Lorber, Greenfield & Polito, LLP

Perspectives

FALL 2007

SB800: California's Homebuilders and Insurers Weigh the Options

by Joyia Z. Greenfield, Esq.

SB800 - California's new right-to-repair statute for all homes purchased after January 2003 is now being put to the test. Our office is now starting to handle claims pursuant to the statute's pre-litigation procedures as well as responding to new lawsuits claiming a breach of the functionality standards. How is SB800 working? Well, as with any new law, it is certainly raising more questions than answers for both plaintiff and defense attorneys.

The statute was born out of a need to define construction defects and provide a prompt procedure for the resolution of construction defect claims. Necessitated by the increase in costs and decreasing availability of insurance in this area of litigation, SB800 was created. The statute's pre-litigation procedure provides an avenue for the homeowner to go directly to the builder to address claims and gives the builder the right to repair those claims. This is the crux of the statute. The statute also sets forth through "functionality standards" what is an actionable defect. Despite the fact that a builder may choose to opt out of the pre-litigation procedures, the functionality standards still apply.

The statute, passed on August 31, 2002, is a product of untold hours of tough negotiations between homebuilders, lawyers, consumer advocates, insurers and lawmakers. When reading the statute, this becomes apparent. So, practically speaking, we know what the benefits are, but what are the challenges the homebuilders face with this new statute? **Continued on Next Page**

GUILTY UNTIL PROVEN INNOCENT: The Story of Arizona's Minimum Wage Act

by Andrea A. Hewitt, Esq.

In the November 2006 elections, Arizona voters were inundated with nineteen propositions on their ballot. Voters were asked to decide issues ranging from property taxes to smoking in public, animal cruelty crimes to gay rights, voters were even asked to establish a million dollar lottery to be awarded to one lucky voter, an incentive for people to participate in this democratic process. Each proposition had its own tag line B "Protect Marriage Arizona" or "Smoke Free Arizona" B a few key words designed to describe the proposition and garner support. Proposition 202 was referred to as the "Raise the Arizona Minimum Wage for Working Arizonans Act". Campaigns for and against this proposition publicized the effect raising the minimum wage would have on employers and employees alike. However, in our age of thirty-second sound bytes, neither side delved into the myriad of regulations and standards that accompanied this pay increase. The voters approved Proposition 202, which went into effect January 1, 2007, increasing the minimum wage to $6.75 per hour, which will be adjusted automatically each by by the increase in the cost of living. Now, employers must prepare themselves for not only the burden of higher wages, but also the burden of proof in court.

Inside this issue:

Burden Shifts to the Employer

Perhaps the most notable information that did not make it into a commercial for Proposition 202 is the change in the burden of proof. In most civil litigation, the plaintiff has the **Continued on Page Three**

SB800: California's Homebuilders and Insurers Weigh the Options

(Continued from Front Page)

After handling several of these cases to date, the time line set forth for the pre-litigation procedure is ambitious for a case that involves more than 40 to 50 homes. The pre-litigation procedure becomes impractical in the larger case. The statute allows the parties involved to extend the time line, but only if the claimants or their counsel agree. More often than not, claimants will extend the time periods if they believe a good faith effort is being made, but there are always those attorneys who will advise their clients against these extensions.

The statute requires that if a builder's intent is to hold one of its subcontractors responsible, the subcontractor must be given notice. However, the statute does not mandate the subcontractor to participate. This forces a "pay and chase" scenario for the builder. The best way to handle this issue is for the builder to incorporate compliance with SB800 in the subcontract agreement.

Finally, should a builder decide to repair, the builder may not obtain a release. The statute does allow, however, a release where cash is offered in lieu of a repair or in addition to a repair. These challenges, depending on the claims, may be a small price to pay for the benefit of putting the homeowner in direct contact with the builder to resolve disputes. The best advice at this time is to take a hard look at the claims asserted and assess the claims in conjunction with the statute on a case-by-case basis.

Whether or not one chooses to follow the pre-litigation procedures or to opt out, the functionality standards still apply. All parties involved will be faced with these new standards. These standards for all homes purchased after January 1, 2003, will serve to define what is or is not a construction defect. Prior to these standards, the industry had no guidance whatsoever. Undeniably, these standards will be interpreted and litigated in an attempt to further define construction deficiencies.

An example of one of the new functionality standards concerns water intrusion.

