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Employers Must Bolster Their Policies Against Retaliation

Heightened Awareness Necessary After Supreme Court Ruling Increases The Stakes

Part One of a Two-Part Article

By Scott E. Gross

Over the last few years, employers who have faced claims of race, gender, age or other prohibited discrimination typically find themselves also litigating separate and distinct claims of retaliation. Plaintiffs now allege not only discriminatory acts by the employer, but also acts in retaliation for the plaintiff's having raised discrimination complaints within the company. Plaintiffs launch such two-pronged attacks to increase their chances of steering at least some of their lawsuit past summary judgment, and thereby gain the leverage that accompanies the specter of an unpredictable jury trial. Even in the absence of discrimination itself, juries often find employers guilty of retaliation with no more evidence than the short time between the employee's complaint and the alleged retaliatory act.

Of course, most federal anti-discrimination laws and analogous state laws have always protected employees from retaliation, and prudent employers have adopted policies and practices to effectuate such protections. However, with the United States Supreme

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A *Creative* Screening of Electronically Stored Information May Determine the *Victor*

***A Look at* Victor Stanley, Inc. v. Creative Pipe, Inc., et al.**

By Joshua Horn and Beth L. Domenick

For all corporate counsel, the prospect of litigation that requires the preservation, collection, review, and potential production of voluminous electronically stored information ("ESI") can be overwhelming. The time and cost considerations are significant, and many in-house counsel are unsure of the appropriate first steps. One thing is certain: This is not an issue that can be put on the back burner and dealt with in a piecemeal fashion after litigation ensues. The painful results of such an approach were the subject of Magistrate Judge Grimm's recent decision in *Victor Stanley, Inc. v. Creative Pipe, Inc., et al.*, 2008 WL 2221841 (D. Md. 2008).

In that case, the United States District Court for the District of Maryland was forced to decide whether the defendants' inadvertent production of certain categories of ESI waived the protections of the attorney-client privilege and work-product doctrine. After carefully analyzing the events that led to the inadvertent production, the court in *Victor* held that the defendants waived any claim to attorney client privilege or work-product doctrine protection with respect to the inadvertently produced documents.

Background

Defendants, Creative Pipe, Inc. ("CPI") and Mark and Stephanie Pappas ("M. Pappas and S. Pappas") (collectively, the "defendants") initially responded to plaintiff's discovery requests with a traditional "paper production." The plaintiff took issue with the sufficiency of the defendants' paper production and the parties ultimately identified a joint protocol for searching and retrieving relevant and responsive ESI. The joint protocol included nearly five pages of keyword/phrase search terms that were intended to help locate responsive ESI, but not designed to identify privileged or work-product protected documents. After completing their search, defendants expressed concern to the court that an individualized privilege review

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of the responsive documents would unnecessarily delay production and cause undue expense. As a result, defendants provided their computer expert with a list of keywords that could be used to search for and retrieve privileged documents. Defendants' counsel, recognizing the possibility of inadvertent disclosure, requested that the court approve a "clawback agreement" in the event of such a disclosure. The court's subsequent decision to extend the discovery deadline by four months convinced the defendants that they would be able to undertake a document-by-document privilege review and, they believed, made a clawback agreement unnecessary — a decision that would ultimately subject them to judicial criticism.

Soon after receiving and reviewing defendants' ESI production, plaintiff's counsel discovered documents that were potentially privileged or work-product protected and notified defense counsel accordingly. Defendants asserted that any production of protected documents was inadvertent, but plaintiff filed a motion seeking a ruling regarding the discoverability of inadvertently produced documents. The court undertook a close examination of the defendants' retrieval and production of ESI, which included the execution of the joint protocol and an electronic search for privileged material on those files that were in a "text-searchable" format. The electronic privilege search consisted of seventy keywords identified by defendant M. Pappas, one of his former attorneys, and another attorney. Additional, non-text searchable files were turned over to defendants' current attorney for a manual, "page-by-page" privilege review; however, due to time constraints and the need to review thousands of documents, the defendant and defense counsel chose only to review the page titles of the documents. Only if they determined from the title that a privilege might be applicable, did the defendants review a document in its entirety.

The court in *Victor* immediately identified numerous problems with the defendants' explanation of their ESI search protocol, as well as the search itself. First, the court found that the defendants were "regrettably vague" in their description of the 70 keywords that they used for the text-searchable ESI privilege review; specifically, the defendants failed to inform the court how the search terms were developed, how they conducted the search itself, and what quality controls, if any, were used to assess the reliability and accuracy of the search. Second, the court questioned whether the defendants and the two attorneys who created the keyword search were qualified to create a search and information retrieval strategy designed to yield a reliable privilege review. Finally, the court in criticized the defendants for failing to assert that they sampled the text-searchable ESI files to determine whether the electronic keyword search was reliably identifying privileged documents.

Three Possible Approaches

In evaluating the plaintiff's motion, Magistrate Judge Grimm identified three possible approaches when deciding whether a party waives the protection of the attorney client privilege or work-product doctrine as a result of an inadvertent production. Judge Grimm described a spectrum of tests that ranges from the most lenient to the strictest.

Under the most lenient approach, a court will find no waiver because there is no knowing and intentional relinquishment of the privilege or protection. Under the strictest approach, courts find waiver because once the documents have been disclosed, there is no longer any

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What the Insurance Industry Doesn't Want You to Know

You are Covered for Intellectual Property Lawsuits

By Richard Milone and Mahmood Ahmad

Your company creates the perfect formula for a high-energy drink, and after extensive research and testing, decides to enter the market. Energy Cola is launched with an extensive national advertising campaign. Immediately after the launch, a jealous competitor sues you for trademark, trade dress, trade secret and copyright infringement. For good measure, the competitor also asserts patent infringement claims based on the methods used to bottle and manufacture Energy Cola.

