contract and the jurisdiction in which you might attempt to challenge any award. You should be especially mindful of the differences between every potentially applicable state arbitration act, and even some international arbitration acts which might apply. After Hall Street, your right to seek relief from a bad arbitration award may hang in the balance.
Bankruptcy filings can affect personal injury, employment, and commercial litigation cases.

**BANKRUPTCY BASICS:**

As most people know, filing bankruptcy is a means for financially distressed persons or corporations to obtain relief from their creditors. The vast majority of personal bankruptcies in the U.S. are filed under either Chapter 7 or Chapter 13 of the United States Bankruptcy Code. Bankruptcies filed and granted under Chapter 7 afford debtors a complete liquidation of their debts. When a federal bankruptcy court grants relief under Chapter 7, the debtor’s obligations are paid out of the bankruptcy estate’s existing assets, and most debts are usually wiped away. The case is then said to be “discharged.” Bankruptcies filed and granted under Chapter 13 place debtors in a repayment program, where they are obligated to repay all or part of their debts, usually out of future income from employment or other sources. When a bankruptcy court approves a Chapter 13 debtor’s proposed repayment plan, the bankruptcy case is said to be “confirmed.” Repayment plans usually range from 36-60 months.

Federal legislation passed several years ago by Congress (officially termed the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, or BAPCPA) enacted means testing to determine a potential debtor’s eligibility for filing bankruptcy under Chapter 7. The new laws essentially made it harder for debtors to obtain a complete liquidation of their debts under Chapter 7, and were designed to steer debtors to a repayment plan under Chapter 13. The number of consumer bankruptcy filings in the United States rose significantly in 2009. There were 1.41 million bankruptcy filings nationwide in 2009, according to the National Bankruptcy Research Center. This marked a 32% increase from the number of filings in 2008. Experts say that the increase was driven by foreclosures and job losses. Due to the recession that has plagued the U.S. economy since early 2008, the bankruptcy filing rate is anticipated to remain steady or rise slightly in 2010. For 2009, cases filed under Chapter 7 made up about two-thirds of personal bankruptcy filings; Chapter 13 filings comprised about one-third.

**THE STATEMENT OF FINANCIAL AFFAIRS**

The bankruptcy code imposes a duty upon a debtor to disclose all assets, including contingent and unliquidated claims, 11 U.S.C.S. § 521(1). This is done in the petition and its accompanying statement of financial affairs. That duty encompasses disclosure of all legal claims and causes of action, including pending claims or potential claims, which a debtor might have. The
statement of financial affairs specifically requires a debtor to disclose his involvement in pending lawsuits.

In addition to disclosing information about pending lawsuits, the statement of financial affairs requests detailed information about a petitioner’s income and the sources from which it is derived, as well as information about the petitioner’s monthly expenses. It also requests information about the value of the petitioner’s real property and personal property, including vehicles. It also requires the debtor to list his debts, and classify the debts as secured or unsecured, and priority or non-priority claims.

JUDICIAL ESTOPPEL: AN INTRODUCTION

Bankruptcy filings have the potential to impact personal injury, employment, and commercial litigation cases through judicial estoppel if those claims are not listed in the debtor’s bankruptcy petition. Judicial estoppel is a little-understood but powerful equitable doctrine that prohibits a party from gaining an advantage by asserting one claim or position in one case, and then later seeking an advantage by taking an inconsistent position either in that same case or another case. Typically, estoppel attaches in a Chapter 7 case when the order of discharge is signed by the court. It attaches in a Chapter 13 case when the plan is confirmed and the debtor goes into repayment.

Courts nationwide have been known to exact what are seemingly harsh penalties against persons who file bankruptcy and fail to identify property that should be included as part of the bankruptcy estate. Many times, the court will order the civil case to be stayed so that the bankruptcy case may be re-opened by the Chapter 7 or Chapter 13 trustee, and the omitted asset can be administered to creditors, if applicable. The court is likely to look to the facts and circumstances surrounding both the bankruptcy case and the civil case, and apply factors such as the length of time between the cases, the level of sophistication of the debtor, the size of each case, and whether or not the debtor was represented by counsel in determining what the proper remedy is.

When defending a personal injury, medical malpractice, or employment case, the prudent litigator or insurer should conduct a search of the plaintiff’s bankruptcy history to determine whether that individual has ever petitioned for bankruptcy relief, and if so, under which chapter, as well as the status of the action.

ASSET AND DEBT SCHEDULES: A TREASURE TROVE OF INFORMATION

Even if it is deemed that a bankruptcy filing is unavailing in terms of dismissal of a civil case, the petition and its schedules should be examined closely to ensure that the information they contain is consistent with other representations made by a party in the civil matter. These include statements about income, property valuations, debts and the like. In many cases, the old adage, “You don’t really know what you’re looking for, but you know when you find it” rings true.

For example, in 2005, I handled a case in which a plaintiff sued my client, claiming, in addition to personal injuries, that his $15,000 Harley-Davidson motorcycle had been totaled in a motor vehicle accident. Liability was disputed, so my client had not yet paid any property damage settlement. When I determined that the plaintiff had filed for bankruptcy about three months prior to the accident, I learned that he placed the motorcycle’s value at only $4,500 for the purposes of his bankruptcy proceeding. At mediation, this fact was brought to the plaintiff’s attention and was a factor in arriving at a settlement far less than what plaintiff originally demanded.

The schedules can be helpful to assess the validity of a lost income claim. Debtors are required to state their monthly income and the source from which it is derived. If a debtor were to state his monthly income as $2,000 on his bankruptcy schedules during a certain time period, and then claim in a civil case that he was actually earning $4,000 per month during that same timeframe, those inconsistencies can and should be brought to the attention of the plaintiff and the court.

Furthermore, the petitioner’s schedule of debts can be extremely useful in learning about pre-accident injuries and pre-existing conditions. Many bankruptcy filers owe significant amounts to medical providers, and in order for those debts to be discharged, they must be identified in the petitioner’s debt schedules. Reviewing bankruptcy debt schedules often locates additional doctors, hospitals, chiropractors, and physical therapists that were never mentioned in the plaintiff’s disclosures or discovery responses. Often the treatment was for the same injury or condition that was the basis for the lawsuit.

CONCLUSION

Understanding bankruptcy law and judicial estoppel and their affect on pending civil cases can provide extremely useful for the defense of civil actions. A search of the U.S. case/party index for each party in a case is always a good idea, and can prove to be highly beneficial to the defense of a civil matter.

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Most international commercial contracts contain arbitration clauses, which require disputes arising under the contract to be resolved through arbitration, rather than resorting to courts of law. As international commercial transactions continue to grow in frequency, international arbitration can be expected to mirror this growth.

The importance of crafting a proper arbitration clause for inclusion in any international contract cannot be overstated. This article will examine the other end of the process, enforcing a favorable arbitration award in the United States.

The New York Convention and the Panama Convention are the two main vehicles used to enforce international arbitration awards in the United States. The New York Convention, adopted by the United Nations in 1958, is recognized as a foundational instrument of international arbitration and requires courts of signatory states to give effect to an agreement to arbitrate and also to recognize and enforce awards made in other states, subject to specific limited exceptions. Congress adopted the Convention by amendment as Chapter 2 of the Federal Arbitration Act (“FAA”) in 1970. The Convention’s purpose was to “encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries.”

Chapter 3 of the FAA was added in 1990 and is made up of the Inter-American Convention on International Commercial Arbitration, (the “Panama Convention”), which was established in 1975.

Because the New York and Panama Conventions are nearly identical and because most awards are enforced under the New York Convention, here we will discuss enforcement under that Convention only.

**NEW YORK CONVENTION (“THE CONVENTION”)**

U.S. courts have broken down awards into three categories: purely domestic, foreign, and non-domestic. The Convention applies to awards “not considered as domestic,” in other words, those that are either “foreign” or “non-domestic.” A general rule of thumb for distinguishing a “foreign” award from a “non-domestic” award is that a “foreign” award will always be made abroad, while a “non-domestic” award will usually be made in the U.S., but can also be made abroad under U.S. law.

The distinction is important because it determines whether the court may refuse to enforce the award under the Convention or whether it may also have the power to set aside the award under domestic law, known as “vacatur.” Foreign awards are subject only to the Convention, whereas non-domestic awards are subject to both the Convention and domestic law. The New York Convention enumerates very limited grounds on which a court may refuse to enforce an award.

**ENFORCEMENT UNDER THE NEW YORK CONVENTION**

Enforcement can be sought in any
country in which the losing party has assets. The U.S. District Courts have jurisdiction when a party seeks to enforce a foreign or non-domestic award in the United States. An action to enforce or confirm an award must be commenced within three years of the award being issued. The party seeking to enforce the arbitral award can establish a prima facie case for enforcement by providing the original or a certified copy of the written arbitration agreement and award. Once a party has made a prima facie case for enforcement, a District Court “shall confirm” the arbitral award unless it finds one of the grounds for refusal specified in the Convention to exist.

Article V of the Convention provides the exclusive grounds by which to refuse to enforce an award. The burden is on the party seeking to prevent enforcement to produce competent authority that one of the enumerated grounds exists. The grounds for refusing to enforce an award are:

(1) The parties were suffering under some incapacity or the arbitration agreement was invalid.

No U.S. Court has denied enforcement of an arbitration award because of either lack of capacity of one or both of the contracting parties, or invalidity of the agreement to arbitrate under the applicable law. Incapacity at the time of the arbitration hearing is not a defense. A party must show incapacity at the time of the signing of the contract containing the arbitration agreement if they are to use this defense to an enforcement action.

(2) The party against whom the award is sought to be enforced was not given proper notice of the arbitration proceedings or was unable to present their case.

This defense has not often been successful as U.S. Courts have narrowly construed the due process defense by looking at the overall result and determining whether the defendant got a fair hearing. Arbitrators rulings are given great deference and absent a showing of abusive discretion, the court should not refuse to enforce an arbitration award based on allegations of improper evidence or the lack of proper evidence.

(3) The arbitration award exceeds the scope of the arbitration agreement.

Article V (1)(c) provides that a court can refuse to enforce an arbitration award when the award is beyond the scope of the dispute submitted to arbitration. This defense is not often successful as arbitration agreements, and what they encompass, are generally interpreted broadly. Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.

(4) The arbitration panel or procedure was not in accordance with the parties’ agreement or applicable law.

U.S. decisions that have addressed the question of the improper composition of the arbitration panel based on the Convention, have upheld the award. Courts have upheld arbitration awards even when the arbitration agreement called for three (3) arbitrators and a sole arbitrator decided the case, and when one of the arbitrators previously worked for one of the parties, in violation of the arbitration agreement.

(5) The arbitration award is not yet binding or has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made.

If an appeal to a court is pending, the arbitration award is considered binding and should be enforced. If a court has actually issued a ruling setting the award aside, the award is not binding and should not be enforced.

(6) The subject matter is not subject to arbitration.

