Swift Currie
ATTORNEYS AT LAW

*Timeless Values.*
*Progressive Solutions.*

*www.swiftcurrie.com*

The 1st Party Report

A Property & Insurance Update

Spring 2008

# E – DISCOVERY: DANGERS IN AN ELECTRONIC WORLD

*By Melissa K. Kahren*

Did you know:

(1) A party may not be able to avoid a search of its electronic systems and files simply by pointing out the time and expense that may be involved in such an undertaking; and

(2) Some courts have allowed parties to conduct a search of their opponent's computer systems, in some cases even requiring the opponent to produce its entire hard drive, in order to allow full access to conduct searches for potentially relevant electronic data contained on those computers.

As you have probably noticed, more and more information is being generated and stored in an electronic format as companies move toward paperless offices. More and more headlines talk about alleged criminals finding themselves in trouble because the text messages, emails or other electronic information they received or sent did not magically disappear with a tap of the delete button. We must, therefore, consider the possibility that others may obtain the electronic information that floods our computers and blackberries (or whatever other electronic "toy" is your device of choice).

Courts are also beginning to acknowledge our brave new world of electronic communication. For example, the Federal Rules of Civil Procedure were recently amended to address concerns about obtaining electronic documents and information, or "e-discovery." Parties in federal court cases must now discuss e-discovery issues at their early discovery planning conferences. The Federal rules also allow parties to request the production of electronically stored information and documents.

Dealing with the production of electronic documents and information presents new litigation challenges that parties must be prepared to address. Courts may not excuse a failure to produce electronic information on grounds that the information was deleted and can no longer be retrieved. For example, courts have punished a party when it found the party "willfully" deleted emails that had been requested because some of the party's employees had not taken action to preserve the emails after being advised of the potential for litigation and the possibility that such documents could be relevant to such litigation. *See Zubulake v. UBS Warburg, LLC*, 229 F.R.D. 422 (S.D.N.Y. 2004).

Courts have allowed a party access to its opponent's databases, and in some cases, even the actual computers containing the database. Factors a court may consider before allowing such access include:

a. A failure to produce all documents otherwise requested;

b. A discrepancy in the producing party's responses to prior requests;

c. Evidence that the requesting party had failed to indicate that relevant documents or data had been lost, so that the requesting party had a need to conduct a wider search in order to try to find such documents; or

d. Evidence that there were documents that would be contained in a mirror image search that the producing party had been unable or unwilling to produce.

With courts taking such an aggressive approach to the production of electronic information, it may seem a daunting task to come up with a way to preserve any potentially relevant electronic information that may later form the basis of a discovery request to which a court may require compliance. In that regard, the *Zubulake* court proposed the following guidelines for retaining such electronic information:

(1) When a party reasonably anticipates litigation, it should suspend its standard policies regarding the retention or destruction of documents. Instead, the party should impose a "litigation hold" to help ensure that relevant documents are retained.

(2) A party should discuss the importance of retaining the electronic information with employees who are actively involved in the dispute and with the party's IT personnel.

(3) Instructions regarding the litigation hold should be repeated regularly to employees, and the party should monitor its compliance.

(4) A party should also plan to produce copies of all relevant electronic documents and information to its attorneys, who can then segregate and safeguard the documents, to help ensure that the electronic information has been properly preserved.[1]

In addition, insurers should consider hiring a computer forensic expert who can assist in retrieving and saving electronic information that may be at issue in future or existing litigation, particularly if large amounts of electronic data may be subject to production.

Because courts have indicated that a party should begin the process of preserving electronic information at the time it reasonably antic-

[1] *See Calyon v. Mizuho Securities, USA, Inc.*, 2007 U.S. Dist. LEXIS 36961 (S.D.N.Y. 2007).

ipates litigation, parties who choose to wait until litigation has begun before acting to preserve electronic information may find themselves subject to court-imposed sanctions. In order to avoid such sanctions, parties should be proactive in their efforts to preserve and retain electronic information.

For more information on e-discovery, contact Melissa Kahren at 404.888.6179 or melissa.kahren@swiftcurrie.com.

## POTENTIAL AGENT EXPOSURE BY FAILING TO CONVEY COVERAGES TO INSUREDS

*By Robert M. Sneed, Jr.*

An issue many independent agents face is whether certain communications they may have with insureds could potentially expose them to liability in tort outside the scope of the insurance contract. The Georgia Court of Appeals recently published an opinion addressing this issue in *Traina v. Cord & Wilburn, Inc. Insurance Agency*, OB FCDR 664.