What should be an exciting time for your company has turned into a crisis. As in-house counsel, your job is to manage it in a way that allows the business to proceed and to thrive. The first step you take will likely be to hire experienced litigation counsel to defend the suit. But an equally important next step — which is often treated as an afterthought, or neglected altogether — is to hire an experienced policyholders' insurance coverage attorney to assess what coverage is available, and to fight to secure the coverage to which your company is entitled. Many companies, unfortunately, give away their coverage for intellectual property claims because they accept their insurers' self-serving assessment that coverage does not exist. Even more unfortunate is the fact that defense counsel, risk managers, and brokers are often poorly informed about the extent of available coverage and become unwitting accomplices to the insurers. As a savvy in-house counsel, you should not accept the insurers' predictable denials at face value, but rather you should assume that you are covered until somebody proves definitively that you are not.

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IP Lawsuits

Intellectual property-related lawsuits have become routine for corporate America, and there are few companies, large or small, that have not faced lawsuits like the one described above. Standard comprehensive general liability ("CGL") policies include coverage known as "advertising injury," which can extend well beyond traditional notions of advertising and cover a wide array of intellectual property claims. CGL policies generally provide coverage for defense costs ("duty to defend"), and coverage for the judgments or settlements that ultimately might be paid. The duty to defend is an immensely valuable part of the coverage, because it can spare your company the cost of defending the Energy Cola suit out of pocket, even if the suit is proven to be baseless. The rules governing an insurer's duty to defend in virtually every jurisdiction are extremely policyholder-friendly, and often require insurers to defend lawsuits even where the liability is ultimately not covered. One key principle is that if just one claim is potentially covered, the insurer must defend the entire lawsuit. So in order to get a complete defense for the Energy Cola suit — including even the patent infringement claims, which your insurers will jump to tell you are not covered — all you need to show is that one claim within the suit is potentially covered.

This article provides an overview of the issues that typically arise when determining the extent of coverage for intellectual property claims under advertising injury coverage.

Advertising Injury Coverage: The Evolving ISO Form

The insurance industry writes policies on standard forms prepared by the Insurance Services Office ("ISO"), a provider of services to the property/casualty insurance industry located in Jersey City, NJ. The 1973, 1986, 1998 and 2001 versions of the ISO forms differ substantially in their definition of advertising injury, and therefore coverage for intellectual property claims can vary depending on the form used. Some insurers continue to use older versions of the ISO forms, and others modify the ISO definition of advertising injury through exclusions or endorsements. Remarkably, some unscrupulous insurers will deny coverage under one policy based on arguments and caselaw interpreting a different version. Do not fall for this trick — there is no substitute for a close reading of the lawsuit and the insurance policy at hand.

Did the Offense Arise Out of Advertising Activity?

To obtain coverage under the "advertising injury" portion of the CGL policy, an insured must demonstrate that: 1) the offense in question was committed in the course of advertising the insured's goods, products or services; and 2) the injury arose out of a defined offense under the advertising injury definition in the CGL policy. *EKCO Group, Inc. v. Travelers Indem. Co.*, 273 F.3d 409, 412 (1st Cir. 2001). Satisfying the first prong is not as difficult as insurers would have you believe. The types of commercial activity that typically lead to IP lawsuits are usually sufficient to meet the requirement. The 1998 ISO policy form defined advertising as "a notice that is broadcast or published in the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters." *State Farm Fire & Cas. Co. v. Steinberg*, 393 F.3d 1226, 1231 n. 2 (11th Cir. 2004). The 2001 revision to the ISO policy further expanded the definition of advertising to include electronic advertisements on the Internet and Web sites. Courts have, however, differed in their interpretation of what constitutes advertising. In *John Deere Ins. Co. v. Shamrock Indus. Inc.*, 696 F.Supp. 434, 439-40 (D. Minn. 1988) the court construed advertising broadly when it held that "three letters [sent] to a potential buyer" con-

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stituted advertising, but *Fox Chemical Co., Inc. v. Great Am. Ins. Co.*, 264 N.W.2d 385, 386 (Minn. 1978) defined advertising rather narrowly as "public or widespread distribution of the alleged [advertising] material."

The second requirement for advertising injury coverage, a covered advertising "offense," turns on the type of intellectual property infringement alleged. The five most common types of commercial IP claims — trademark, trade dress, copyright, trade secret, and patent — are discussed below.

Advertising Offense: Trademark

The vast majority of courts have concluded that trademark infringement falls within the definition of advertising injury, *e.g., State Auto Prop. & Cas. Ins. Co. v. Travelers Indem. Co. of Amer.*, 343 F.3d 249, 256-57 (4th Cir. 2003). The 1986 ISO form defined advertising injury to include, among other things, "misappropriation of an advertising idea or style of doing business," and "infringement of copyright, title, and slogan." The 1998 forms modified this language to be even broader: "the use of another's advertising idea in your advertisement," and "infringement of another's copyright, trade dress, or slogan in your advertisement." Claims such as the trademark infringement allegations involving Energy Cola would likely constitute advertising injury within the meaning of this language.

Insurers sometimes try to rely upon an outdated and oft-criticized line of cases following *Advance Watch Co. v. Kemper Nat'l Ins. Co.*, 99 F.3d 795 (6th Cir. 1996) to argue that claims for trademark infringement do not qualify as advertising injury. Courts have, however, routinely rejected this "minority view that trademark claims do not involve 'misappropriation.'" *State Auto Prop. & Cas. Ins. Co.*, 343 F.3d at 257 n. 11. Do not let insurers get away with this one — a quick Lexis search on Advanced Watch shows enough negative history to fill an entire brief.

Advertising Offense: Trade Dress

The 1998 and 2001 ISO policy forms include infringement of trade dress as a "specifically enumerated, covered offense." *Westfield Cos. v. Alcoa Packaging Machinery, Inc.*, 804 N.E.2d 45, 50 (Ohio Ct. App. 2003). Accordingly, courts examining such policies have held that trade dress infringement claims are covered under advertising injury. *Id.* at 51-53. The majority of courts to address insurance coverage for trade dress infringement under prior versions of the ISO policy have also found that "'misappropriation' of an advertising idea or style of doing business may include trade dress infringement." *Hyman v. Nationwide Mut. Fire Ins. Co.*, 304 F.3d 1179, 1189 (11th Cir. 2002).