> (a) With respect to water issues:
>
> (1) A door shall not allow unintended water to pass beyond, around, or through the door or its designed or actual moisture barriers, if any.
>
> (2) Windows, patio doors, deck doors, and their systems shall not allow water to pass beyond, around, or through the window, patio door, or deck door or its designed or actual moisture barriers, including, without limitation, internal barriers within the systems themselves.
>
> (3) Windows, patio doors, deck doors, and their systems shall not allow excessive condensation to enter the structure and cause damage to another component... . (C.C.P. § 896(a).)

As anyone can readily see, the terms "excessive and unintended water" will be interpreted in many different ways. Further, any benefits the defense obtained from the *Aas* decision have now been taken away. The trade-off, however, is that the statute of limitations have been shortened in many areas. In conclusion, comprehending this statute will be a challenge in and of itself, but applying and interpreting the statute will pose significantly greater challenges.

Ms. Greenfield a founding partner of Lorber, Greenfield & Polito, LLP. She has handled over the past 24 years many construction claims on behalf of homebuilders and/or their insurers, and handled numerous multimillion dollar cases on behalf of developers through both settlement and trial. She has now had the opportunity to handle several SB800 claims in both the pre-litigation context and litigation.. Ms. Greenfield is more than happy to address any questions relating to the statute by both homebuilders and the insurance industry. You may contact her at (858) 513-1020.

Guilty Until Proven Innocent: The Story of AZ's Minimum Wage Act

(Continued from Front Page)

burden and must prove its case by a preponderance of evidence; in other words, the employee must present evidence that leads the trier of fact to find that the existence of a fact is more probable than not. The Arizona Minimum Wage Act ("Act") places the burden on the defendant and raises the burden of proof for certain issues to a "clear and convincing" standard. Clear and convincing requires analysis beyond the mere balancing of probabilities, it requires that the evidence produces a firm belief in the mind of the trier of fact that the allegations sought to be proved by the evidence are in fact true. Consequently, when an employee brings a claim against an employer, there is a presumption that the employer has violated this Act and the employer must prove their compliance. In essence, the employer is presumed guilty, until proven innocent.

Burden on Employer to Prove Independent Contractor Status

> A.R.S. §23-362 (D) "EMPLOY" INCLUDES TO SUFFER OR PERMIT TO WORK; WHETHER A PERSON IS AN INDEPENDENT CONTRACTOR OR AN EMPLOYEE SHALL BE DETERMINED ACCORDING TO THE STANDARDS OF THE FEDERAL FAIR LABOR STANDARDS ACT, BUT THE BURDEN OF PROOF SHALL BE UPON THE PARTY FOR WHOM THE WORK IS PERFORMED TO SHOW INDEPENDENT CONTRACTOR STATUS BY CLEAR AND CONVINCING EVIDENCE.

Employers should already recognize the importance of determining when a person is an independent contractor versus an employee for purposes of compliance with the Fair Labor Standards Act. Under the Arizona Minimum Wage Act, when a claim is asserted the employer must show, by clear and convincing evidence, the correct status of a worker. According to the Emergency Rules[1] created by the Industrial Commission, section R20-5-1205, the determination of the employment relationship will be based upon "the economic realities of the relationship." The Rule continues with a non-exhaustive list of factors to be considered:

1. The degree of control that the alleged employer has over the manner in which the work is performed;
2. Whether the worker's opportunities for profit or loss is dependent on the worker's managerial skills;
3. The worker's investment in equipment or material, or employment of other workers;
4. The degree of skill required for the work;
5. The permanence of the working relationship; and
6. The degree to which the services rendered is an integral part of the alleged employer's business. See, Emergency Rule R20-5-1205.

While this portion of the Arizona Minimum Wage Act will have little impact on most companies who employ independent contractors, either because the contractors are paid wages above the minimum rate or because of the clear nature of the employment relationship, employers should closely re-evaluate any independent contractors who are paid below Arizona=s minimum wage. If a claim is made that such a worker should be considered an employee, the burden will be on the employer to prove that the correct status is independent contractor. In these instances, the employer would be well served to maintain documentation to assist them in reaching their determination that such a worker was an independent contractor.

Burden on Employer to Show Adverse Action Not Retaliation

> A.R.S. §23-364(B) NO EMPLOYER OR OTHER PERSON SHALL DISCHARGE OR TAKE ANY OTHER ADVERSE ACTION AGAINST ANY PERSON IN RETALIATION FOR ASSERTING ANY CLAIM OR RIGHT UNDER THIS ARTICLE, FOR ASSISTING ANY

Continued on Next Page

Guilty Until Proven Innocent: The Story of AZ's Minimum Wage Act

(Continued from Previous Page)

> OTHER PERSON IN DOING SO, OR FOR INFORMING ANY PERSON ABOUT THEIR RIGHTS. TAKING ADVERSE ACTION AGAINST A PERSON WITHIN NINETY DAYS OF A PERSON'S ENGAGING IN THE FOREGOING ACTIVITIES SHALL RAISE A PRE-SUMPTION THAT SUCH ACTION WAS RETALIATION, WHICH MAY BE REBUTTED BY CLEAR AND CONVINCING EVIDENCE THAT SUCH ACTION WAS TAKEN FOR OTHER PERMISSIBLE REASONS.