In order to take advantage of this defense, a party must prove that the enforcing nation attaches a special national interest to the dispute that makes it incapable of being settled by arbitration. The national interest must be more than “incidentally” involved in the dispute for the court to find that the matter is non-arbitrable.

(7) Enforcement of the award would be contrary to public policy.

As with other grounds for non-enforceability of arbitration awards, this ground is narrowly construed. The ground applies only when enforcement would violate the most basic notions of morality and justice of the foreign state.

In one case the public policy defense was used successfully when the interest rate used by the arbitrators to determine interest payments was so excessive that it was penal in nature. The penal nature of the interest was held to be a violation of public policy.

VACATING NON-DOMESTIC ARBITRAL AWARDS

An action to vacate a non-domestic award can overlap with an action to enforce the same award. The following grounds to vacate an arbitration award are found in Section 10 of the FAA:

(1) where the award was procured by corruption, fraud, or undue means;
(2) where there was evident partiality or corruption in the arbitrators;
(3) where the arbitrators were guilty of misconduct; or
(4) where the arbitrators exceeded their powers.

The U.S. courts have supplemented the narrow procedural grounds for vacatur with a handful of non-statutory grounds, including awards that are “arbitrary and capricious,” “completely irrational,” the award’s “failure to draw its essence from the underlying contract,” and those in “manifest disregard of the law.”

Among these, manifest disregard is the most widely recognized ground upon which courts set aside arbitral awards. The standard for finding manifest disregard is extremely high. The challenging party must show that 1) the law was unambiguous and clearly applicable, 2) the arbitrator knew the law, and 3) the arbitrator chose to ignore the law despite his or her knowledge of it.

The use of “manifest disregard of the law” has come under fire in recent years and courts are split on whether this is still a valid ground to vacate an arbitration award.

CONCLUSION

While the New York and Panama Conventions are the principal vehicles for enforcement of international arbitration awards, they are not the only such vehicles. There are also various treaties and common law, however, these are subjects for another day.
SEC rules have long required companies to disclose material information an investor should possess to decide whether to buy a company’s stock. However, on January 27, 2010, the SEC issued interpretive guidance indicating disclosures must now include projected impacts of business and legal developments related to climate change.

The agency advised disclosures should include a consideration whether existing or pending laws, rules, and international treaties will have a material impact on their business. The regulator also told companies to consider the actual and physical impact of climate change. The rationale for such disclosure makes sense, at least on the surface. Investors have a fundamental right to know which companies are well-positioned for the future and which are not. This ensures that business risks of climate change will not be ignored.

One dissenter indicated this release was unnecessary and the guidance was premature at best. For the reasons set forth below, this may well be a fair assessment. It likely marks the path to increased litigation for one simple reason. In most instances, the judiciary and legislative are currently unable to provide sound guidance regarding what businesses can expect vis-à-vis climate change concerns.

As an example of this, a couple landmark decisions have laid groundwork for great debates regarding what type of risks businesses can reasonably expect to confront. The first came on September 21, 2009, when the Second Circuit reinstated a public nuisance lawsuit brought by eight states, the City of New York, and three land trusts against six electric power companies in Connecticut v. American Electric Power Company. The Plaintiffs claimed Defendants were the largest emitters of carbon dioxide in the United States. As such, they were contributing to global warming, resulting in harm to human health and natural resources.

The District Court had originally dismissed these actions because the claims represented a non-justiciable political question which would require balancing of environmental and economic issues. The Second Circuit reversed stating:

...Nowhere in their complaints do plaintiffs ask the court to fashion a comprehensive and far-reaching solution to global climate change, a task that arguably falls within the purview of the political branches. Instead, they seek to limit emissions from six domestic coal-fired electricity plants on the ground that such emissions constitute a public nuisance that they allege has caused, is causing and will continue to cause them injury...Well-settled principles of tort and public
nuisance law provide appropriate guidance…[to address these claims]…through principled adjudication.

On October 16, 2009, in Comer v. Murphy Oil, a Fifth Circuit panel likewise reversed a Mississippi District Court and reversed a suit alleging global warming exacerbated damage caused by Hurricane Katrina. Adopting much of the Second Circuit’s position, the Fifth Circuit ruled plaintiffs have standing to assert their claims and that these claims did not represent non-justiciable political questions. Of note, however, on February 26, 2010, the Fifth Circuit indicated this matter will be rescheduled for a rehearing en banc.

Even if the Fifth Circuit en banc adopts the initial panel’s opinion, this issue remains far from resolved on several levels. For example, it is uncertain what impact this decision may have in jurisdictions where, unlike New York, emission standards have already been established.

California, who ironically was one of the Plaintiff states in the Second Circuit action, had the opportunity to provide a quick answer and may have indirectly done so. Nine days after the American Electric Power decision, in Kivalina v. Exxonmobil Corporation, the Northern District of California addressed an Inupiat Eskimo village’s attempt to bring federal nuisance actions against 24 energy and utility companies. The action sought both “mone-

tary damages for defendants’ past and ongoing contributions to global warming,” and “damages caused by certain defendants’ acts in furthering a conspiracy to suppress the awareness of the link between these emissions and global warming.”

The District Court expressly rejected the Second Circuit’s conclusion, instead finding the emission of greenhouse gases is fundamentally different from water and air pollution cases. Whereas the latter typically involve a discrete geographically definable area, it is impossible to similarly limit a claim based on global warming. The Court concluded it was not equipped to address the policy decisions inherent in these truly global environmental claims.

Businesses trying to assess risk are really left with more questions than answers from these decisions. Unfortunately, it does not appear legislation will be on its way to solving the issues any time soon. Rather, this appears to be an issue where policies will likely be implemented at regional levels first.

The 2009 United Nations Climate Change Conference was by most counts an unmitigated failure. Following negotiations from December 7 to December 18, there was not even agreement regarding what international goals should be. They varied from South Korea’s suggestion that, by 2020, greenhouse gas emissions should be reduced by 4% from 2005 levels to Costa Rica’s suggestion that all nations become carbon neutral by that same date. The result of the summit was an accord that was “taken note of,” but not adopted by participating nations.

Of late, there seems to be some optimis-
mism of a national resolution. In February 2010, Senators Tom Carper and John Kerry each expressed hopes for new legislation by year’s end. Carper indicated Congress may establish a cap-and-trade market this year. This would provide federal regulation of emissions from coal, oil, and natural gas, but allow businesses to buy and sell pollution rights. A similar bill passed the House of Representatives last year, but stalled in the Senate. Kerry was less specific, but indicated Congress was on track to enact a comprehensive measure including nuclear energy provisions.

In the meantime, California has already shown state governments are capable of setting meaningful goals. In 2006, Governor Schwarzenegger signed Assembly Bill 32. This landmark bill established a first-in-the-world comprehensive program to achieve quantifiable reductions of greenhouse gases. Using market-based incentives, California mandated a 25 percent reduction of carbon emissions to 1990 levels by the year 2020 and an 80 percent reduction of that amount by 2050.

Based on the above, real efforts are being made to move toward lower carbon emissions at all levels. However, it creates problems for those charged with assessing risk. Because greater strides are initially being made at regional levels, there is a great risk of differing environmental standards across the geographic in which each publicly traded business operates. In addition to these inconsistencies, there are a number of factors that may force the “local rules” to change. Obviously, federal law and international agreements will trump any state regulations with lower standards. There also may be certain political pressures to “keep up with the Joneses” and modify existing policies depending on legislative goals sister states later enact.

Notwithstanding this optimistic ap-
proach—that governments and business will continue to be ready, willing, and able to reduce pollution—the reality is that standards may also run a risk of loosening. California, who stood at the vanguard in 2006, has been one of the harder hit states by the economic decline over the past two years. It may be unrealistic to expect companies doing business in the state to have the funds and technology available to meet the 2020 targets and foolishly expect to attract any new manufacturing with the state’s higher associated costs.

What is the net effect of this on a duty to disclose risks based on environmental factors? A true discussion of all these variables as they might apply to any company would require a short treatise. There appears to be an incredibly slender border between “speculation” and “risk” dividing a broad scope of issues.

For the time being, despite this “guid-ance” from the SEC, businesses will be left weighing for themselves the extent of disclosures they will make regarding potential risks and rewards associated with environmental related issues. Obviously, whatever material information is known must be disclosed, but materiality will be adjudged by the probability of any event occurring. The more tentative information is, the less useful it will be to potential investors. The apparently ever-shifting sands make it difficult to project with more than speculation the likelihood any particular change in environmental policies and regulations will take place, let alone its impact. Nonetheless, it is apparent the SEC, from its interpretation expects businesses to make projections based on climate change issues. This leaves directors and officers making disclosure decisions at their own peril. By failing to disclose risks, they risk actions from stock purchasers, who will be emboldened by the SEC’s statement. To the extent stock holders believe disclosure reports overstate risk, they too may seek relief. The only thing that seems certain is that the SEC’s new interpretation will guide many to the courthouse.

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soned civil litigator with Klinedinst PC in San Diego, California. He has significant experience assisting corporate entities, officers and directors, and successful individuals with complex disputes. He also represents legal professionals in malpractice claims.
In response to a perceived problem of drug use in the workplace, many employers have implemented post-offer, pre-employment drug testing to detect and deter the use of substances that impair workplace activity. The circumstances under which testing may occur, however, vary greatly and present several significant concerns for an employer, depending upon whether the employer is a public or private one.

When a drug test is performed by a public employer, it is a “search” that must satisfy the reasonableness requirement set forth in the Fourth Amendment to the United States Constitution. In determining what is reasonable, the practice in question must be judged by balancing its intrusion on the individual’s Fourth Amendment rights against its promotion of legitimate government interests. A public employer is therefore restricted in pre-employment drug testing unless there is a compelling governmental interest that outweighs the privacy, due process, and search and seizure rights of the employee.

The United States Supreme Court has provided some guidance on when drug testing of employees is permitted. If a policy applies to all employees, not just those in positions implicating safety issues, a desire to promote a drug-free workplace is an insufficient justification. If a public employer is not experiencing an actual drug problem among its current employees, it should limit drug testing to positions that require the candidate to execute safety-sensitive tasks or involve the enforcement of drug laws.

The Constitution does not restrict private employers from drug testing their employees. Nevertheless, an employer’s drug testing policy must satisfy the requirements of various state statutory provisions. In general, a private employer may require the collection and testing of samples for any job-related purpose or business necessity consistent with the employer’s written policy.

SUPREME COURT GUIDANCE – THE VALIDITY OF GOVERNMENTAL DRUG TESTING PROGRAMS

In several key decisions, the Supreme Court has sought to delineate the parameters of the balancing analysis required to determine the constitutionality of an employment drug testing program. The Court has clearly stated that a public employer’s interest in drug testing its employees must be weighed against an individual’s privacy interests and the nature and scope of the intrusion into that reasonable expectation of privacy.

In 1989, the Supreme Court issued rulings in two companion cases and held that the government is allowed to conduct drug tests without individualized suspicion when there is a “special need” that outweighs an individual’s privacy interest. In , the Court found that public safety was such a special need. Applying these standards, a suspicionless drug testing program designed to test railroad employees after they were involved in an accident was constitutional. The government's compelling interests in security and national security hazards are such a special need.