Advertising Offense: Copyright

"Infringement of copyright" is a specifically enumerated advertising offense on all of the standard form ISO policies. *Farmington Cas. Co. v. Cyberlogic Tech., Inc.*, 996 F.Supp. 695, 699-700 (E.D.Mich. 1998). Accordingly courts waste little time in concluding that a claim for copyright infringement states a claim arising out of an advertising offense. Since copyright infringement is often the least controversial claim from a coverage perspective, the inclusion of such a claim is frequently cited by policyholders to trigger the duty to defend. In the *Energy Cola* lawsuit, the fact that this claim is included likely will obligate your company's insurers to defend the lawsuit in its entirety.

Advertising Offense: Trade Secret

Courts distinguish between trade secrets related to manufacturing and production and those related to marketing and sales, finding that the latter constitutes an advertising injury due to misappropriation of advertising ideas. *See Sentex Systems, Inc. v. Hartford Acc. & Indem. Co.*, 93 F.3d 578, 580-81 (9th Cir.1996) (use of competitor's trade secrets like customer lists, methods of bidding jobs, methods and procedures for billing, marketing techniques for marketing and sales brought complaint within the coverage for advertising injury). However, for trade secrets related to manufacturing and production, at least some courts have found that the misappropriation of a trade secret "does not meet the required causal nexus since the injury is the misappropriation and not the advertising by which the misappropriation was revealed." *Tradesoft Tech., Inc. v. Franklin Mut. Ins. Co., Inc.*, 329 N.J. Super. 137, 152-53 (App. Div. 2000).

Advertising Offense: Patent

Courts have generally been reluctant to find coverage for patent infringement claims under the advertising injury section of the CGL policy. However, this does not necessarily mean that your CGL policies do not provide coverage for patent infringement. For example, the court in *Elan Pharm. Research Corp. v. Employers of Ins.*, Wausau found advertising-injury coverage when the plaintiff was sued for use of patent infringing clinical studies to develop a market for one of its products, and the policies defined "'advertising injury' to include injury arising out of patent infringement committed in the course of the insured's 'advertising activities.'" 144 F.3d 1372, 1375-77 (11th Cir. 1998). In *Foundation for Blood Research v. St. Paul Marine and Fire Ins. Co.*, the court found that the insurer had a duty to defend an underlying claim of inducement of patent infringement because the allegations may constitute the enumerated offense of "belittlement of a product." 730 A.2d 175, 180 (Me. 1999). In *Amazon.com Int'l Inc. v. American Dynasty Surplus Lines Ins. Co.*, the court suggested that "patent infringement may constitute an advertising injury 'where an entity uses an advertising technique that is itself patented.'" 85 P.3d 974, 977 (Wash. Ct. App. 2004). As these examples show, you should examine closely the language of your policies and the allegations of the underlying lawsuit before accepting the insurers' snap judgment that no coverage exists.

Do Any Exclusions Apply?

CGL policies typically contain several exclusions for advertising injury. These exclusions superficially appear all-encompassing, but are generally interpreted narrowly by the courts, particularly with respect to the duty

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The Federal Arbitration Act

Supreme Court Precludes Contractual Expansion Of Grounds for Appeal Set Forth in the Act

By John Wilkinson

The U.S. Supreme Court's recent decision in *Hall Street Associates, L. L. C. v. Mattel, Inc.* (Slip Opinion, No. 06-989) had long been anticipated by the litigation and arbitration communities and has been the subject of extensive commentary and debate in the brief period since it was rendered. The issue (which had created a sharp conflict in the Circuits) was whether the standards for judicial review of arbitration awards, as set forth in Sections 9-11 of the Federal Arbitration Act (FAA), could be contractually expanded by the arbitrating parties. More particularly, the question was whether parties could contract to inject traditional grounds for appeal into FAA arbitrations or whether they were *limited* to what was specifically set forth in Sections 9-11 of the FAA, *e.g.*, "evident partiality," "fraud," "corruption," refusing to hear "pertinent and material" evidence, and acts exceeding the powers of the arbitrator.

The *Hall Street* Court held that parties could not contractually expand the standards for judicial review in Sections 9-11 of the FAA. A likely, practical outgrowth of this ruling is that arbitrating parties will also be unable to contractually expand standards for judicial review under most if not all state arbitration statutes. This will make it more difficult for courts to overturn arbitration awards, and raises serious doubts about the continuing vitality of generally accepted decisions which hold that "manifest disregard of the law" is a separate and distinct ground for challenging an arbitration award under the FAA.

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BACKGROUND

The case arose from a lease dispute between landlord, Hall Street Associates, L. L. C. ("Hall Street") and tenant, Mattel, Inc. ("Mattel"). The leased property had been used for many years as a manufacturing site, and the lease provided that the tenant would indemnify the landlord for any costs resulting from the failure of the tenant or its predecessor lessees to comply with environmental laws while using the premises.

In 1998, the leased property was found to contain high levels of trichloroethylene, which apparently resulted from manufacturing discharges by Mattel's predecessor lessees between 1951 and 1980. The parties agreed to arbitrate their resulting indemnification dispute pursuant to an agreement which was approved and entered as an order by the U.S. District Court for the District of Oregon ("Oregon District Court") and which provided that:

> [t]he United States District Court for the District of Oregon may enter judgment upon any award, either by confirming the award or by vacating, modifying or correcting the award. The Court shall vacate, modify or correct any award: *1) where the arbitrator's findings of facts are not supported by substantial evidence, or 2) where the arbitrator's conclusions of law are erroneous.* (Emphasis added.)

Following an arbitration at which Mattel prevailed, the Oregon District Court vacated the award and remanded for further consideration by the arbitrator. In reaching this result, the court expressly invoked the standard of review chosen by the parties in the arbitration agreement, which included review for legal error, and cited *LaPine Technology Corp. v. Kyocera Corp.*, 130 F. 3d 884, 889 (9th Cir. 1997), a case subsequently overruled en banc by the Ninth Circuit in *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987 (2003), for the proposition that the FAA leaves the parties "free … to draft a contract that sets rules for arbitration and dictates an alternative standard of review."

The Oregon District Court's vacating of the award prompted lengthy hearings and appeals in numerous tribunals and courts, culminating in the U.S. Supreme Court's granting *certiorari* to decide the important issue of whether parties could contractually vary or add to the FAA's standards for judicial review of arbitration awards.