In most employment discrimination suits, the burden is on the employee to show that an adverse job action against the employee was for an improper reason, i.e., the adverse job action was taken because of the employee=s gender, race, or religion. The Arizona Minimum Wage Act requires only that the employee show that he was engaged in a protected action under the act and that he suffered an "adverse action." Once a protected action has been established, there is the presumption that the employer did indeed take adverse action against the employee in retaliation. The employer must prove, through clear and convincing evidence, that the adverse action was taken for "other permissible reasons." The difficulty with this is that Arizona is an at-will employment state. An employer does not need a reason, for example, to discharge an employee; employers are only forbidden from having an improper, unlawful reason, e.g. race, gender, or religion.

The Arizona Minimum Wage Act is silent as to the definition of an "adverse action." Will the Industrial Commission (AIC@) follow the principles of "tangible job action" established in the line of cases surrounding Title VII of the Federal Civil Rights Act? Finally, an employer must recognize that the definition of protected acts appears to be very broad. Obviously asserting a claim under this Act is protected, but additionally, assisting another with a claim or even just telling someone of their rights under the Act is protected.

Consider the following hypothetical: a long-term part-time employee, for no particular business justification, gets reassigned to a position usually reserved for new hires. The employee considers this an adverse action, and within the last ninety days, he told a co-worker about the Arizona Minimum Wage Act and he brings a claim asserting that he was reassigned because he informed another about the Act. The employee need only prove that he did in fact talk to the co-worker to create a presumption that the manager retaliated against him. In order to defend against the claim, the manager must now prove, with clear and convincing evidence, that he reassigned the employee for no particular reason and not because of the employee informing a co-worker about rights under the Act. The office manager likely has no written documentation, no substantive evidence to support his position and the success of the claim depends the word of the manager versus that of the employee, which may or may not be enough to establish the burden of clear and convincing proof. Thus, extra care must be taken when disciplining or discharging an employee.

Notice and Record Keeping: A Continued Presumption of Guilt

> A.R.S. §23-364(D) EMPLOYERS SHALL POST NOTICES IN THE WORKPLACE, IN SUCH FORMAT SPECIFIED BY THE COMMISSION, NOTIFYING THE EMPLOYEES OF THEIR RIGHTS UNDER THIS ARTICLE. EMPLOYERS SHALL PROVIDE THEIR BUSINESS NAME, ADDRESS, AND TELEPHONE NUMBER IN WRITING TO EMPLOYEES UPON HIRE. EMPLOYERS SHALL MAINTAIN PAYROLL RECORDS SHOWING THE HOURS WORKED FOR EACH DAY WORKED, AND THE WAGES PAID TO ALL EMPLOYEES FOR A PERIOD OF FOUR YEARS. FAILURE TO DO SO SHALL RAISE A REBUTTABLE PRESUMPTION THAT THE EMPLOYER DID NOT PAY THE REQUIRED MINIMUM WAGE RATE. . .

The Arizona Minimum Wage Act contains more requirements than just paying the new minimum wage rate. The employer must 1) post an approved notice,[2] 2) provide each new hire with the name, phone number and address of the company, and 3) keep payroll

Continued on Next Page

Guilty Until Proven Innocent: The Story of AZ's Minimum Wage Act

(Continued from Previous Page)

records for four years. While this portion of the Act does not mention a heightened standard of proof, failure to do either of these three steps results in a presumption that minimum wages were not paid. Employers should note that the four year record keeping requirement differs from the three year federal requirement. Additionally, small companies may seek relief from the record keeping and notice requirements if they are unduly burdensome. However, employers should make every effort to comply with these three rules in order to facilitate their compliance with the Arizona Minimum Wage Act.

And if the Employer is Unable to Prove Their Innocence?

While there is sure to be an "educational period" where the IC is more apt to provide instructional guidance and warnings, the Act does mandate penalties for any violations if employers are unable to prove their innocence.[3]

Unfortunately, the wording of the Act allows for considerable leeway for the IC to assess varying penalty amounts. For example, violations of the record keeping, posting, or "other requirements" results in $250 for the first instance and $1,000 for each subsequent or willful violation. A.R.S. '23-364(F). Not only are the "other requirements" not specified, this section also permits special monitoring and inspections by the IC, should the IC determine they are necessary.