The government is allowed to conduct drug testing unless there is a compelling government interest to justify the particular drug testing search. Notably, however, the Supreme Court has resisted expanding the scope of the “special need” requirement to encompass large sections of the workforce. For example, the Court struck down a Georgia law requiring candidates for state offices to certify that they had tested negative in drug urinalyses. Such mandatorv drug tests were unconstitutional, suspicionless searches, as Georgia failed to show a “special need” substantial enough to override the candidates’ privacy interests (such as a demonstrable problem of drug abuse by its elected officials).

PARAMETERS OF DRUG TESTING PROGRAMS FOR PUBLIC EMPLOYERS

Subsequent challenges to drug testing programs have focused on whether a public employer has shown the “special need” for such testing. Although showing a problem with drug abuse among current public employees may not be necessary in every case to demonstrate the validity of a testing regime, it would shore up the assertion of “special need” for a suspicionless, general search program. Courts are also more inclined to permit testing programs with respect to employees performing safety-sensitive tasks (based on a review of the job responsibilities of the tested employees) or where the government has a reasonable suspicion of drug use.

Even though the government may possess a legitimate interest in having a drug-free workplace and maintaining a positive public image, these ideals are insufficient to pass constitutional scrutiny for purposes of suspicionless drug testing programs. Many public employers have tried to argue that large segments of their workforce have critical responsibilities that justify random testing, but this is an insufficient reason to require candidates for all positions to pass a pre-employment drug test as a condition of a job offer. Even random, suspicionless drug testing of firefighters, which most people consider a safety-sensitive position, might not pass constitutional scrutiny absent evidence that there is a significant drug problem among firefighters.
The Supreme Court has provided limited exceptions for drug testing of public employees in “special needs” cases. In implementing a post-offer, pre-employment drug testing program, a public entity must demonstrate an interest important enough to justify an intrusion into a legitimate expectation of privacy. The procedure must be as unobtrusive as possible, such as post-accident testing or testing based on a demonstration of reasonable suspicion. Absent a showing of an actual drug problem among its workforce, testing by a public employer should be limited to safety-sensitive positions, such as those involving the enforcement of drug laws, use of firearms, or circumstances that would justify the intrusion into an individual’s reasonable expectation of privacy.

PRACTICAL ADVICE FOR IMPLEMENTING A DRUG TESTING PROGRAM FOR PRIVATE EMPLOYERS

Although drug testing by private employers does not have the same Fourth Amendment implications, there may be statutory limitations and requirements for drug testing in the private sector. Many states provide that drug testing programs for private employers may be conducted for any job-related purpose consistent with business necessity, including:
- Investigation of possible individual employee impairment;
- Investigation of accidents and for safety reasons;
- Maintenance of safety for employees, customers, clients or the public at large;
- Maintenance of productivity, quality of products or services, or security of property or information; and
- Reasonable suspicion that an employee may be affected by the use of drugs, and the use may adversely affect the job performance or the work environment.

Before a private employer compels drug testing of its employees, the employer should implement a written policy that is distributed to all employees. The policy should be distributed in the same manner in which the employer informs its employees of other employment policies and procedures, such as through inclusion in an employee handbook. Prospective employees also should be advised about the drug testing requirements. At a minimum, the written policy should include:
- A statement of the employer’s policy respecting drug and alcohol use by employees;
- A description of those employees or prospective employees who are subject to testing;
- The circumstances under which testing may be required;
- The substances for which testing may be required;
- A description of the testing methods and collection procedures to be used;
- The consequences of a refusal to participate in the testing;
- Any adverse personnel action that may be taken based on the testing procedure or results;
- The right of an employee, on request, to obtain the written test results;
- The right of an employee, on request, to explain in a confidential setting, a positive test result; and
- A statement of the employer’s policy regarding the confidentiality of the test results.

Although an employer may designate the type of sample to be used in drug use or impairment testing, samples must be collected and tested in accordance with each state’s own statutory provisions. Communication received by private employers regarding drug tests is considered confidential and may not be used or disclosed in any public or private proceeding, unless the proceeding relates to an action by an employer or employee in regard to the testing.

Many states permit private employers to refuse to employ job applicants who fail a drug test or who refuse to take a drug test required to complete the application process. Employers may also take disciplinary action against employees who test positive for drugs or refuse to submit to testing. Discipline for a positive test result or refusal to take a drug test should be set forth in an employer’s policy and may include any of the following:
- A requirement that the employee enroll in an employer-provided or employer-approved rehabilitation, treatment or counseling program in which participation may be a condition of continued employment and the costs of which may or may not be covered by the employer’s health plan;
- Suspension of the employee, with or without pay, for a designated period of time;
- Termination of employment; or
- Any other adverse employment action.

1 National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989);

IMPACT OF THE AMERICANS WITH DISABILITIES ACT

Under the Americans with Disabilities Act, which prohibits discrimination against the disabled and those perceived to be disabled, a test to determine the illegal use of drugs is not considered a medical examination. The administration of drug tests by a private employer to its job applicants or employees is not a violation of the ADA. Employers are not prohibited from conducting drug tests of their job applicants or employees to determine the illegal use of drugs or to make employment decisions based on such test results.

Although individuals who are currently using illegal drugs are explicitly denied protection under the ADA (even if their drug use causes them to meet the statutory definition of “disability”), no such exclusion applies to those who are erroneously regarded as disabled because of drug use. The ADA prohibits discrimination against individuals who are erroneously regarded as engaging in illegal drug use because of a false positive drug test, but who are not actually engaging in such use. Thus, an individual who is denied employment or suffers an adverse employment action because of a false positive test result may be able to claim that his employer discriminated against him because his employer perceived him to be disabled.

PRACTICAL ADVICE AND TO DO LIST FOR EMPLOYERS

Drug testing presents several significant concerns for both public and private employers, some of which are set forth in this article. Employers must understand their legal obligations and requirements with respect to statutes and regulations, as well as any constitutional implications for public employees. Employee handbooks and other written policies need to be continuously updated to comply with state and federal laws governing drug testing. Most importantly, employers must ensure that all human resources personnel and supervisors are trained regarding statutory requirements to avoid costly litigation landmines.

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The ultimate fate of the healthcare reform bill(s) which the U.S. House of Representatives passed on March 21, 2010, is now clear. The House has passed the Senate bill and President Obama signed it into law on March 21, 2010. That same day, the House also passed a “fix-it” bill (formally titled a Reconciliation bill) to be sent to the U.S. Senate proposing to modify some of the provisions in the Senate bill which the House had passed. With minor exceptions relating to student loans, the Senate and the House approved the “fix-it” bill on March 25, 2010 (the “fixit” bill was necessary because many House Democrats disliked the Senate bill, especially the “luxury tax” on so-called “Cadillac” health insurance policies, which the now-approved fixit bill, well, fixes). This article looks at how healthcare insurance reform, in its final form, will impact employers, and what steps employers can take now to minimize potential adverse impact.

To summarize the order of battle: There were two healthcare reform bills introduced in 2009, one in the House and another in the Senate. To make matters more complex, when healthcare reform bogged down in early 2010, President Obama proposed his own version of health care, an admixture of the two bills. Although the Senate bill was the version that the House passed on March 21, 2010, the House also passed a “reconciliation act” along with it—a fix-it bill, with a number of changes to the Senate bill. The understanding was that the reconciliation bill would be passed by the Senate, modifying some of the Senate bill provisions voted into law and signed by President Obama. On March 25, 2010, the Senate passed the fix-it bill with minor changes, which were then approved by the House and sent on to President Obama for signature. What follows is an attempt to sort through the new legislation to identify and discuss employer-related issues.

A. DIRECT EMPLOYER MANDATES

The proposed House bill and the proposed Senate bill in 2009 each imposed a “pay or play” mandate on employers. This means that if covered employers (a) fail to provide their employees with health insurance, or (b) fail to provide health insurance meeting certain government-imposed qualifications, including cost to employees and identified benefits levels, the federal government will impose a tax or penalty on the employer to cover the costs associated with providing adequate health insurance to those employees through insurance “exchanges” to be set up in each state (under the Senate bill) or through one nationwide exchange (under the House bill).
So what’s the cost to employers who elect to “pay” as opposed to “play”? The Senate bill, which the House approved in March 2010, required covered employers to make a minimum standard of coverage available to employees or pay an assessment of $750 per month per full time employee who is not offered adequate health care insurance through the employer. If the employer-offered health care is not deemed to be “affordable” and a full time employee insures through an Exchange, the employer will be assessed $3,000 annually for each such employee. (The House bill, by contrast, set “pay or play” rates in an annual amount equal to 8% of payroll to a national exchange that will provide those employees affordable health care.)

President Obama’s version of health care reform, as announced in late February, was a little more employer-friendly. It proposed not to require non-conforming employers to pay the fines for the first 30 workers (e.g., a firm with 51 workers that does not offer coverage will pay an amount equal to 51 minus 30, or 21 times the applicable per employee amount). The Obama plan also dropped the annual penalty for not offering employees insurance coverage from $3,000 to $2,000. The Reconciliation bill contained both of these Obama modifications. In this one respect, the reform became slightly more employer-friendly.

B. BATTLEGROUND: FULLTIME VS. PART-TIME OR SEASONAL EMPLOYEES

Employers wary of becoming trapped into more health care coverage will need to pay close attention to what might trigger an obligation to insure part-time or seasonal employees, and plan accordingly. The Senate bill applies only to full time employees but beware: your U.S. Senate defines “full time” as an average of 30 or more hours per week measured on a monthly basis, not 40 hours per week (this is not your father’s “full time”). President Obama’s latest version of healthcare reform tracks this aspect of the Senate’s version. This aspect of the Senate bill was not modified in the Reconciliation bill.

The issue of seasonal employees may also turn out to be a difficult one. The now-enacted Senate bill arguably applies to “seasonal” employees who work in excess of an average of 30 or more hours per week—at least those who work for more than 60 days (the maximum “waiting period” employers’ health insurance can impose before group coverage must be offered). One possible strategy for both “part time” and seasonal employees, depending on the relative costs of social security and other non-health benefits versus pay or play: hire more employees who work less than an average of 30 hours per week, rather than hiring fewer employees to work between 30-39 hours per week average.

C. BATTLEGROUND: SIZE MATTERS—BUT HOW DO YOU MEASURE IT?

Both bills claimed to exempt “small” employers from the “pay or play” mandate (although the bills did give small employers tax credits as incentives for them to provide adequate health insurance). But the House and the Senate disagreed as to how to measure employer size. The House bill defined “small” in relation to payroll size, imposing no penalty on employers with annual payrolls of less than $500,000, and reducing it for non-compliant employers with annual payrolls between $500,000 and $750,000. By contrast, the Senate bill applied only to employers employing an average of at least 51 employees on business days during the preceding calendar year. President Obama’s own proposal adopted the Senate version, i.e. a small employer is 50 or less employees. The Reconciliation bill makes no change to the Senate bill, so “small employers” exempt from pay-or-play are those with less than 51 employees.