THE BASIC HOLDING

The Supreme Court's consideration of the issue before it was rather straightforward. First, the Court acknowledged that "arbitration is a creature of contract, and that the FAA is 'motivated, first and foremost, by a congressional desire to enforce agreements into which the parties ha[ve] entered.'" *Dean Witter Reynolds Inc. v. Byrd*, 470 U. S. 213, 220 (1985). In the end, however, the Court passed over this consideration in favor of a strict analysis of the wording of the FAA, stating:

> Hall Street is certainly right that the FAA lets parties tailor some, even many features of arbitration by contract, including the way arbitrators are chosen, what their qualifications should be, which issues are arbitrable, along with procedure and choice of substantive law. But to rest this case on the general policy of treating arbitration agreements as enforceable as such would be to beg the question, which is whether the FAA has textual features at odds with enforcing a contract to expand judicial review following the arbitration.

Turning to the language of the FAA, the Court first noted that "Sections 10 and 11 … address egregious [arbitrator] departures … [such as] 'corruption,' 'fraud,'" etc, and in that context, the court went on to say:

> Given this emphasis on extreme arbitral conduct, the old rule of ejusdem generis has an implicit lesson to teach here. Under that rule, when a statute sets out a series of specific items ending with a general term, that general term is confined to covering subjects comparable to the specifics it follows. Since a general term

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> included in the text is normally so limited, then surely a statute with no textual hook for expansion cannot authorize contracting parties to supplement review for specific instances of outrageous conduct with review for just any legal error. "Fraud" and a mistake of law are not cut from the same cloth.

Even more importantly, the court found the wording of the FAA to be controlling in that: 1) the FAA *exclusively* limits the grounds for judicial review of arbitration awards to those set forth in Sections 10 and 11; and 2) such *exclusive* language is entirely inconsistent with any contractual expansion of those grounds for review. As the court stated:

> … [E]xpanding the detailed categories [of Sections 10 and 11] would rub too much against the grain of the [Section] 9 language, where provision for judicial confirmation carries no hint of flexibility. On application for an order confirming the arbitration award, the court "must grant" the order "unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title." There is nothing malleable about "must grant," which unequivocally tells courts to grant confirmation in all cases, except when one of the "prescribed" exceptions applies. This does not sound remotely like a provision meant to tell a court what to do just in case the parties say nothing else.

Manifest Disregard Argument

In *Hall Street*, petitioner argued that *Wilko v. Swan*, 346 U.S. 427, 74 S. Ct. 182, 98 L. Ed. 168 (1953) expressly authorized expansion of the standards for review set forth in the Federal Arbitration Act. The basic holding of *Wilko* (which was subsequently overruled) was that Section 14 of the Securities Act of 1933 voided any agreement to arbitrate claimed violations of that Act. In the course of explaining that the limited power to vacate an arbitration award would undermine the buyer protections of the Securities Act, the *Wilko* Court made the following statement, on which the *Hall Street* petitioner subsequently relied:

> The interpretations of the law by the arbitrators *in contrast to manifest disregard [of the law]* are not subject, in the federal courts, to judicial review for error in interpretation. (Emphasis added.)

The *Hall Street* petitioner argued that the foregoing statement recognized "manifest disregard of the law" as a further ground for vacating arbitration awards, in addition to those listed in Section 10 of the FAA and, as a result, the grounds set forth in Section 10 could not possibly be exclusive. The *Hall Street* court rejected this argument for a number of reasons, including the following: 1) *Wilko* involved a supposed judicial expansion of the FAA through interpretation, whereas *Hall Street* involved an attempted private expansion by contract; and 2) the statement in *Wilko* expressly rejected precisely what the petitioner in *Hall Street* was seeking, *i.e.*, general appellate review of an arbitrator's legal errors. Significantly the *Hall Street* Court went on to make the following additional observation about *Wilko*:

> Then there is the vagueness of *Wilko's* phrasing. Maybe the term "manifest disregard" was meant to name a new ground for review, but maybe it merely referred to the [Section] 10 grounds collectively, rather than adding to them … Or, as some courts have thought, "manifest disregard" may have been shorthand for [Section] 10(a)(3) or [Section] 10(a)(4), the subsections authorizing vacatur when the arbitrators were "guilty of misconduct" or "exceeded their powers." … We, when speaking as a Court, have merely taken the *Wilko* language as we found it, without embellishment … and now that its meaning is implicated, we see no reason to accord it the significance that Hall Street urges.

The above-quoted language appears to open the door for future elimination or at least severe erosion of the "manifest disregard," standard for review of arbitration awards. Such an occurrence would mark a watershed change in the law of arbitration. While courts since *Wilko* have differed widely on the meaning of "manifest disregard," they have been quite uniform in holding that the phrase itself represents an independent ground for judicial review of arbitration awards. If "manifest disregard" were no longer an accepted standard for review, that would vastly change the arbitration landscape and (for better or for worse) would greatly increase the difficulty of vacating arbitration awards.

Possible Limitations on *Hall Street*

The *Hall Street* court noted that the applicable arbitration agreement was "entered into in the course of district-court litigation, was submitted to the Oregon District Court as a request to deviate from the standard sequence of trial procedure, and was adopted by the District Court as an order." On that basis, the court raised at least the possibility that the appellate standard in the arbitration agreement might ultimately be upheld "as an exercise of the District Court's authority to manage its cases under Federal Rule of Civil Procedure 16 … ." While an interesting twist, this possible exception to the court's ruling is unlikely to evolve into one of broad applicability.

Perhaps more importantly, the Court carved out the following additional limitation on its basic ruling:

> In holding that [Sections] 10 and 11 provide exclusive regimes for the review provided by the statute, we do not purport to say that they exclude more searching review based on authority outside the statute as well. The FAA is not the only way into court for parties wanting review of arbitration awards: they may contemplate enforcement under state statutory or common law, for example, where judicial review of different scope is arguable. But here we speak only to the scope of the expeditious judicial review under [Sections] 9, 10 and 11, deciding

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> nothing about other possible avenues for judicial enforcement of arbitration awards.

In the end, the court's "state law" limitation may have little practical effect. Thus, for example, the grounds for review in Section 23 of the Revised Uniform Arbitration Act (RUAA) appear to be just as surrounded by words of exclusivity as the standards for review in Section 10 of the FAA.