The Act also establishes methods to calculate penalties for retaliation and for paying an employee below the Arizona minimum wage. A.R.S. '23-364(G) provides that an employer must pay the employee who suffers retaliation an amount "sufficient to compensate the employee and deter future violations." The Act states that the IC or a court will decide what is sufficient and offers a guideline that the amount will be not less than "one hundred fifty dollars for each day the violation continued or until legal judgment is final." In the latter instance, a court case which takes one year to complete would result in an award of at least $54,750.00.[4] The fear is that the Act intended this to be a base and that a penalty to "deter future violations" would be a much higher amount. Finally, when determining the cost of an employer actually not paying the Arizona minimum wage, the Act is clear. An employer must pay the employee triple the amount owed, plus interest. A.R.S. '23-364(G).

The Act does not stop there, but gives the IC and a court broad authority to order additional penalties. A.R.S. '23-364(G) gives the IC and courts the power to order unpaid wages, "other amounts," and "any other appropriate legal or equi-

Continued on Next Page

QUICK CASE SUMMARIES *By Kelly T. Boruszewski, Esq.*

In *Prince v. Pacific Gas & Electric Company* (2006) 145 Cal.App.4th 289, the no-indemnity-without-liability doctrine did not apply to an implied contractual indemnity claim brought against an indemnitor who was statutorily immune from liability to the plaintiff.

In *Shepard v. Edward Mackey Enterprises, Inc.* (2007) 148 Cal. App. 4th 1092, a home buyer sued a contractor and a developer after a leak from an underground plumbing pipe caused extensive damage to the home. Defendants' move to compel arbitration based on a provision in the real estate purchase agreement was granted, The Court held that the Federal Arbitration Act preempted contrary California law (CCP § 1298.7) allowing a purchaser of real property to bring an action in court for construction and design defects, notwithstanding an agreement to arbitrate after defendants produced evidence that the transaction at issue substantially affected interstate commerce by submitting evidence that the construction of the buyer's house involved the receipt and use of building materials that were manufactured and or produced outside the state.

In *Templeton Development Corporation v. Superior Court* (2006) 144 Cal.App.4th 1073, a California-based subcontractor sued a Nevada-based general contractor for breach of contract. The general contractor moved to dismiss the complaint, claiming the subcontract agreement between the parties required the subcontractor to submit the dispute to mediation or arbitration in Nevada before filing suit. The court denied the general contractor's motion to dismiss, finding that California's Code of Civil Procedure section 410.42 rendered the out-of-state mediation provision unenforceable. The court concluded that 410.42 voided the subcontract to the extent it required that any mediation be held in Nevada before filing suit.

GUILTY UNTIL PROVEN INNOCENT

(Continued from Previous Page)

table relief." Further, it all but encourages the IC to seek penalties because the monies are retained by the agency that recovers them. Finally, even though the employer clearly bears the burden in a suit, the Act provides for the awarding of attorney=s fees for a prevailing plaintiff, yet is silent on an award for prevailing defendants.

Burden on Employers to Pass New Proposition

Unfortunately, this is the system employers must exist under for the foreseeable future. The Arizona Minimum Wage Act was a proposition passed by a majority of voters, as such, the Arizona Legislature has limited authority to amend the Act. In fact, the Legislature can only amend the Act if 1) the amendment furthers the purpose of the Act and 2) the amendment receives at least three-fourths approval in each house of the legislature. The Legislature cannot repeal the Act. Arizona law holds that only another proposition receiving a majority of votes can repeal it. Now try creating a thirty-second sound byte for that proposition.

Andrea A. Hewitt was born in Manchester, Connecticut and resides in Phoenix, AZ. She received her Bachelor of Science in Business Management from Post College, cum laude, in 1986 and her J.D. from the University of Connecticut School of Law in 1990. She was admitted to the Connecticut Bar and the United States District Court, District of Connecticut in 1990, the Second Circuit Court of Appeals in 1992, and the Arizona state and federal bars in 2006. Ms. Hewitt practices in the area of civil litigation in the areas of construction defect defense and employment law. Prior to moving to Arizona and joining Lorber Greenfield & Polito LLP in 2006, Ms. Hewitt practiced business litigation with a strong emphasis on employment law in Connecticut. She was also in-house counsel for Konica Business Machines, Inc. (now Konica Minolta Business Solutions U.S.A., Inc) where she handled business and employment issues for Konica's national and international sales organization. Ms. Hewitt also taught Business Law for eight years for the New England College of Finance, Connecticut chapter. Prior to practicing law Ms. Hewitt managed accounting functions and financial systems for the largest bank in New England.