Although the “pay or play” features won’t kick in for several years, employers using the services of independent contractors, or hiring employees through third-party employers or staffing agencies, must be vigilant. A periodic and honest check up on the status and documentation of independent contractors would be a worthwhile project for employers who don’t want to push their full time employee head count to an average of 51 or more. Similarly, employers using the services of staffing agencies will want to review their contracts and other documentation with the real “employer”—the staffing agency—to make sure the right language is in place and that the right resources and insurance, are in place. The risk of being found to be a joint employer liable for “pay or play” insurance payments would be an unwelcome surprise.

D. BATTLEGROUND: “CADILLAC” PLANS

Perhaps the most controversial aspect of the otherwise relatively more “employer-friendly” Senate bill was the 40% excise tax it imposes on employer-paid health insurance premiums in excess of $8,500/year for individuals, and $23,000/year for families. The House was strongly against such a tax and under President Obama’s proposal, the amount of premiums exempt from assessment was increased to $10,200 for individuals, and from $23,000 to $27,500 for families. The exempt amount will be indexed for inflation. President Obama also proposed to “adjust” the “Cadillac” premium threshold by including an adjustment for firms whose health costs are higher due to the age or gender of their workers, and by no longer counting dental and vision benefits as potentially taxable. President Obama’s proposals in this regard were included in the Reconciliation bill, which passed both the Senate and the House on March 25, 2010.

So, the “Cadillac” tax now has a slightly higher trigger (and will not kick in until later this decade). Note: employers who maintain age and gender data related to health insurance must be exceedingly careful in how that information is disclosed, and for what purpose it is used, to avoid other kinds of discrimination claims. Employers should at minimum review health care benefits now to determine potential exposure to the excise tax on “Cadillac” plans and to explore possible options with their brokers to avoid the excise tax.

E. EMPLOYER LESSONS FROM MASSACHUSETTS

Anecdotal evidence from Massachusetts (where a variant of the proposed reform is already underway) suggests that large, sophisticated employers with robust and nimble payroll systems will see little dramatic increases in costs of administering the reforms. As always, the increased financial and administrative burdens of health care reform fall more harshly on smaller employers, restaurants, retailers, and the staffing industry.

F. CONCLUSION

Healthcare reform looks like it’s here to stay (for at least a little while – Republicans are talking about “repeal and replace” in the Fall of 2010; stay tuned!). Take steps now to best-position your company or clients for what it will require.
Some construction projects seem destined to complete their close out in the court room, and with a down economy, the trend seems to be in that direction. Most contractors define success by whether they get their full retention, while owners look instead to whether the project was delivered on time and on budget. Between these lines is where most lawyers make their living, but lawyers who fail to understand the process of construction fail their clients by forcing close-out into the court room when that result could have been avoided.

Neither Owners nor Contractors typically care much about the contract documents until a dispute arises. Contractors often finance the construction and get nervous when the pay applications are slow to get certified and even slower to get paid. Owners get nervous when they see the schedule starting to slip, their budget leaking, or work being done that is of questionable quality. Most Owners are not sophisticated enough to know conforming work from non-conforming work, or when a schedule slip is worth worrying about, so they frequently contract with design professionals, construction managers, or owner’s representatives to give them advice. If these concerns are minor, they usually get resolved in the field, but when a major dispute erupts, everyone calls their lawyer and starts dusting off the contract. That’s when the letter writing campaigns begin and the threat of work and payment stoppages become real concerns.

Owners justifiably want their project delivered in accordance with the contract documents, but how much conformity is truly required? Most contractors will claim that no project can be built exactly as drawn, without a busted tolerance here or there, and any Owner who insists on strict conformity is unreasonable by definition. Contractors cannot afford to have major disruptions in their project cash flows, and abusive Owners are a real hardship. These unmet expectations are where the disputes originate, so we return to the contract documents to find out who is being the most unreasonable.

When this happens, the lawyer adds value to the Project by helping the client understand what rights they have and what rights they do not have. When an Owner or Contractor’s Poor Performance Is Not a Breach of Contract

Todd Harpst
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conditions usually provide the answers to these questions, but rarely are those answers easy to come by. It’s not enough for the lawyer to know what the contract says – but what it actually means, and the only way to know what it means is to understand project delivery.

For various reasons, many projects have some level of subjectively poor performance by one party or another, but the key to keeping close-out on the project and out of the court room is knowing when that poor performance translates into a breach of contract and when it does not. Thankfully, the courts have recognized that insisting on strict compliance with contract documents would result in clogged court dockets, so they embraced the concepts of “material breach” and “substantial performance” a long time ago. This means there is no breach of a construction contract unless the party’s poor performance is “material,” or stated another way, a party who has “substantially performed,” can not be found in material breach.

Determining what constitutes a “material breach” on a construction project is a very specific analysis that involves not only legal advice (based upon the contract language and any relevant court decisions or statutes), but the advice of other professionals, such as architects, engineers, construction managers, or other consultants. The challenge lies in being able to integrate this information cogently and efficiently so the client can be told: “Yes, you have the right to withhold payment,” or “No, you can not stop working.”

Courts have typically favored the Contractors when it comes to an Owner’s poor performance on payment. Although Contractors will usually put up with a slow paying Owner for a while, if it gets so bad the Contractor is considering its rights to suspend or stop work, the Owner should be worried about their poor performance being converted into a “material breach.” When considering whether the Owner’s failure to make on-time payments constituted a material breach, the court in General Ins. Co. of America v. K. Capolino Const. Corp. 983 F.Supp. 403 (S.D.N.Y.1997) not only found it was a material breach, but that the Contractor’s failure to properly certify that all his sub-contractors were paid was not a material breach excusing payment. Even though a clear contract violation, the Contractor cured that poor performance within two weeks.

The Owners have a more difficult time declaring a material breach when it comes to a Contractor’s poor performance. Most performance complaints boil down to non-payment of sub-contractors (including lien filings) and poor work (either construction defects or delays). When the Contractor is under scrutiny, the analysis becomes case specific, and the courts are all over the place as to what level of poor performance must exist before the Owner can declare a material breach and terminate for cause. Consequently, Owners take tremendous risk when making termination decisions.

Most warranty clauses give the Contractor the right to repair or replace the non-conforming work before being found in breach. As such, the mere presence of non-conforming work, by itself, is rarely a condition of breach.

Almost all contracts require notice to the Contractor and an opportunity to cure the non-conformity. Most warranty clauses give the Contractor the right to repair or replace the non-conforming work before being found in breach. As such, the mere presence of non-conforming work, by itself, is rarely a condition of breach. In those cases, the lawyer has to focus on whether the Contractor has met its cure obligation.

The same holds true in delay situations. If a contractor is behind the current schedule, he may not be in breach of contract until he actually delivers the project late, which is usually not known until the milestone or substantial completion dates have past. Most times, an Owner does not have the right to declare a breach just because the Contractor is behind schedule – because they can still make up the time by the date. In these cases, the contract language is very important as to the conditions that must exist regarding the Contractor’s poor progress before being in material breach.

Both Owners and Contractors also have to watch out for remedy clauses when it comes to poor performance. Delay scenarios have this common trap, and it can become a problem because many states have statutes that trump contract language. Many contracts have “no damage for delay” or “time extension as a sole remedy” clauses. They apply to either waive a Contractor’s right to pursue delay damages, or limit a Contractor’s remedy for delays to a time extension (rather than compensation). In Ohio, the Legislature thought that was unfair and wrote a law stating that such clauses are not enforceable against Contractors when the Owner is the cause of the delay. In states without such statutes, an Owner’s interference is neutralized by the remedy clause, so the Owner avoids a material breach. While in states with these statues, the Owner’s poor cooperation on scheduling matters can bring major liability.

Owners need to realize and accept that not every deviation from the specifications or schedule means the Contractor has committed a material breach and may not give them the right to withhold payment. Contractors need to realize that to avoid being hit with the nuclear option of termination for cause or having payments withheld, they can avoid being set-up by responding quickly to Owner-issued notices. If lawyers are involved, there has been at least a perception of poor performance by someone. Lawyers are often quick to draw their sword, attack the other side and focus on the poor performance. What is really necessary is an honest assessment of whether the poor performance rises to the level of material breach. No project that gets closed-out in the court room comes in on-time or on-budget. Sometimes, a court battle is necessary to be sure, and when they are, such battles must be fought aggressively. But most of the time, we can best serve our clients by avoiding premature declarations of material breach and keep close-out on the project where it belongs.

Todd Harpst is a Partner at Roetzel & Andress, LLP in its Akron, Ohio office. He focuses his practice on litigation and risk management for the construction industry.
While commercial general liability policies typically respond only to injury or damage that occurs during the policy period, the threshold question of which insurance policies are potentially “triggered” by an occurrence can be difficult, especially in cases where the damage is alleged to have taken place over an extended period of time. Further complicating this issue in the context of construction defect claims is the fact that there is often significant debate as to when the damage giving rise to liability actually took place. As a result, insurance coverage disputes arising from underlying construction defect litigation often involve considerable uncertainty as to which policies are potentially implicated by such claims. In that regard, the question of which trigger methodology applies is presently one of the most pressing and misunderstood concepts in construction defect coverage law.

KNOW THE TRIGGERS

The concept of “trigger” is a shorthand term to describe the event that determines whether an insurance policy is potentially implicated, subject to its terms, conditions and exclusions, to respond to a claim. Depending largely on jurisdiction, courts generally apply one of four theories for determining when coverage is triggered under an occurrence-based liability insurance policy. Under the “exposure” trigger, the triggering event is the initial exposure to the harm that ultimately causes damage. Under the “injury-in-fact” trigger, coverage is triggered when the damage first occurs. Under the “manifestation” trigger, coverage is triggered when the owner becomes aware of the property damage. Finally, the “continuous” trigger may implicate multiple policies in effect over a period of time in cases involving continuous, progressive, indivisible property damage.

Courts around the country are sharply divided over which trigger methodology applies is presently one of the most pressing and misunderstood concepts in construction defect coverage law.

PULLING THE RIGHT TRIGGER:
Identifying the Appropriate Insurance Policy Trigger Approach at the Inception of a Construction Defect Coverage Case

Jonathan P. McHenry
and Neil V. Mody
Connell Foley LLP

For example, New Jersey courts have consistently applied the manifestation trigger and—despite repeated policyholder attempts—refused to extend the continuous trigger outside the context of traditional long-tail (i.e., environmental, asbestos and toxic tort) cases to construction defect coverage claims. Other jurisdictions, such as South Carolina, have applied an injury-in-fact trigger to certain construction defect claims in a manner certain practitioners have characterized as more akin to a continuous trigger approach. Further confounding many practitioners, courts often state they are applying one trigger methodology but perform an analysis that arguably suggests another approach. As a result, even the highest courts from certain jurisdictions have left room for debate over which trigger methodology should apply in construction defect cases. Thus, it is less important to extract the label of a particular trigger approach from a given case than it is to understand how a jurisdiction has applied the trigger theory under similar facts.
GET THE FACTS

Just as important as identifying which trigger methodology will likely apply in a given jurisdiction, practitioners must discover as early as possible when the alleged damage took place under the applicable trigger approach. Thus, in a jurisdiction that has indisputably adopted the manifestation trigger, it is critical to identify precisely when the damage was discovered to determine which liability policy is on the risk. Where there is room for debate as to which trigger theory a court would apply, experienced practitioners must fully investigate when the “damage” could be deemed to have happened under each potentially applicable trigger methodology. This will enable the parties to intelligently evaluate the pros and cons of each trigger approach being advanced in the case.