Further, the year 2000 Commentary to Section 23 indicated that: 1) The drafters specifically considered inclusion of a provision that "the parties could 'opt in' to judicial review of arbitration awards for errors of law or fact or any other grounds not prohibited by applicable law." In the end, however, Section 23 contained no such language; and 2) only a few state courts had addressed the contractual expansion of statutory standards for review of arbitration awards, and those few decisions were "split," with only one upholding such contractual expansion.

Policy Considerations

In the final analysis, it appears that *Hall Street* cut back substantially, if not almost entirely on contractual expansion of statutory grounds for judicial review of arbitration awards. While the *Hall Street* Court heard extensive argument from both sides about the policy ramifications of its upcoming decision, it ultimately eschewed most such considerations in favor of a strict reading of Sections 9-11 of the FAA. The court, however, did pause at one point to note that there is a real, fundamental difference between arbitration and litigation and that its decision was in furtherance of maintaining the simplicity and cost-effectiveness of arbitration, as opposed to litigation:

> Instead of fighting the text [of Sections 9-11], it makes more sense to see the three provisions … as substantiating a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway. Any other reading opens the door to the full-bore legal and evidentiary appeals that can "rende[r] informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process," … and bring arbitration theory to grief in [the] post-arbitration process. (Citations omitted.)

It appears that *Hall Street's* preclusion of expanded judicial review of most if not all arbitration awards, coupled with preservation of the parties' right to expanded internal review before a second panel of arbitrators strikes a proper balance between a norm of cost-effective arbitration, on the one hand and on the other, the parties' need to preserve certain procedural rights (including a right to a comprehensive appeal) in relatively rare instances involving exceptionally complex and extended arbitrations.

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expectation of confidentiality. Between these two divergent views, Judge Grimm identified an intermediate approach that requires a balancing of factors to determine whether the producing party exercised reasonable care under the circumstances to prevent the disclosure of privileged or protected information. If the court believes that the party exercised reasonable care, there is no waiver. Judge Grimm in *Victor* evaluated the disclosure and determined that the defendants waived the protections afforded by the attorney-client privilege and work-product doctrine because they failed to exercise reasonable care to prevent the disclosure of these items.

The *Victor* Court's Approach

The court in *Victor* employed the intermediate approach, which relies upon a balancing of the following factors: 1) the reasonableness of the precautions taken to prevent inadvertent disclosure; 2) the number of inadvertent disclosures; 3) the extent of the disclosures; 4) any delay in measure taken to rectify the disclosure; and 5) overriding interests of justice. *Victor Stanley, Inc.*, 2008 WL 2221841, *5 (citing *McCafferty's, Inc. v. Bank of Glen Burnie*, 179 F.R.D. 163, 167 (D. Md. 1998)). The court then determined that it need not go any further than the first factor, and found that it "militated most strongly in favor of a finding that Defendants waived the privilege in this case." *Id.* Specifically, the defendants had not carried their burden of proving that their conduct was reasonable because they failed to provide the court with: 1) information regarding the keywords used for the search; 2) the rationale for the selection of keywords; 3) the qualifications of the individuals who created the search to design an effective and reliable search and information retrieval method; 4) whether the search relied on simple keywords or a more sophisticated methodology such as Boolean proximity operators; and 5) whether the defendants had analyzed the results of the search to assess its reliability, task appropriateness, and quality of implementation. The court adopted the position that "all keyword searches are not created equal," and emphasized that proper selection and implementation requires technical and scientific knowledge.

Sedona Conference 'Practice Points'

To address the known deficiencies associated with basic keyword searching, the court focused on the Sedona Conference "Practice Points" as a guide for a proper search protocol. These practice points included: choosing a search method that is dependent on the specific legal context (Practice Point 3); performing due diligence when selecting an information retrieval product or vendor

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ESI and *Victor*

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(Practice Point 4); recognizing that the use of search and information retrieval tools does not guarantee the identification of all responsive documents in a large data collection (Practice Point 5); making a good-faith effort to collaborate on the use of particular search and information retrieval methods, tools, and protocols (Practice Point 6); and, expecting that your choice of search methodology will need to be explained, either formally or informally, in subsequent legal contexts (Practice Point 7). *Victor Stanley, Inc.,* 2008 WL 2221841, *6; The Sedona Conference Best Practices Commentary on the Use of Search & Information Retrieval Methods in E-Discovery, 8 Sedona Conf. J. 189). The court in *Victor* reasoned that compliance with the Sedona Conference Best Practices for search and information retrieval would strongly support a parties' argument that their chosen method was reasonable and reliable, but the defendants failed to demonstrate the reasonableness of their search, or satisfy the remaining criteria of the intermediate approach. Finally, the court criticized the defendants for failing to pursue a clawback agreement that could have provided them with added security in the event of an inadvertent production of protected documents.

Analysis

Although it may require the expenditure of time and money up front, a corporation will benefit greatly from the creation and institution of a document retention policy that clearly delineates the company's position of how (and for how long) documents are maintained, where those documents are maintained, and in what format. The policy should be well thought out, reasonable, and strictly adhered to by all employees. Upon receipt of discovery requests seeking ESI from many years prior to the litigation, a company will be able to quickly assess the request in light of its document retention policy and access material in an orderly fashion. Having a well-documented document retention policy will also provide companies with a ready explanation why an otherwise discoverable document may not have been retained.

Another important component of any company's e-discovery plan is the creation of a standard form litigation hold notice that can be modified, as needed, for specific situations. Once corporate counsel is aware of the potential of litigation, the litigation hold notice should be distributed to all employees as well as all information technology staff. The notice should explain that electronically stored data could become a key source of information and that the deletion of any material, even that which occurs in the normal course of business, should immediately be suspended and all potentially responsive information must be maintained.

Even for a small company that is infrequently faced with litigation, the creation and institution of a document retention policy and standard litigation hold notice will pay for itself in the long run by saving time and money in responding to discovery requests and by preserving the confidential nature of attorney client privilege or work-product doctrine documents. Without such a pre-litigation protocol, a small company will particularly feel the economical pain of developing and implementing such a policy on the fly in the middle of litigation with the added pressure of an opponent and the court.