End Notes

1. The Industrial Commission ("IC") has the authority to establish regulations that assist in the enforcement of the Act. The IC implemented temporary Emergency Regulations due to the short time frame between the elections (November 2006) and the effective date of the Act (January 1, 2007) and is in the process of creating permanent regulations.

2. The approved notice is currently available on the Industrial Commissions website: www.ica.state.az.us.

3. In fact, the IC is currently providing educational classes. A schedule of classes can be found on their website.

4. An employee working forty hours a week, being paid the Arizona minimum wage, would gross $12,960.00 in a year. Not to mention that a year-long trial is an ideal situation. The retaliation would likely occur months prior to a lawsuit being filed and likely two years prior to final judgment by a court. A time of two years from the date of retaliation until the date of final judgment would result in a penalty of $109,500.00.

On The Books . . .

In Arizona, the State Legislature enacted a Hate Crimes Act for vegetables, allowing farmers and shippers of produce to sue anyone who “maliciously” spread false information about Arizona farm products. (Arizona Revised Statutes, § 3-113.)

In California, school bus drivers may be terminated if they believe in the religious sacrifice of children. (*Hollen v. Pierce* (1967) 257 Cal.App.2d 468.) And persons living in Marin County must admit, warrant or not, a county health inspector into their private homes, but only during business hours. (Ordinance 141 § 2.)

Meet the Partners: The First . . .

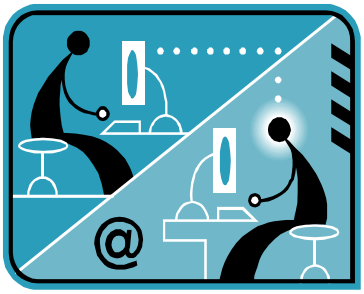
Bruce W. Lorber was born and resides in San Diego, California. He received his Bachelor of Science in Economics from Southern Oregon College in 1974 and his J.D. from the University of San Diego in 1977. He was admitted to the California Bar in 1977, the Nevada Bar in 1996, the Colorado Bar in 2000, and the Arizona Bar in 2006. He is also admitted to practice before the U.S. District Courts for the Southern and Central Districts of California, the U.S. District Court for the District of Nevada, the U.S. Court of Appeals for the Ninth Circuit, and the United States Supreme Court. Mr. Lorber founded the Firm in 1980. His practice emphasizes the representation of developers and general contractors in construction defect claims. Over the last 30 years he has defended several thousand claims asserted against various members of the construction industry which total well in excess of several billion dollars. Mr. Lorber has been a featured speaker before numerous organizations, including the Building Industry Association, West Coast Casualty, the Community Associations Institute, the San Diego County Bar Association, the California/Nevada Consumer Attorney Association, the San Diego County Superior Court, the Nevada State Bar, Lorman Group, and various insurance companies. He has served as arbitrator, mediator, and Judge Pro Tem for the San Diego Municipal and Superior Courts. He is currently a member of the Association of Southern California Defense Counsel, the San Diego Defense Lawyers Association, the San Diego Bar Association, the Nevada Bar Association, the Colorado Bar Association, the Arizona Bar Association, and the American Board of Trial Advocates.

. . . And The Newest

Holly P. Davies was born and raised in Tucson, Arizona. She graduated magna cum laude from the University of Notre Dame in 1993. After graduation she worked as the Director of Communications for an sports representation firm where she realized the benefits of obtaining a law degree. While working for the sports representation firm, she attended the University of Arizona College of Law and graduated cum laude in 1997. She was admitted to the State Bar and the District Court of Arizona in 1997. In 1998 she started her own company, Stadium Toys LLC, which designs, manufacturers and distributes a variety of plastic noisemakers. She has also designed and obtained three patents. Holly joined the firm in 2004 and her practice since joining the firm has focused on construction defects and personal injury accidents related to construction sites. Prior to joining the firm she practiced in the areas of domestic relations, estate planning, personal injury, insurance defense and medical malpractice. She is a member of the Arizona State and Maricopa County Bar Associations and the Arizona Association of Defense Counsel. She also serves as a mentor in association with the Florence Crittenton Girls Home.

PRACTICAL STEPS TO TAKE NOW TO AVOID SANCTIONS UNDER THE NEW E-DISCOVERY RULES *By Andrea A. Hewitt, Esq.*

"... courts , using 20/20 hindsight, have found that employers had a duty to preserve evidence well before a formal complaint was ever filed."