PUT IT IN PRACTICE

Imagine a policyholder building an apartment complex in a manner in which an underlying plaintiff later charges in a lawsuit harmed its property. Specifically, the lawsuit charges that the policyholder’s actions or lack thereof resulted in water intrusion, corrosion, dry rot, or some other damage to a third party’s property. The policyholder, in turn, seeks insurance coverage in connection with the claims against it under three separate one-year liability policies. Assuming discovery reveals the construction took place in 2008, the damage actually happened in 2009, and the damage was ultimately discovered in 2010, which of the policyholder’s general liability policies are potentially implicated by the underlying construction defect claim?

The answer, of course, to this critical coverage inquiry depends largely on which of four generally recognized trigger methodologies is applicable in the subject jurisdiction. The exposure trigger methodology, which focuses on the initial exposure to the harm that ultimately causes damage, could potentially implicate the liability coverage in effect as early as when the construction took place in 2008. Conversely, the injury-in-fact trigger, which focuses on the moment actual damage takes place as opposed to the initial exposure, would trigger the liability policy in effect when damage to third party property happened in 2009. The manifestation trigger theory, which triggers coverage when damage is discovered, would implicate the liability policy in effect upon discovery of the damage in 2010. Lastly, the continuous trigger approach, if applied in the context of a construction defect case, would potentially implicate all policies on the risk from the time of initial exposure when the apartment complex was constructed in 2008, through the period of actual damage in 2009, to its manifestation in 2010. Thus, identifying the applicable trigger approach and timing of damage is instrumental in determining which liability policies are potentially implicated in a given construction defect case.

For this reason, it is imperative that practitioners carefully evaluate which trigger methodology will potentially apply to a coverage dispute at the inception of litigation.

CONCLUSION

In sum, the entire landscape of a construction defect coverage case is significantly impacted by the particular trigger methodology applied by the court. This single coverage question will determine whether a given policy, subject to its terms, conditions and exclusions, can potentially respond to a construction defect claim. For this reason, it is imperative that practitioners carefully evaluate which trigger methodology will potentially apply to a coverage dispute at the inception of litigation. By doing so, parties may be able to avoid extensive litigation over the myriad of coverage issues typically presented in construction defect cases by focusing on the right trigger of coverage from the start of an action.

FIX THE GUEST LIST

All too often, a construction defect coverage action is filed which includes insurers whose policies could never be triggered under applicable law or, alternatively, fails to include insurers who should be in the case. For at least three reasons, it benefits all parties to “fix the guest list” early by dismissing those defendants who do not belong in the case and joining those that do. First, litigating a case with the wrong parties creates case management nightmares. Judges are often reluctant to meaningfully proceed with significant discovery and/or motion practice until all the right parties are in the case. Second, conducting discovery with the wrong parties is a colossal waste of time. This is particularly true where defendant insureds are forced to engage in needless discovery merely to confirm their policies can never be triggered by the occurrence of property damage during the policy period. Finally, having the wrong parties in a case can significantly hinder settlement efforts. Defendants facing no exposure typically take strong no-pay positions and/or file early dispositive motions, which may have the practical effect of delaying or derailing attempts to reach a global resolution among parties belonging in the case.

Once it has been discovered that a party in the case should be dismissed because its liability policy cannot be triggered, that party should be voluntarily dismissed. If the policyholder refuses to dismiss its claim, in many cases an early dispositive motion is appropriate. Similarly, where a party whose liability policy was likely triggered is not initially included in the litigation, judicial standards for adding parties are generally much more lenient early in a case than on the eve of trial.

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I-9 Tips to Help Your Company Avoid Becoming a Victim of Immigration Customs and Enforcement

Jennifer Parser  Poyner Spruill LLP

The Form I-9 is a mandatory employment eligibility verification form. Completion of the I-9 by both employer and employee must occur within three days of hire for every employee hired after November 7, 1986, regardless of nationality or immigration status. I-9 violations can occur even if your workforce is legal. A paperwork violation can be something as simple as failing to date or sign the Form I-9. Fines can range from $110 to $1,100 per paperwork violation, but increase exponentially for knowing violations. For instance, employers convicted of having knowingly hired unauthorized aliens or continuing to employ aliens who are or became unauthorized to work in the United States may face fines of up to $3,000 per employee and/or six months imprisonment. The following rules should assist your organization in being I-9 compliant.

**TIP 1**
I-9s cannot be used to screen job applicants. They can only be used to confirm employment eligibility after hiring.

**TIP 2**
If you are copying blank I-9 forms for completion, both sides must be copied or the I-9 is incomplete, potentially resulting in a fine. This means that the List of Acceptable Documents on the back of the Form I-9 is part of a complete I-9.

**TIP 3**
Any changes to an existing I-9 must be done by striking through, correcting and having you as employer and the employee initial those changes as applicable.

**TIP 4**
If a Form I-9 is incomplete or needs correcting, you also have the option of using an updated Form I-9 and attaching it to the old I-9.

**TIP 5**
Are you using a current Form I-9? Below is a chart of which Form I-9 should be used:

<table>
<thead>
<tr>
<th>If hired on or after:</th>
<th>Use Form:</th>
</tr>
</thead>
<tbody>
<tr>
<td>July 5, 2007</td>
<td>06/05/07</td>
</tr>
<tr>
<td>03/03/09</td>
<td>02/02/09</td>
</tr>
<tr>
<td>09/07/09</td>
<td>08/07/09</td>
</tr>
<tr>
<td>08/07/09, but the 02/02/09 edition is also acceptable.</td>
<td></td>
</tr>
</tbody>
</table>

The latest Form I-9, dated 08/07/09, and any subsequent updates, can always be found at http://uscis.gov/files/form/i-9.pdf

**TIP 6**
You do not need to maintain copies of the documentation showing identity and employment eligibility that is presented by the employee as part of the I-9 process. But if you do, you must do so for all employees or risk being liable for document abuse.

**TIP 7**
You may not suggest to an employee which documents to present or risk being liable for document abuse.

**TIP 8**
Any document used to indicate employment authorization with an expiration date needs to be followed up on by completing Section 3 of the I-9 or by completing a new I-9.

**TIP 9**
In the case of expiring employment eligibility documentation, it is the employer’s responsibility to notify the employee between four to six months of expiration to obtain new proof of employment eligibility and complete Section 3 of the I-9.

**TIP 10**
Employee name changes also require completion of either Section 3 or a new Form I-9, but changes of address do not.
TIP 11
Form I-9 carries strict retention rules: three years from date of hire or one year after termination of employment, whichever is longer.

TIP 12
Discard all I-9s that no longer need to be retained.

TIP 13
If your organization acquires a business and its employees, you can use the previous owners’ I-9s but you are responsible for any mistakes in them.

TIP 14
If you use an outside I-9 management and storage contractor, confirm that your contractor is able to retrieve and make the information requested by an Immigration and Customs Enforcement ("ICE") notice of inspection available in its required time frame of 72 business hours.

TIP 15
By checking the employment eligibility of an independent contractor’s employees working at your organization, you are assuming responsibility for the independent contractor’s I-9 process. Once it does so, a company can be deemed to have knowledge of it, by doing so, it discovers that workers on its premises hired through its subcontractor are not employment authorized.

TIP 16
Rather than assume the responsibility of checking whether a subcontractor’s employees are work authorized, require the subcontractor to confirm that its workforce is legal.

TIP 17
Do the research: before entering into an agreement with a prospective independent contractor, ascertain whether it has experienced problems with either the Department of Labor or United States Citizenship and Immigration Service.

TIP 18
Actual knowledge of an independent contractor’s illegal workforce is not the only way your company could be liable. Constructive knowledge is enough to impose liability. Constructive knowledge is defined as “knowledge which may fairly be inferred through notice of certain facts and circumstances which would lead a person, through the exercise of reasonable care, to know about a certain condition.”

TIP 19
Ask experienced counsel to review your existing agreements with any independent contractors, and, if necessary, prepare a side agreement to insulate your company from liability of potentially illegal workers performing under that agreement. But be aware that having constructive knowledge of an illegal workforce trumps any agreement.

TIP 20
Just calling it an independent contractor relationship, even by contract, does not make it so. Train your managers to know the difference between independent contractors and employees and not treat an independent contractor’s employees as company employees.

TIP 21
To be prepared for an ICE inspection is to have already in place clear, consistent I-9 policies and have already conducted your own internal audit.

For further information or to schedule an internal audit, please contact Jennifer Parser at 919-783-2955 or jparser@poynerspruill.com.

Jennifer Parser’s practice includes a broad range of immigration and labor and employment matters. She is a multi-lingual attorney able to handle all immigration matters, including visas, pre-PERM and PERM labor certifications, permanent resident, investor, employment, and family-based visa petitions, deportation and political asylum cases, and naturalization matters.
I have worked with all sorts of witnesses over the past 25 years. Two types still scare me. The first is what I call the “Just leave it to me” witness. This person finds it hard to believe that time must be spent in preparing for a deposition or even trial testimony when he or she is clearly smarter than everyone involved in the case including the lawyers, the jury and the judge. The other witness I fear is at the opposite end of the spectrum. This is the “I know I’ll lose the case” witness. Despite great preparation, this witness believes that giving testimony under oath will be both unbearable and the death nail for the case. I know how to prepare these difficult witnesses, but they still scare me.

One type of witness I no longer fear is the corporate representative or 30(b)(6) witness. 30(b)(6) is a Federal Rule of Civil Procedure that allows a party to identify subject matters or topic areas that must be answered by the company’s designated representative. When a 30(b)(6) Deposition Notice is served, the company “must designate one or more officers, directors or managing agents, or designate other persons who consent to testify” on behalf of the company. When served with a 30(b)(6) Notice, the first logical question is Who Should Speak for the Company? However, some other issues need to be explored before answering that question.

Most states have a Rule similar to the Federal Rule described above. Perhaps the most important factor to keep in mind is that the testimony of the corporate representative binds the company and may be used for any purpose at trial.

NEGOTIATE THE TERMS OF THE 30(B)(6) NOTICE
Often times, a 30(b)(6) Notice of Deposition requesting the testimony of a corporate representative will be served in draft form. Even when it is in final form, the terms are almost always negotiable. Because the Rule requires a party to “describe with reasonable particularity the matters for examination,” there may be disagreement over whether the matters to be covered have been clearly described or it may be argued that the topics are inappropriate in the context of the pending lawsuit. Also, beware of 30(b)(6) issues that are raised by way of letter, e-mail or Interrogatory. The other side may seek to “put you on notice” through these other forms.