Finally, *Victor* teaches us that all ESI searches are not created equal. When conducting a large-scale electronic document search and production, parties must pay particular attention to ensure that attorney-client privileged and work-product protected documents are not inadvertently produced during the course of discovery. As the defendants in *Victor* found, prudence dictates that a company develop a protocol to identify and segregate attorney-client privileged and work-product protected documents, including the clear demarcation of these items with a "privilege" or "confidential" stamp, well in advance of litigation.

By having a set protocol, companies can better avoid the pitfalls of the *Victor* defendants. In-house and outside counsel should work together and employ the "utmost care" in selecting a search and information retrieval methodology to identify and withhold information protected by the attorney-client privilege and work product doctrine. This includes, among other things, careful consideration of the qualifications of individuals who design the search methodology, quality assurance testing once the methodology has been implemented, and an expectation that a party could be called on to explain and defend its chosen methodology in future proceedings. When faced with litigation, the parties should also produce an accurate and complete privilege log that identifies any documents that are being withheld from production and the basis for doing so. Finally, early in the litigation, the litigants should work together towards the entry of an appropriate protective order or "clawback agreement" in the event that documents are inadvertently produced, despite taking the appropriate steps to prevent that from happening.

Although this time-consuming and expensive process does not guarantee against the inadvertent production of protected documents, abiding by document retention, document hold and ESI production protocols will support an argument that an inadvertent production should not result in a wholesale waiver of the attorney-client privilege or work-production protection. Companies who fail to implement such protocols in advance of litigation run the risk of bearing the increased burden of having an inadvertent production be deemed to be a wholesale waiver. Needless to say, a wholesale waiver could have devastating results on the outcome of litigation.

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Work Overtime to Ensure That Your Unauthorized Employees Do Not

By Michael C. Schmidt

Consider the following hypothetical scenario:

- Your company policy states that a non-exempt employee cannot work overtime, unless the employee receives prior written approval.
- Your company policy says that an employee who works overtime that is not authorized can be subject to discipline up to, and including, termination of employment.
- Your company did not believe that its non-exempt employees worked overtime hours.
- The overtime hours worked by non-exempt employees were unauthorized.
- Your company is found liable for significant unpaid overtime wages.

This situation is not so far-fetched, particularly after the federal Court of Appeals in New York ruled earlier this year that an employer cannot necessarily avoid liability for overtime wages — even if its policy requires prior approval for overtime work, and even if the employer did not have actual knowledge that its employees were working overtime hours. This article looks at the surge in overtime litigation, the court's recent decision and steps for limiting your company's potential exposure.

A Surge in Overtime Litigation

As we have passed the mid-way point of 2008, it is clear that wage and hour lawsuits continue to dominate a large portion of all new cases filed in court each day. This noticeable surge will continue, if not further increase, as current and former employees claim in increasing numbers that they have been classified improperly as "exempt" employees, and thus are owed overtime premium pay. These cases are often prosecuted through class action lawsuits, where the existence of multiple plaintiffs raises the potential for significant exposure to the employer.

In 2008, the ever-changing nature of the workplace and the workforce also has contributed to the wide spectrum of issues facing employers, and the increasing number of overtime lawsuits being filed. In years past, an employer had an easier time controlling its employees and hours worked when the work performed generally was confined to the nine-to-five workday and within the walls of the employers' office. In those circumstances, when employees were there to be seen, employers could strictly enforce anti-overtime policies and monitor the hours worked by its employees.

However, technology has torn down the office walls, making anywhere and everywhere in the world a virtual cubicle. Employees not only have greater access to company documents and e-mail from home computers, but Blackberries and similar devices allow employees to remain connected with the office and with clients day and night. Coupled with the increasing number of employees allowed to telecommute, it is practically impossible for your company to control, let alone know about, all hours in which employees are performing work for the company. Indeed, the fact that employees in financial services and sales-related industries often receive their compensation in the form of commissions provides its own incentive for employees to work as many hours as possible without the encumbrance of the typical workday or office walls.

New York Federal Court-Payment Required For Unauthorized Overtime

On Jan. 24, 2008, the Court of Appeals for the Second Circuit in New York issued its long-awaited decision in *Chao v. Gotham Registry, Inc.,* in which the Secretary of the United States Department of Labor brought an action against a nurse staffing agency for an alleged failure to pay for overtime hours worked by the nurses placed with requesting hospitals. After placement by the staffing agency, the nurses reported directly to the hospital and signed in and out on daily time sheets that were compiled and reviewed by the hospital. Notably, the staffing agency was "not permitted to go on hospital premises to verify the nurse's hours or otherwise supervise his or her performance."

The hospital paid the agency a fee based on the number of total hours worked by the particular nurse, and, in turn, the agency paid most of that fee to the nurse. However, the fee paid by the hospital to the agency did not change depending on whether the nurse had worked fewer or more than forty hours in a particular workweek, even though the hospital occasionally asked the nurses to work overtime. The court in *Gotham* noted that the agency itself maintained an overtime policy that required prior notification to, and authorization from, the agency before a nurse would be paid premium rates for overtime worked. Despite that policy, nurses often did not request approval from the agency to work overtime, and those that did were denied authorization more than they were approved. The agency ultimately refused to pay overtime premium pay to those nurses who worked overtime hours that were unauthorized.

The court held that unauthorized overtime constitutes "work" that must be compensated. Thus, an employer who has "actual or imputed knowledge that an employee is working" must compensate the employee at a rate of time and one-half for overtime hours worked, even if the employer acquires such knowledge at some point *after* the work is performed. The court stated:

> An employer who has knowledge that an employee is working, and who does not desire the work be done, has a duty to make every effort to prevent its performance … This duty arises even where

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the employer has not requested the overtime be performed or does not desire the employee to work, or where the employee fails to report his overtime hours.

The import of the decision in *Gotham* is that an employer cannot turn a blind eye to after-hours and off-premises work it knows, even constructively, is being performed. The Second Circuit has now stated clearly that a company has a duty to compensate its non-exempt employees for overtime work about which it knew or had reason to know.