Be careful before you hit the Delete key! It could cost you thousands, millions, or billions of dollars!

The discovery process has been expanded by the enactment of recent amendments to the Federal Rules of Civil Procedure. These amendments impose stringent obligations on companies to preserve and disclose Electronically Stored Information ("ESI") and pose particular problems in the Employment Litigation context. It's not just e-mail that is being captured in the new rules, but all forms of electronically stored information - e.g. voice mail messages and files, back-up voice mails, deleted e-mails and back-up e-mail files, data files, program files, archival tapes, temporary files, system history files, website files, cache files, cookies, and graphic, audio or .PDF files. It's also not just one copy, but every iteration or copy of a document or file whether it is stored on an employee's hard drive, a main server or your accountant's or benefit administrator's computer. Whether or not you are sued in federal court or your jurisdiction adopts the new changes to the Federal Rules of Civil Procedure, you need to be ready for the way discovery will be conducted in all forums and at all levels in the future.

You Must Be A Mind Reader - The Litigation Hold

Although the new rules focus on the production of electronic documents in court proceedings, most courts hold that the duty to preserve evidence arises when one is placed on notice that documents are relevant in pending or reasonably anticipated litigation. But how do you know when litigation will be forthcoming? Not every employee complaint is certain to result in a lawsuit. However, courts, using 20/20 hindsight, have found that employers had a duty to preserve evidence well before a formal complaint was ever filed. In *Zubulake v USB Warburg LLC,* the Court found the employer had a duty to preserve ESI starting four (4) months before the employee filed an EEOC charge.[1] In *Broccoli v. Echostar Communications Corp.*, the Court held ESI should have been preserved as soon as the employee complained to his supervisors about sexual harassment, one year before the employee finally filed an administrative charge.[2]

The obligation to preserve documents "is an affirmative one that rests squarely on the shoulders of senior corporate officers."[3] However, in-house counsel and human resource professionals need to assess each employee complaint and determine when a "litigation hold" must be implemented.

Identify Key Players - When a situation arises that you reasonably anticipate may lead to litigation, identify who within the organization is likely to generate ESI - the employee (if still employed), his or her co-workers, managers, personnel from other departments with whom the employee regularly interacts, and the human resource and payroll staff. Explain their duty to preserve evidence and follow the litigation hold procedures.

Reminders Are Essential - Whether you are awaiting a possible claim or the matter has already been converted to a formal claim, litigation lasts a long time so your policies and procedures have to include periodic reminders to key personnel about the need to preserve evidence and follow

Continued on Next Page

Practical Steps To Take Now To Avoid Sanctions Under the New E-Discovery Rules (Continued from Previous Page)

the litigation hold procedures. Managers tend to forget about their obligations to preserve evidence if not reminded. This will also ensure new employees, who were not there when the hold was originally implemented, are aware that a hold situation exists. It is no defense that a particular employee was not on notice of the duty to preserve evidence or what kinds of evidence were material to the potential litigation.[4]

Update Your Electronic Communication Policy

Make sure your Electronic Communication Policy is up to date and covers all forms of electronic information. Advancements in technology and the incorporation of new technology into our everyday communications is so rapid it often outpaces our policies. Does your Policy accommodate blogging, instant messaging, flash drives, PDAs, remote access or wireless access? Each of these methods of communication is implicated under the new e-discovery rules. If your company policy does not allow their usage, then use technology to configure your system to block access to them to avoid inadvertent or unknown storage of ESI that will trigger an obligation of disclosure.

Implement An Electronic Information Retention and Destruction Policy

If you wait until you get sued to implement an ESI Information Retention and Destruction Policy it will be too late. A court may find that any policy developed to deal with retention and destruction after litigation ensues, was crafted solely to avoid e-discovery obligations.

A comprehensive policy will assess all forms of ESI (whether or not it is easily accessible) and determine what records should be kept based on operations or legal requirements. Make sure there is a valid business justification for the retention and destruction policy. The policy should also indicate destruction schedules which should be automated whenever possible. Be sure, however, to have a way to suspend automatic deletion of relevant ESI when a litigation hold is implemented.

Although the amendments to the Rules state that you do not have to produce ESI that is "inaccessible," you have the burden of proving inaccessibility to the court.[5] You must prove that the information is not reasonably accessible because of undue burden or cost. However, even if you make this showing, the court may "nonetheless order discovery from such sources if the requesting party shows good cause."[6] If so ordered, the court may specify conditions for the discovery, such as ordering the requesting party to pay for its production, however, this is not likely in employment litigation where the typical plaintiff can not match the resources of a large corporation, yet seeks access to their vast databases.