Too often we spend our time focused on the procedure, i.e., Is the deposition going to be limited to the 7 hour rule in Federal Court? When and where are we going to take the deposition? Is it going to be videotaped? All of these things are subject to agreement, but this is the time to start negotiations on the substantive “topics.” You may also receive a Subpoena requesting documents to be produced at the deposition. Demand that the topics in the Deposition Notice and the documents in any subpoena are adequately described. Also object to topics requesting information that is easily obtainable from another source. If negotiations fail, you may need to seek a Protective Order.
DESIGNATE THE CORPORATE REPRESENTATIVE

One of the reasons that a 30(b)(6) deposition no longer scares me is because you get to preview the other side’s questions by carefully reviewing and negotiating the terms set forth for examination. You also get to choose the person to testify on behalf of the company. The right person or persons will depend upon the topics designated. Although the designated topics will be different in every case, some of the more common areas include corporate governance, information technology, testing and safety procedures, training, company policies and procedures, relationships between entities and individuals and negotiations performed on behalf of the company.

We are seeing more and more 30(b)(6) depositions related to the storage of electronic information. Your company or client may have complete confidence in the IT person to answer those types of questions for the company. On the other hand, you might believe that the IT person will make a terrible witness. Remember, you can choose to designate someone else. Often times 30(b)(6) Notices cover multiple matters that cross lines of responsibility. Again, keep in mind that there is no obligation to designate only one representative. Multiple persons may be designated for differing subject matters.

So, Who Should Speak for the Company? Whomever you choose, understand that this person must not simply be a human body to speak on behalf of the corporation. There is a duty under the Rules and caselaw to designate someone that either knows the subject matter or has educated themselves about the noticed topics. Unlike a routine fact witness deposition, the answer “I don’t know” can be lethal and a cause for sanctions against your company or client. So while the Rule does not require that you designate the “best” person, it does require that you designate and present an educated witness that can speak on behalf of the company and have answers for the topics to be covered. Interestingly, this does not have to be an officer or employee of the company. The Rule allows for the designation of any other persons who consent to testify on behalf of the company. This might include a retired officer or employee. It might include a consultant or some other trusted and loyal friend of the company. In-house and outside counsel should exchange information and thoughts about the best person to designate. Both will usually have perspectives that aid in the proper choice. Additionally, in-house and outside counsel can assist in educating and preparing the designated person for the actual deposition.

Counsel and company management should discuss the deposition topics with the employees or other persons most knowledgeable about the specifics involved. You will now have enough information to make your designation.

EDUCATE THE WITNESS

Educating the corporate representative for deposition involves gathering and reviewing the necessary information about the subject matters designated in the Notice. Caution: Avoid having corporate representative designees review privileged or otherwise protected documents that may be discovered at the time of deposition unless you are prepared to waive the privilege. Review of privileged documents cannot always be avoided, but should be considered when gathering the information to be reviewed by the designated witness. Your representative may need to talk with other corporate employees or representatives to educate themselves about a specific topic or subject matter. Keep in mind that the 30(b)(6) witness does not speak based upon his or her “personal knowledge.” He or she speaks for the corporation. In-house and outside counsel can assist in providing the designated witness with the relevant documents to review. This might include the topics from the Notice, certain pleadings, discovery responses or briefs. The company’s internal documents, manuals, corporate structure or similar documents may need to be reviewed.

PREPARE FOR THE DEPOSITION

Preparation for the 30(b)(6) deposition incorporates many of the ideas referenced above but is a unique process unlike preparing a fact witness. It is important to prepare the witness to testify about facts, policy and opinion from the company’s perspective. The witness should be counseled to distinguish between the company position and the individual’s view of the world. At the deposition, the ground rules must be set with regard to the specific topics that the designated witness will be testifying about. Company counsel should always clear up any issues that might cloud the distinction between the individual as the company representative and the individual as a fact witness.

The dangers of an unprepared corporate representative are incentive to thoroughly cover things with your witness in advance. The company is bound by the testimony of an unprepared 30(b)(6) witness whose testimony may conflict with other company fact witnesses. The unprepared 30(b)(6) witness may reveal legal strategy from in-house counsel and waive the work product or attorney-client privilege. The unprepared corporate representative may testify on matters outside of the designated topics in a way that damages your case.

Some type of mock deposition will prove useful after you have designated and educated a witness. You want to know (and help direct) how the company representative will answer the questions. The good news is that you already have an outline of the other side’s questions in the Deposition Notice.

CONCLUSION

When a 30(b)(6) Notice or similar request is served and you have to determine Who Speaks for the Company, it is important to remember that it is a process. Negotiate, Designate, Educate and Prepare. These are the keys to a successful 30(b)(6) deposition. You no longer need to fear these depositions. There are actually advantages to defending a 30(b)(6) deposition. You get to choose the witness or witnesses. You know (and can limit) the topics to be covered in the depositions. Finally, it allows the company and its counsel to establish the company’s position and plan a trial strategy around it.

There are many good sources for further reviewing 30(b)(6) deposition issues. A few are listed here for your reference:

2. “Selecting and Preparing Corporate 30(b)(6) Witnesses,” The Metropolitan Corporate Counsel (Volume 11, No. 9)
3. www.dri.org, search 30(b)(6) articles
Kathy Davis of Carr Allison (Birmingham, AL) has recently been designated the National Coordinating Counsel for Zurich’s Reactive Drywall Cases involving Distributors. This work will mainly involve “Chinese” drywall cases in various states and the MDL case currently pending in the Eastern District of Louisiana before Federal Judge Eldon Fallon.

John P. Lacey, a partner with Connell Foley LLP (Roseland, NJ) was appointed president of the Association of the Federal Bar of New Jersey. The Association represents more than 800 attorneys who practice before the United States District Court for the District of New Jersey. In his capacity as President, John works with Association members and the District Judges to present legal education programs and other initiatives regarding practice in the United States District Court for the District of New Jersey.

The country of Georgia recently named John E. Hall, Jr. of Hall Booth Smith & Slover (Atlanta, GA) as its first Honorary Consul for the Southeast United States. John’s appointment brings the number of nations that have honorary consuls or trade offices in the state of Georgia to 62. His involvement with the country of Georgia began in 2007 when he participated in the Open World Program, which hosted a delegation of Georgian attorneys in Atlanta. That prompted him to become active in the Atlanta-Tbilisi Sister City Committee (ATSCC), which he currently chairs.

Phillip Stanfield, a Partner with Jones, Skelton & Hochuli, P.L.C. (Phoenix, AZ), and Charles Bauer, a Shareholder–Director with Gallagher, Callahan & Gartrell, P.C. (Concord, NH), have become Fellows of the American College of Trial Lawyers.

Minnesota USLAW member Larson • King is pleased to announce that John R. Allison joined the firm on March 15th. John was Assistant General Counsel at 3M where he had overall responsibility for litigation, and brings to the firm invaluable experience as an in-house attorney and years of experience overseeing mass tort, class action, environmental and other complex litigation. Larson • King is also pleased to announce the January 2010 publication of Arbitration Acts: A Desk Reference, Second Edition. This revised edition is a valuable resource for anyone facing or pursuing arbitration as a form of alternative dispute resolution. It contains the complete text of several relevant national and international arbitration acts, including: Federal Arbitration Act; Uniform Arbitration Act; Revised Uniform Arbitration Act; Convention on the Recognition and Enforcement of Foreign Arbitral Awards; English Arbitration Acts of 1996 and 1950; UNCITRAL Model law on International Commercial Arbitration; and International Chamber of Commerce Rules of Arbitration.

Lee Piovarcy of Martin, Tate, Morrow & Marston, P.C. (Memphis, TN), has been elected President of the Trucking Industry Defense Association (TIDA). He leads a 1,500 member trucking organization comprised of motor carriers, insurers of motor carriers and those attorneys who defend the trucking industry.

Quattlebaum, Grooms, Tull & Burrow PLLC (Little Rock, AR) is one of a limited group of law firms across the country designated as lead trial counsel in the defense of manufacturers of welding products against claims of neurological injury due to exposure to manganese in welding fumes. Steve Quattlebaum, John Tull, and Kris Baker, with other lawyers from the firm, have tried three of these cases to date resulting in two defense verdicts and one plaintiff’s verdict, which is currently on appeal.

Roetzel & Andress, LPA’s (Cleveland, OH) Business Services Practice Group assisted clients with numerous international transactions in 2009. These included structuring, documenting and negotiating numerous matters for our clients, including direct sales agreements, distribution arrangements, acquisition terms, corporate restructuring, intellectual property protection and compliance and export compliance. These matters were for both out-bound and in-bound transactions, with parties and sales in multiple countries, including Ecuador, Japan, Greece, Malaysia, Brazil, Columbia, Korea, Morocco, Spain, Canada, Venezuela, Mexico, Argentina and Italy.
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In today’s global marketplace, legal needs often transcend geographic boundaries. Clients with complex legal needs turn to USLAW NETWORK member firms to represent them in the courtroom and the boardroom, next door and across the United States.

When a complex legal matter emerges — whether it’s in a single jurisdiction or nationwide — USLAW is there. We represent some of the country’s leading businesses in matters ranging from complex commercial litigation, employment law, products liability, and professional malpractice defense.

USLAW NETWORK is a national organization composed of over 60 independent, defense-based law firms with over 4,000 attorneys covering the entire United States and Mexico. An alliance with the Trans-European Law Firm Alliance (TELFA) gives us access to 26 European law firms each representing its own jurisdiction.

For more information, visit us at www.uslaw.org or contact Roger Yaffe at roger@uslaw.org.
Ahmuty, Demers & McManus (Albertson, NY)
The plaintiff, a 43 year-old male, claimed he sustained an exacerbation of a pre-existing back injury resulting in a hemilaminectomy, facetectomy and foraminotomy at L5/S1; and a second surgery consisting of an open retro-peritoneal exposure of the lumbar spine, anterior lumbar interbody decompression and fusion at L5/S1; anterior spinal instrumental implant at L5/S1; lumbar implant, bonegraft and revision hemilaminectomy. The plaintiff claims that as he was walking down the front stoop at the premises he tripped on loose bricks which separated from the step causing him to fall. Patrick Conney of Ahmuty, Demers & McManus argued comparative negligence and assumption of risk at trial. The plaintiff’s credibility came into question as he sent emails to his employer which casted doubt whether the accident actually happened. Three prior convictions for DWI, reckless endangerment and petit larceny and filing a false instrument, while initially denied by the plaintiff were put in front of the jury. Plaintiff made a demand of the $500,000 policy. The jury rendered a verdict in favor of the firm’s client.