But, what about the company policy prohibiting unauthorized overtime? The court in *Gotham* next addressed this issue. Consistent with the state of the law in other discrimination and harassment contexts, the court reaffirmed that the mere promulgation of a policy prohibiting unauthorized overtime is insufficient alone. Rather, the staffing agency was held to a standard requiring it "to adopt all possible measures to achieve the desired result." The evidence presented established that employees who disregarded the prior approval policy generally did not face any adverse consequences, while employees who disregarded other company policies were in fact disciplined. Therefore, there was no evidence that the agency sought to monitor or imposed any consequences for violations of its stated overtime policy.

From an equitable standpoint, a company is not likely to garner much judicial sympathy for failing to pay overtime when it had the power to prevent the overtime work from being performed and ultimately benefited from the overtime work. The presumption will arise that "an employer who is armed with knowledge has the power to prevent work it does not wish performed."

Steps for Minimizing Exposure

Your company cannot ignore the strict requirements pertaining to employee wages and hours. The court's decision in *Gotham* is important for its pronouncement on a company's obligation to pay overtime rates even for unauthorized overtime worked. However, the decision takes on a larger significance for most companies in New York, and could for other organizations nationwide, because the company in *Gotham*: 1) had even *less* control than the typical organization would have over its employees and the hours worked; and 2) seemingly received no benefit from the overtime work, and instead had to bear the cost, since the nurses worked directly for the hospital, and the hospital did not provide added fees to the agency if a nurse worked overtime.

It should be beyond cavil by now that an employer can never completely eliminate the possibility of a lawsuit. Still, there are pro-active steps that your company can take to minimize the potential exposure in any lawsuit. First, create a well-defined overtime policy (or review and revise any existing policies) that is distributed and communicated to all employees. It is not enough simply to create a policy — it is imperative that your policy be communicated through regular meetings with employees, and regular distribution (and employee acknowledgement) of the company's policy.

While the *Gotham* case demonstrates that an employer may be required to pay overtime premiums even if the overtime work is not authorized, an employer can discipline and even terminate an employee for performing unauthorized overtime. Issues such as the scope of what constitutes "work" for your particular company, and how the company treats meal breaks, travel time, and "on call" time also should be carefully considered and defined to ensure that the correct wage rates are used for each employee, and that the correct amount of working time is compensated.

Secondly, say what you mean and mean what you say. If your company maintains a policy that employees should not work after hours, then you should not create a culture where employees feel as if they are expected to "check in" at all hours through home computers or Blackberries. A good indication that an employee may be working off hours is if one of your supervisors receives a return e-mail message late at night or on the weekend. Employers also should be aware of the production of its employees, since certain high levels of productivity may be indicative of extra work being performed outside the company's office. Companies and their in-house counsel must ensure that any overtime policies maintained are enforced consistently and indiscriminately.

Third, verify that the appropriate classifications are made and that the appropriate records are maintained supporting the proper wage classifications for employees. The number of administrative audits and federal lawsuits challenging employee exempt statuses is on the rise, and your organization should be in the best position to produce proper documentation in defense of an audit or lawsuit.

Last, and similarly, consider instituting a documentation procedure for non-exempt employees, so that your company can better track (and better defend itself against) the number of hours an employee later claims he or she worked. Employers often walk the fine line between the hope of avoiding the lost morale associated with "big brother" watching and the need to protect against employee claims. However, in light of today's changing workforce, from the standpoint of increased use of technology and more time spent outside the traditional office, consider a requirement that employees provide written certification, for example, at the end of each pay period attesting to: 1) the number of hours worked during that period; and 2) the fact that the employee did not work more than 40 hours during that period. Such a certification will not eliminate the potential for an employee to claim in a subsequent lawsuit that hours were worked in addition to those identified on the certification. However, a contemporaneous certification completed regularly by the employee may bolster your company's defense of that claim.

Conclusion

Wage and hour lawsuits will, for the foreseeable future, continue to consume federal courts and expose employers to a growing number of issues that will reflect the evolving workplace and workforce. But, by tackling these issues head on in advance, your company will be best equipped to minimize potential exposure.

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Retaliation

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Court's recent decision in *CBOCS West, Inc. v. Humphries*, 128 S. Ct. 1951 (2008), the stakes in retaliation claims arising from complaints of race discrimination have increased dramatically. Employers consequently must revisit and reinvigorate their policies and practices to minimize the risks of exposure to retaliation claims.

The Legal Landscape Before *Humphries*

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on race, color, religion, sex or national origin. Plaintiffs who bring Title VII claims have a relatively short period within which to file their claim (up to 300 days) and must file with the Employment Opportunity Commission or a comparable state agency before filing a federal lawsuit. Plaintiffs can seek compensatory and punitive damages, but such amounts are capped, depending on employer size, to an aggregate maximum of $300,000.

Section 1981 of the Civil Rights Act of 1866, codified at 42 U.S.C. § 1981 *et seq.*, also prohibits race discrimination in employment. After the Supreme Court held in *Patterson v. McClean Credit Union*, 491 U.S. 164 (1989), that Section 1981 protects employees only in hiring and promotion decisions, Congress expanded Section 1981 via the Civil Rights Act of 1991 to apply to the "making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship." 42 U.S.C. § 1981(b).

Section 1981 in this broader scope provides plaintiffs with a highly advantageous alternative for challenging adverse employment decisions allegedly based on race. First, there is no administrative pre-requisite to filing Section 1981 claims. Second, the plaintiff has, in most cases, up to four years to bring a lawsuit. Third, whereas Title VII only reaches employers with 15 or more employees, Section 1981 applies to employers of any size. Fourth, and perhaps most significant, there is no cap on compensatory or punitive damages that a jury may award if it finds discrimination. With these advantages, plaintiffs routinely append Section 1981 claims to their Title VII claims in federal court. And, if a plaintiff missed the Title VII filing deadline, the potentially more lucrative Section 1981 with its uncapped monetary remedies remains an option.

While the Civil Rights Act of 1991 clearly expanded Section 1981 to protect employees from race discrimination in all adverse employment decisions, it did not explicitly provide that Section 1981 protects employees from retaliation for opposing unlawful discrimination. Title VII has always contained an express prohibition against retaliation. 42 U.S.C. § 2000e-3(a). Despite the absence of similar language in Section 1981, plaintiffs brought Section 1981 claims of retaliation and defendants predictably challenged the viability of such claims.