Note also that you cannot produce paper printouts of documents when the originals you hold are electronically searchable. The requesting party gets to select the form that you must produce the documents, or if you have already identified the form you intend to use, they get to object to it.[7] The Rules now require that litigants meet at the outset of the lawsuit to discuss the discovery of ESI, including steps to preserve ESI, and the form it will be produced in discovery.

Make Sure All Privileged Communications Are Clearly Marked On ESI

Do not forget to mark e-mails, voice mails, spreadsheets, word processing documents, and all other electronically stored information as PRIVILEGED if it is attorney-client communication or attorney work product. Be careful that privileged information does not get inadvertently mixed in a thread of otherwise innocuous e-mail without being marked.

Make sure that all data can be searched and sorted by this tag to make it easier to create a privilege log for such documents to be redacted or scrubbed before ESI files are turned over to opposing counsel. The amendments to the Rules allow for a "quick peek" which is production of all files to the opposing party, who then identifies which files are relevant so that the privilege review only needs to be on those files. In this case, the producing party does not waive the privilege for any file viewed during the "quick peek" identification process. The amendments also contain a clawback provision which allows the producing party to notify the receiving party of an inadvertent disclosure of privileged materials. Once on notice the receiving party must return, sequester or destroy the specified infor- Continued on Next Page

Practical Steps To Take Now To Avoid Sanctions Under the New E-Discovery Rules (Continued from Previous Page)

mation and may not use or destroy the allegedly privileged ESI until the claim of privilege is resolved by the Court.

Safe Harbor For Those Who Are Diligent

In recognition of the difficulty of preserving data the Rules provide a safe harbor, but only for those entities that act diligently to preserve data but fail. The Rules prohibit a court from imposing sanctions for the failure of a party to provide ESI lost as a result of the "routine, good-faith operation of an electronic information system."[8] If you plan to rely on this safe harbor, make sure you have a comprehensive retention and destruction policy, as well as a litigation hold procedure. In determining what documents are "relevant" and thus need to be preserved under a litigation hold, you must take a broad view of the employee's claims and are not allowed to narrow the scope of discoverable information without court permission. Even if you do not mean to destroy information when a claim is pending, the court may find that you have breached your duty to preserve data if you do not have specific criteria regarding what should be saved and what should not be saved related to the lawsuit, and a general dissemination of this information in writing to your employees.[9]

Periodically Check Your Company's Compliance

Employers should routinely verify that all employees are complying with the retention and destruction schedules, and suspending those policies when a litigation hold exists. Employers have an affirmative duty to ensure their policies and procedures in this regard are being followed. You may not just rest on the assumption that everything is running along the way it is supposed to.

Training Line Managers

Include your Electronic Communication Policy in your Employee Handbook. Train line managers who may be accountable for enforcing litigation holds in the procedure.

Ignore The Rules Concerning E-Discovery At Your Peril

So in the end, what happens if you ignore the rules concerning e-discovery? Eleven senior executives of Phillip Morris Company were sanctioned $250,000 each, for a total of $2.75 million, for failing to preserve evidence by, *inter alia*, continuing to allow e-mail that was 60 days old to be automatically deleted when a litigation hold was in place.[10] The CEO of USN Communications, Inc. was personally fined $10,000 for his company's inadequate retention efforts which "resulted in documents being discarded without having been reviewed to determine whether they should have been preserved."[11] In another case, a magistrate judge recommended that a default judgment be entered against the defendant as a sanction for producing electronic files with metadata missing.[12] Morgan Stanley failed to meet its discovery obligations by overwriting e-mails, and when they failed to produce backup tapes, the Court sanctioned them by not allowing them to rebut essential allegations, which resulted in the jury awarding the plaintiff $1.58 billion, including $850 million in punitive damages.[13]

End Notes

1. Zubulake v. UBS Warburg LLC, 220 F.R.D. 212 (S.D.N.Y. 2003) (Employee's co-workers were marking their e-mails "attorney-client privilege" even though no attorney was a party to any e-mails/supervisor had subjective fear employee would sue).

2. Broccoli v. Echostar Communications Corp., 229 F.R.D. 506 (D. Md. 2005).

3. Larson v. Bank One Corp., 2005 U.S. Dist. LEXIS 42131 (D. Ill. 2005).

4. Toste v. Lewis Controls, 1996 U.S. Dist. LEXIS 2359 (D. Cal. 1996)

5. Fed.R.Civ.P. 26(b)(2)(B).

6. Id.

7. Fed.R.Civ.P. 34(b).

8 . Fed.R.Civ.P 37(f).