Dillingham & Murphy, LLP (San Francisco, CA)
Carla Hartley successfully defended a two plaintiff sexual harassment/retaliation case in December 2009. The plaintiffs, male and female construction workers, alleged that they were sexually harassed by their employer’s job superintendent while working on a canal project in the Coachella Valley. They contended that after they complained, the company retaliated by assigning them to menial work and forcing them to leave the company. After a three week trial, the jury returned a defense verdict as to the male plaintiff. The jury found for the female plaintiff but only on a theory that the company had negligently retained the superintendent and awarded $41,000 in damages. This verdict was less than the defendant’s statutory offer to compromise for $60,000 plus costs and attorneys’ fees which was served nine months before trial. While cross motions to tax costs are pending, it is anticipated that the net judgment will be less than $25,000. The case, Shoemaker, et al. v. R & L Brosamer, et al. was tried in Contra Costa County Superior Court.

Fee, Smith, Sharp and Vitullo, LLP (Dallas, TX)
Partners Tom Fee and Rebecca Bell (appellate counsel), who teamed with fellow trial lawyer Ed Wright, recently obtained a defense verdict on behalf of Austin Bridge & Road, L.P. The jury awarded total damages of over 23 Million Dollars to Plaintiff Jackie Murphy (whose life care plan alone totaled in excess of 12 Million Dollars) and assigned negligence to each of the other Defendants and designated responsible third party, TxDOT. Ms. Murphree sustained a very severe, permanent brain injury as the result of a motor vehicle collision with an intoxicated driver who was illegally operating a vehicle in a construction zone on Highway 380 during the Highway 380 Widening Project in Wise County, TX in 2007. Compliance with the Traffic Control Plan and the Manual on Uniform Traffic Control Devices were key issues of dispute during the course of the two-week trial. The jury determined that Defendant Monroe was 70% responsible for the accident. The jury also determined that Site Concrete and the Texas Department of Transportation each held 15% liability. The jury found in favor of Austin Bridge & Road, answering “NO” to the initial liability question as to its alleged negligence.

Hall Booth Smith & Slover (Atlanta, GA)
Hall Booth Smith & Slover Partner Chip Benton and Associate Dean Taylor successfully defended an ophthalmologist who was accused of failing to diagnose an infection on a corneal transplant for one of his patients. The case was tried for one week where the Plaintiffs asked for over $1,000,000 in compensatory damages for blindness to her eye. The allegations were that the ophthalmologist failed to diagnose an infection. The ophthalmologist’s defense was that the symptoms and signs indicated a rejection of the corneal transplant rather than infection. The jury deliberated approximately three hours before returning a defendant’s verdict to the ophthalmologist and his practice.

Hinckley, Allen & Snyder, LLP (Hartford, CT)
William S. Fish, Jr. and William H. Champlin III, partners in Hinckley, Allen & Snyder’s Connecticut office successfully represented the state’s largest newspaper, The Hartford Courant in a whirlwind effort in July 2009 to obtain the Report of an Investigatory Grand Jury concerning probable cause that Hartford’s Mayor committed a crime or crimes. On June 29, 2009, the Grand Juror filed his report and the Chief State’s Attorney immediately filed a Motion to Seal the Report of the Grand Jury. On July 20, 2009, Bill Champlin successfully moved to intervene for our client and argued for release of the report. After the Grand Juror granted the Motion to Seal on July 23, 2009, Bill Fish and Bill Champlin filed a Petition for Review with the Appellate Court on July 24, 2009 and the Supreme Court transferred the Courant’s Petition to its docket. After less than a week for briefing, the Supreme Court held oral argument on July 29, 2009. Bill Fish argued for public disclosure of the Report. On September 2, 2009, the Supreme Court issued its decision reversing the Grand Juror decision to seal a portion of
the report but affirming the Grand Juror’s sealing of other portions to protect the interests of persons not accused and to protect the fair trial rights of defendants. The decision came in an intense effort to affirm the public’s right to know the details of the work of a Grand Juror investigating political corruption in Hartford.

Klinedinst PC (San Diego, CA)
Kevin Gramling, Managing Shareholder of Klinedinst PC, Santa Ana, successfully defended his apartment complex client in a premises liability case. The lawsuit involved a tenant who claimed she tripped and fell due to a crack in the parking lot. The defense argued that the crack in the parking lot was a trivial defect that did not warrant repair. The defense also argued the crack did not cause the plaintiff to fall. The plaintiff ruptured her left Achilles tendon in the accident, and the following day, ruptured her right Achilles tendon. The plaintiff sought $105,000 in medical specials, $10,000 in lost wages, over $600,000 in non-economic damages and over $90,000 in future non-economic damages. The judge granted the defense’s motion for directed verdict, finding that the crack was a trivial defect.

Martin, Tate, Morrow & Marston, P.C. (Memphis, TN)
Lauri Prather and Lee Piorvcey successfully defended Gordon Trucking Company in the United States District Court for the Northern District of Mississippi at Oxford. Plaintiff was seeking $3 million in damages. There was no issue that the Plaintiff had sustained serious and permanent injuries causing her to walk in metal braces the rest of her life. Her medical expenses were in excess of $500,000. The jury found that the Gordon truck driver did not run the vehicle off the road in which the Plaintiff was a passenger which finding resulted in a judgment in favor of the trucking company and its driver.

Murchison & Cumming, LLP (Los Angeles, CA)
In the case of Robbyn Kuykendall v. The Vons Companies, Inc., Murchison & Cumming, LLP Partner Jefferson Smith secured victory with a unanimous verdict from an East County San Diego Superior Court jury. The jury declared Mr. Smith’s client, The Vons Companies, reasonable in the maintenance of their Spring Valley store property, in response to allegations of safety-related negligence by Plaintiff Kuykendall. On May 23, 2008, a day of scattered showers, Plaintiff entered the Spring Valley supermarket wearing flip-flops. She walked past an orange cone located just outside the store’s entrance doors, and over a six-foot mat, before slipping and falling almost four feet from where the mat lay. Plaintiff, who eventually underwent surgery for total knee replacement, contended the store should have placed a warning cone inside the lobby, that the floor mat was worn and saturated, and that the floor was unreasonably slippery. In response, the defense presented evidence illustrating reasonable precautions taken by the store, with safety measures in place during the time of the incident. The defense also argued that the cone was not necessary because it was obvious foot traffic could cause tracking of rainwater into the lobby entrance, and that the floor was reasonably safe under such conditions. In the end, the proven integrity of Store Manager Tim Bottenberg, and the implementation of safety precautions taken by his store, prevailed over Plaintiff’s attempts to sway the jury with colorful witness testimony recounting her community service acts. Associate Partner Scott Loeding handled Law & Motion for the defense.

Quattlebaum, Grooms, Tall & Burrow PLLC (Little Rock, AR)
In May 2009, Steve Quattlebaum served as lead trial counsel in a two-week toxic tort trial in which the plaintiff claimed that arsenic used by poultry companies caused his leukemia. The jury found in favor of the defendants after only two hours of deliberation.

Traub Lieberman Strauss & Shrewsbury, LLP (Hawthorne, NY)
Partners Stephen D. Strauss and Gerard Benvenuto secured a defense verdict at trial for their client, Northwestern National Insurance Company (“NNIC”) in an environmental cost recovery and insurance coverage action entitled, State of Minnesota v. Evanston Insurance Company, et al., Court File No. 62-C7-05-12469 (Minn. Dist. Ct. Ramsey County). This action was initiated by the State of Minnesota against various insurers under the Minnesota Landfill Cleanup Act, Minn. Stat. §§ 115B.441-445 (“Act”). The Act authorizes the State to bring actions directly against insurance companies that issued liability policies to insureds alleged to have disposed of waste at publically used landfills where the State has incurred environmental response costs. NNIC is the first of the more than 50 insurers sued under the Act in six separate actions filed over the course of 10+ years to proceed to trial. All other insurers named as defendants in this case and in the other actions commenced by the State settled before trial. This bifurcated trial involved the State’s attempt to establish the liability of NNIC’s insured for cleanup costs incurred at certain landfills under the Minnesota Environmental Response and Liability Act (“MERLA”), which is a prerequisite to recovering insurance proceeds under the Act. After a trial involving fact and expert testimony by multiple witnesses, the court held that the State did not prove its case as there was insufficient evidence to establish that NNIC’s insured significantly contributed to the environmental damage at the subject landfill during the relevant policy period.

Wicker, Smith, O’Hara, McCoy & Ford, P.A. (Miami, FL)
Orlando, FL member firm Wicker, Smith, O’Hara, McCoy & Ford, P.A., recognizes Richards H. Ford and Brian D. Stokes for successfully obtaining a defense verdict in a 1 week trial seeking damages alleged to be the result of negligence by a surgeon during the performance of a laparoscopic cholecystectomy. The Plaintiff had alleged that the defendant doctor had failed to properly identify the anatomical organs as a result of which he cut the common hepatic duct as well as the right and left hepatic ducts instead of the cystic duct. The defendant acknowledged having cut the wrong organs but asserted this did not constitute negligence. Plaintiff demanded $650,000 at mediation. The jury deliberated for just over four hours before returning its verdict.

OTHER USLAW MEMBER CASES OF NOTE
SmithAmundsen, LLC (Chicago, IL) and Johnson (Houston, TX)
On March 8, 2010, Judge A. Benjamin Goldgar of the United States Bankruptcy Court in Chicago confirmed a creditors’ election of Jeff Marwil as chapter 11 trustee in the consolidated cases of Life Fund, 5.1 LLC; Life Fund, 5.2, LLC; Houston Tanglewood Partners, LLC; A&O Resource Management, LP; A&O Life Fund, LLC; A&O Bonded Life Assets, LLC; and A&O Bonded Life Settlement, LLC, overruling the objections of the U.S. Trustee’s Office and of the original chapter 11 trustee, Patrick Collins. The cases involve over 722 investors in bonded, life settlement contracts who appear to have been defrauded in their investment. The election of Mr. Marwil was invoked and won by a Group of Investors represented by Houston counsel Deborah J. Fritsche and Lori Hood with the Johnson, Trent, West & Taylor law firm, and local, Chicago counsel Brian M. Graham of SmithAmundsen.

Cox Smith Matthews Incorporated (San Antonio, TX)
The firm represented TXCO Resources Inc., a San Antonio-based oil and natural gas exploration and development company, in the February 11, 2010 sale of TXCO’s assets in the Maverick Basin of Southwest Texas to Newfield Exploration Co and Anadarko Petroleum Company. The $310 million acquisition of substantially all of the assets of TXCO was completed pursuant to an Order of the United States Bankruptcy Court for the Western District of Texas. Deborah D. Williamson, the bankruptcy department leader, led the Cox Smith legal team, which was comprised of attorneys across the firm’s bankruptcy, litigation, corporate, energy and tax practice areas.
on the list home for the day. The employees may leave the premises, but must not remove anything that could potentially be the subject of the search warrant.

One of the primary reasons for sending home all non-essential employees is to reduce the number of people that law enforcement agents potentially can interrogate during the search. Law enforcement officials execute search warrants in dramatic fashion to surprise and intimidate employees, with one goal being to extract from them damaging information about the company. The manager-in-charge can reduce the number of individuals that could potentially give a statement by sending all non-essential employees home. Law enforcement agents should not stand in the way of sending non-essential employees home.