About half of the Federal Courts of Appeals had ruled on this issue before the Supreme Court weighed in, and those courts were unanimous in holding that Section 1981 allows for retaliation claims. Because it is unusual for the Supreme Court to accept a case when there is no disagreement among the appellate courts, many observers predicted the Court would overturn those decisions and reject Section 1981 retaliation claims.

The Supreme Court Ruling in *Humphries*

To the dismay of employers, those observers' forecasts proved wrong. Agreeing with all of the Federal Courts of Appeals who had ruled on the issue, the Supreme Court held in its 7-2 *Humphries* decision that "42 U.S.C. § 1981 encompasses claims of retaliation."

To reach this holding, the Court focused on its earlier decisions interpreting Section 1982 of the Civil Rights Act of 1866, which prohibits race discrimination in real estate and personal property transactions. The Court had held as far back as 1969 that Section 1982 "cover[s] retaliation against those who advocate the rights of groups protected by that prohibition." *Jackson v. Birmingham Board of Education*, 544 U.S. 167, 176 (2005), citing *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969). Like Section 1981, Section 1982 does not contain any express prohibition against retaliation, but the Court reasoned that such prohibition is implicit in the statute because "punish[ing an individual] 'for trying to vindicate the rights of minorities protected by § 1982' would give 'impetus to the perpetuation of racial restrictions on property.'" Given the Court's longstanding propensity to interpret Sections 1982 and 1981 identically since they were enacted together, have similar language and have a common goal to protect African-Americans' legal rights, the Court concluded that § 1981 also implicitly prohibits retaliation.

Addressing why its decision is important for employers, the Supreme Court dispensed with the defendant's argument that recognizing Section 1981 retaliation claims would allow plaintiffs to circumvent Title VII's carefully crafted procedural requirements. Congress expressly tolerates such overlap in the reach of Title VII's and Section 1981's protections against race discrimination. Acknowledging similar overlap in their protections against retaliation does not breach congressional intent.

A Wake-Up Call for All Employers

That retaliation is unlawful is not news, given that most employers have always been subject to Title VII and comparable state statutes. The *Humphries* decision is troubling for employers because employees in all states now have the expansive remedies and procedural advantages of Section 1981 whenever they allege retaliation for opposing unlawful race discrimination, and employers consequently face significantly greater challenges in such cases. Damages that a jury may award under Section 1981 are not capped, so

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employees will have greater leverage to force employers to settle even frivolous cases. Section 1981's limitations period is typically much longer, so employers will likely have to track down former employees long gone from the company to explain the adverse employment action. In addition, employees can completely circumvent the EEOC administrative process, thereby avoiding a mechanism that often weeds out frivolous claims.

At a minimum, *Humphries* should alert employers who have not yet adopted effective anti-retaliation policies that the bullet they have been dodging now has a much larger caliber. Preventing retaliation can minimize the risk of being party to a retaliation lawsuit. Effective preventive mechanisms can also better the employer's chances of prevailing if subject to a retaliation lawsuit. *Humphries* should also prompt employers who have already adopted retaliation policies to review them, republicize them and enhance their effectiveness.

Recommendations for Employers

Employers recognize the importance of documenting all adverse employment decisions, and doing so in retaliation cases is no less valuable. Employers are well advised to consider the following additional recommendations, and should adopt, revise or reinvigorate their policies and practices accordingly.

Include Within the Written Anti-Discrimination Policy a Clear Policy Against Retaliation

The policy should contain, at a minimum, the following types of provisions: The company prohibits retaliation against employees who have opposed unlawful discrimination of any kind, whether based on race, ethnicity, gender, age, disability or another protected category. The company also prohibits retaliation regardless of how the employee opposed discrimination — whether by raising a concern internally or by participating in an investigation of a complaint. Employees will not be retaliated against even if their complaints are proven unfounded by an investigation, unless the employee knowingly made a false allegation or otherwise acted in bad faith. Employees must participate in good faith in any company investigation. Policy violations will result in discipline, up to and including termination. Employers may need to revise any progressive discipline policy to clarify that violation of the anti-discrimination and anti-retaliation policies are an exception to the progression and may lead directly to termination.

Promote and Reinforce the Policy on a Regular Basis

Employers should set forth the policy in detail in employee handbooks and in supervisors' policy and procedure manuals, and train all employees and supervisors in the policy. Some states require employers to provide training on a regular basis, but employers in all states are well advised to conduct the training annually or even semi-annually. It is good practice to periodically remind employees and supervisors of the policy in other ways. For example, yearly or semi-yearly e-mail reminders can be effective. Some employers incorporate reminders on a regular schedule into bulletins and other employee communications.

Adopt Aggressive Mechanisms to Halt and Remedy Unlawful Retaliation

It is critical that the anti-retaliation policy provide employees with clear and detailed written procedures for raising complaints of retaliation. Employees should be offered multiple contact options so that an employee can feel safe to complain. For example, a well-crafted policy invites employees to lodge their complaints with any of various higher-level management or human resource employees. Many larger organizations have even implemented toll-free hotlines. In addition, manuals that will guide the management employees who investigate retaliation claims should establish a basic framework for the investigation of complaints that is flexible enough to deal with varying situations and uncomplicated enough to assure prompt and thorough investigations.

Next month: the mechanics of the investigation.

IP Lawsuits

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to defend. If exclusions were applied in the sweeping manner that insurers frequently advocate, they would swallow the entire policy and render the coverage illusory — a result that courts should not, and generally do not, allow to happen.

One Final Point: Be Sure You Give Prompt Notice

Do not forget to give prompt notice to your insurers. Most CGL policies require two types of notice for advertising injury claims – notice of the lawsuit itself, and notice that you have learned of an "occurrence" potentially giving rise to a suit. An example of the latter would be a cease and desist letter, or other pre-suit threats from a competitor. Late notice defenses are difficult for insurers to prevail upon because courts usually construe notice provisions liberally in favor of the policyholder, and because in most jurisdictions (New York is one notable exception) insurers need to prove that they were prejudiced by the late notice, which can be proven only in unusual cases. Nevertheless, late notice is one defense that the policyholder can eliminate altogether, and should therefore be taken off the table by consulting insurance coverage counsel and giving notice to the appropriate insurer(s) at the first opportunity.

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