9. See, Larson v. Bank One Corp., supra.

10. United States v. Phillip Morris USA, Inc., 327 F.Supp.2d 21 (D. D.C. 2004).

11. Danis v. USN Communications, Inc., 2000 U.S. Dist. LEXIS 16900 (N.D. Ill.).

12. Hayman v. PricewaterhouseCoopers LLP, 2004 U.S. Dist. LEXIS 27296 (N.D. Ohio 2004). See also, Williams v. Sprint, 230 F.R.D. 640 (D. Kan. 2005) (Producing party should produce electronic documents with metadata intact unless parties agree otherwise or the producing party obtains a protective order).

13. Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., Inc., 2005 WL 679071 (Fla. Cir. 2005)

NOW YOU CANNOT EVEN TAKE THE HORSE TO WATER: California Courts Must Stop Compelling Mediation by Threat of Payment of Sanctions

By Kelly T. Boruszewski, Esq.

Back in 1993, California enacted the Civil Action Mediation Program that allowed trial courts to order cases and the parties to mediation as an alternative to judicial arbitration. This evolved into the courts ordering any other action to court-sponsored mediation, regardless of the amount in controversy, if all the parties so stipulate. Then ordering mediation whether the parties wanted to or not.

In *Jeld Wen v. Superior Court* (2007) 146 Cal. App. 4th 536, the trial court imposed sanctions upon an uninsured, although far from insolvent, cross-defendant in a construction defect case for failing to attend a mediation session pursuant to a case management order. The trial court's case management order determined that the case was a complex civil action and appointed an individual to mediate and conduct settlement conferences. In the unanimous decision, the Fourth District Court of Appeal issued a writ of mandate directing the trial court to set aside the order. The court held that the trial court did not have the inherent authority under law to order parties in a complex civil action to attend and pay for private mediation because such an order conflicts with the statutory scheme for mediation as set forth in the Civil Action Mediation Program, which emphasizes the voluntary nature of mediation. With no preemptive statue, the Court of Appeal reverted to the Rules of Court, one which requires a trial court to consider the expressed views of the parties before ordering a case to mediation, and allows a party to withdraw from mediation at any time. (CRC, rules 3.871(a)(1); 3.853(2).) In essence, a judge may try to cajole the parties into stipulating to private mediation, but it cannot coerce such behavior by sanctions into attending and paying for private mediation.

LOOKING AHEAD: Will the Unruh Act No Longer Cover Employment?

In 2006, the Ninth Circuit held in *Bates v. UPS,* 465F,3d 1069, that UPS violated the Americans with Disabilities Act by excluding deaf persons from consideration for jobs driving delivery vehicles because UPS failed to show a business-necessity defense. Of little notice at the time, the Ninth further held that California's Unruh Act no longer covers employment, holding that a violation of ADA's Title I is not an automatic violation of the Unruh Act. Now, pending before California's Supreme Court is *Williams v. Genetech, Inc.* (2006) 139 Cal.App.4th 357, which will address this very issue. Like the Ninth's interpretation of Title I, *Williams* may have long term consequences. Stay tuned.

Who We Are,

Lorber, Greenfield & Polito, LLP is a full-service civil litigation defense firm. The Firm was established in 1980 and is A-V rated with Martindale-Hubbell. Lorber, Greenfield & Polito, LLP handles a broad range of civil litigation matters. The primary emphasis of our practice has been and continues to be representation of developers and general contractors in complex construction defect claims. The Firm has had over twenty-five years of experience in representing developers and general contractors in some of the largest construction defect and civil litigation cases in the States of California and Nevada. Litigation matters are handled throughout Northern California, Southern California, Nevada and Arizona.

Southern California
13985 Stowe Drive
Poway, CA 92064
T: 858.513.1020
F: 858.513.1002

Northern California
150 Post Street, Suite 700
San Francisco, CA 94018
T: 415.986.0688
F: 415.986.1172

Arizona
8222 S. 48th St., Suite 230
Phoenix, AZ 85044
T: 602.437.4177
F: 602.437.4180

We welcome suggestions for future articles. Please contact Kelly Boruszewski at Lorber, Greenfield & Polito, LLP, 13985 Stowe Drive, Poway, California, T: 858.513.1020; E: ktb@lorberlaw.com

LORBER, GREENFIELD & POLITO, LLP
13985 Stowe Drive
Poway, California 92064
Telephone: 858-513-1020