The second benefit to the company of sending home non-essential employees is to minimize the disruption to business operations. After seeing armed law enforcement agents swarming in the doors with a search warrant in hand, employees naturally will feel stressed about the security of their own jobs. The longer the employees stand around while agents rummage through the premises, the more their stress and anxiety will grow. Furthermore, rumors invariably will ensue regarding the reasons that agents focus on a particular person’s office or files. These rumors can spread like wildfire throughout the company, often with damaging effects on employee morale, cohesiveness and productivity. In our experience, employees will appreciate the offer to leave the hectic, overwhelming situation created by the execution of a search warrant.

Prior to sending employees home, the manager-in-charge should speak with all employees, either individually or in a group, to explain what the agents are doing on the premises. Although the manager might not have much information about the investigation, there are a few basic facts that can usually be communicated. The manager should indicate to the employees that the company: 1) has not been charged with or accused of any wrongdoing (assuming this is accurate); 2) has retained competent legal counsel; 3) is cooperating fully with the agents; and 4) will provide further information as soon as practicable. The employees should also be advised that they could be approached by the media, and the manager-in-charge should remind each employee of the company’s policy regarding communicating with the media, usually contained in the employee handbook.

All employees, whether they are leaving the premises for the day, or are remaining to assist the agents with the search, will likely have the same question: what should I do if I am approached by a law enforcement agent looking for information about the company? This question is best left answered by the company’s legal counsel. Providing a wrong, or even a poorly worded, answer could trigger accusations from the government of a serious crime: obstruction of justice. Given that in our scenario corporate counsel is not present on the scene, the best approach is for the manager-in-charge to simply advise employees that it is each individuals’ decision whether or not to talk with law enforcement. The manager-in-charge can also remind the employees that they are free to tell the agents that they would like to consult with an attorney before responding to any questions. It is imperative, however, that the manager-in-charge does not in any way direct employees not to speak with the agents. Such an instruction, while seemingly innocuous and practical at the time, can later be construed by the government as the company impeding its investigation, and could lead to an obstruction of justice charge.

**POA # 5: Offer Your Cooperation to the Agents**

Once all of the non-essential employees have been sent home, the manager-in-charge should locate the agent in charge, and ask him whether there is anything he or she can do to help the agents locate the enumerated items for which they are looking. By then, the manager-in-charge will have reviewed the search warrant and may be able to direct the agents to the location of the items they are authorized to seize. The manager-in-charge should tell the agents that they are free to search within the limits of the warrant and that he or she will assist them as necessary. Without impeding the search, the manager-in-charge should attempt to determine whether the agents are searching in places and seizing items that are not authorized by the warrant. Such information could prove useful to the company’s attorney later in the investigation. At no point, however, should the manager-in-charge disrupt or impede the search.

In addition, although the manager-in-charge should offer his or her assistance, he or she should not engage in a discussion with law enforcement regarding the details of the investigation, or attempt to explain why he or she thinks the organization is innocent. The goal on the day of the search is to get through the process as quickly as possible without compounding the company’s problems or creating new ones, and any extraneous communication, albeit in the spirit of cooperation, could potentially harm the company in the long run.

Oftentimes, the files that the government is attempting to seize are located on computer hard drives or servers. The agents at the scene may wish to seize these items. Such drastic action can have a devastating impact on any business by leaving it without access to its critical business records and other crucial data. It is recommended, therefore, that the manager-in-charge, in consultation with other company leadership, designates an Information Technology employee who will be deemed a “essential employee” the day of the search, and who can thus be on hand to assist the agents in locating computer hard drives and servers, and downloading the pertinent information contained in the warrant. Such assistance may eliminate the need for the agents to seize the hard drives and servers. As the IT professional will likely spend significant
time with agents on the day of the search, it is critical that the individual receive proper training, in advance, regarding his or her role in the process, the need to assist the agents in a polite fashion, and that he or she is to avoid unnecessary “chit chat” with the agents regarding the company and its business operations.

POA #6: Obtain and Scrutinize the Search Warrant Inventory

Once the agents have located and seized the items specified in the search warrant, they are legally obligated to provide an inventory of all items they intend to take with them. The manager-in-charge should carefully review the search warrant inventory and ask any questions he or she might have about the description of the items being seized. Depending on the volume of materials seized, the manager-in-charge may wish to request to make a copy of the seized documents and records before they are taken off-site, to minimize disruption of ongoing business operations. The lead law enforcement officer must sign the search warrant inventory.

POA #7: Once The Search Is Over, Politely Ask the Agents to Leave the Premises

After the manager-in-charge is satisfied with the search warrant inventory, he or she should politely ask the agents to leave the premises. Should the agents linger for any period of time after finalizing the inventory, the manager-in-charge should firmly but politely stress the need for them to leave. Hopefully, by this point, counsel has been able to arrive at the scene and can assist with this process. Once the agents have completed the tasks authorized by the search warrant, in most instances, they no longer have legal authority to remain on the company’s premises. Furthermore, ensuring that the agents leave as quickly as possible minimizes their ability to attempt to question the employees who still remain in the office. In addition, until the agents leave the premises, the company cannot begin the process of debriefing its employees and conducting its own review of the agents’ actions.

The manager-in-charge must remember that during all contact with the agents, he or she must remain calm, polite, and cordial. It is firmly against the company’s interest to have any hostile confrontations during the execution of a search warrant.

POA #8: Conduct Your Own Post-Search Inventory

As soon as the agents have left the premises, the manager-in-charge should conduct an inventory of the offices to determine precisely where the agents looked during the search. It is important to note any damage that may have been done to the company’s property during the course of the search.

The manager-in-charge should take detailed notes regarding his or her findings to be provided to the company’s counsel as soon as he or she arrives. No detail is too small to note during this post search inspection. In our experience, it is sometimes the little details that have been noted that later become critical as the government’s case progresses.

POA #9: Debrief All Employees Who Remained on the Premises During the Search

The manager-in-charge should speak individually with each employee who remained on the scene during the execution of the search warrant. The employees’ personal observations of what the agents were looking at, what they took, and what they said, could prove valuable to the corporations’ lawyers. In addition, the manager-in-charge should ask if any employee gave any statements to the agents. If so, the manager-in-charge should make a note for the attorneys. At a minimum, the manager-in-charge should be prepared to provide corporate counsel with a roster of all employees who witnessed any portion of the search.

POA #10: Do Not Lower Your Guard Once the Government Leaves the Building

In the days, weeks and months following the execution of the search warrant, company management should report any inquiries or other events that they find out of the ordinary to corporate counsel. From our experience, law enforcement agents may pre-arrange telephone calls and meetings with individuals who are cooperating with the government. These calls, meetings, and other encounters may be taped and monitored by the government as part of its ongoing investigation. The government is obviously looking for the company to say or do something incriminating, or that supports its theory of wrongdoing.

Because searches often occur in the early stages of an investigation, the company should be prepared to deal with the government’s typical investigative methods that follow a search. These tactics involve requests to interview employees, issuing grand jury subpoenas to employees, and serving the company with a “clean-up” subpoena for documents not seized during the search. Hopefully, by the time these events occur, the company will have experienced white collar criminal defense counsel who will be prepared to respond.

CONCLUSION

The federal government is spending millions of dollars in its effort to detect and deter fraud and abuse. We predict that with the substantial increase in funding being allocated to law enforcement agencies, the use of search warrants during early stages of investigations will be on the rise. An increasing number of companies may find themselves, therefore, facing the unpleasant experience of responding to a search warrant. Companies must be prepared, in advance, to respond calmly, effectively, and legally during the search. Without such advance preparation or decisive decision making at the scene, companies risk committing critical mistakes that can lead to lengthy, expensive, and potentially devastating criminal prosecutions.

To avoid or minimize the risks associated with responding to search warrants, we recommend that every company develop a plan of action for responding to search warrants. Implementing modest, inexpensive contingency plans, such as those detailed in this article, can go a long way to ensuring that your company has a fighting chance of survival when government agents come knocking at your door.
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USLAW NETWORK law firms:
- Are fully vetted and subject to a rigorous review process prior to admission;
- Are AV-rated by Martindale-Hubbell;
- Become part of the USLAW NETWORK by invitation only;
- Possess broad commercial legal capabilities;
- Have substantial litigation and trial experience.

Using a USLAW NETWORK firm provides clients with national access to some of the best trial lawyers in the country when needed for the litigation and trial of complex, difficult issues and cases. These law firms are highly skilled at early case evaluation and resolution, when possible, while providing cost effective representation.

The commitment of member firms is to provide high quality legal representation to major corporations, captive insurance companies, insurance carriers, and to both large and small businesses across the United States.

USLAW NETWORK is founded on the relationship between its lawyers and their clients throughout the organization. Working with USLAW NETWORK firms helps clients:
- Streamline the law firm procurement process;
- Access competent legal counsel across the US and in Europe, through our affiliation with the Trans-European Law Firm Alliance;
- Access top-quality CLE and ongoing legal education opportunities through our web site and our Spring and Fall client conferences;
- Access a variety of USLAW-sponsored resources, including our Rapid Response Handbook, our web site and a series of compendiums on US law and other issues.

USLAW / TELFA Affiliation Provides Resources Across Europe

In 2007, USLAW established a mutual relationship with TELFA, the Trans-European Law Firm Alliance, a network of 26 law firms in Europe representing more than 700 lawyers. Our affiliation with TELFA offers USLAW member firms and their clients access to top-quality, qualified counsel in Europe.

TELFA offers USLAW clients:
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- Service unaffected by costly bureaucracy;
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- Partner-led personal service;
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TELFA member firms subscribe to formal quality, training and IT standards. As a result, TELFA does much more than enable referrals. Instead, it coordinates and facilitates their clients’ needs for counsel in unfamiliar markets, while offering the assurance and peace of mind that the quality of advice and service they will receive is consistent across TELFA firms.
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USLAW Radio is a podcast produced two times per month and covers timely topics relevant to in-house counsel and senior executives in companies large and small. Topics include emerging federal statutes, cases pending before the Supreme Court, issues employers should be aware of, including labor matters, and file and case management, including cost containment, retention of women and minorities in the legal profession and much more.

USLAW Magazine

USLAW Magazine is a professional publication produced twice annually and designed to address legal and business issues facing commercial and corporate clients. Issued in Spring and Fall, recent topics have covered managing litigation in a tighter economy, changes in M&A strategies, sidestepping legal challenges during a workforce reduction, best practices in e-discovery policies, and weighing the pros and cons of litigation versus mediation.

USLAW EduNet

The USLAW EduNet is our newest webinar program to help in-house counsel stay ahead of changing legal developments in the US and around the globe. Prepared by our USLAW practice groups, webinars provide short summaries of legal happenings – recent court rulings, legislative changes, and timely issues – affecting USLAW clients and their businesses.
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