In *Traina*, Traina Enterprises, Inc. owned several properties where its docks collapsed following a severe snowstorm. Traina sought reimbursement for the damage to the docks from its insurance carrier, only to discover that the insurance coverage procured by an independent agent was allegedly not what Traina had originally requested. The agent had prepared a coverage summary for Traina, but failed to advise Traina of a letter he received from the insurer notifying him that the collapse coverage for snow was now excluded under the new policy.

During the course of discovery, it was determined that Traina had specifically requested property insurance coverage for the collapse of piers, wharfs or docks caused by the weight of snow, ice and sleet. This coverage was important because Traina had sustained similar losses in 1988 and 1992, when snow storms in Atlanta caused extensive damage to Traina docks. For policy years 2002 to 2003 and 2003 to 2004, the agent obtained such coverage for Traina. However, Continental Casualty Company ("Continental") subsequently sent written notice to the agent explaining that Traina's coverage for the collapse of piers, wharfs and docks, if caused by weight of snow, would be excluded. The agent acknowledged receiving the letter, but Traina contended it never received the letter and was never advised of the change in coverage.

The insurer denied coverage, stating that the loss was not covered because the damage occurred due to an excluded cause under the 2004 to 2005 insurance policies. Traina filed suit against the agent, alleging misrepresentation, negligent failure to procure insurance and negligent failure to provide notice of change in coverage.

The Court of Appeals discussed the general duties of an insured and agent with respect to communication regarding the types and amounts of coverage procured under a policy. As the *Traina* court explained, while an insured has a duty to read and examine an insurance policy to determine whether the coverage requested was procured, several exceptions to this rule exist. For example, one exception is when the agent holds himself out as an expert and the insured has reasonably relied on the agent's expertise to identify and procure the correct amount or type of insurance. *Heard v. Sexton*, 243 Ga. App. 462, 463, 532 S.E.2d 156 (2000). Other exceptions include instances where an agent intentionally misrepresents the existence or extent of coverage to an insured, or where the evidence reflects a special relationship of trust or other unusual circumstances which would have prevented or excused an insured of his duty to examine the policy. *Traina, citing Rogers & Sons, Inc. v. Santee Risk Managers, LLC*, 279 Ga. App. 621, 627, 631 S.E.2d 821 (2006).

In discussing the exceptions to the rule, the *Traina* court found that the first exception did not apply because Traina was a sophisticated business that independently determined the appropriate amounts and scope of coverage it required, and thus it did not rely on or authorize the agent to assess its coverage needs. The court held that the second exception was also inapplicable as there was no evidence that the agent intentionally or fraudulently misrepresented the extent of Traina's coverage. However, the court held that unusual circumstances existed, specifically the agent's preparation of a policy summary for Traina.

The importance of this recently decided case lies in how an independent insurance agent provides information to the insured regarding coverages. Independent agents should be cognizant of information received from the insurers regarding coverage changes and should immediately notify the insured of any such changes. In that regard, whenever possible, insurers should instruct independent agents to refrain from summarizing coverages to the insured outside the express provisions of the policy.

For more information on this topic, contact Robert Sneed at 404.888.6174 or robert.sneed@swiftcurrie.com.

## EXAMINATIONS UNDER OATH

*By Steven J. Defrank*

An examination under oath (EUO) is a sworn statement conducted by an insurer pursuant to the conditions to coverage of an insurance policy. In an EUO, the insured is placed under oath and the examiner's questions, as well as the insured's answers, are transcribed by a stenographer. Most insurance policies, under the CONDITIONS or RIGHTS AND DUTIES sections, provide that an insured who is making a claim has certain obligations under the policy to cooperate in the investigation of the loss, including submitting to an examination under oath and producing requested documents for inspection.

The Supreme Court in *Claflin v. Commonwealth Ins. Co.*, 110 U.S. 81, 95 (U.S. 1884), upheld the validity of an examination under oath provision in an insurance policy. According to the *Claflin* court,

> The object of the provisions in a policy of insurance, requiring the assured to submit himself to an examination under oath, to be reduced to writing, is to enable the [insurance] company to possess itself of all knowledge, and all information as to other sources and means of knowledge, in regard to the facts, material to their rights, to enable them to decide upon their obligations, and to protect them against false claims. And every interrogatory that is relevant and pertinent in such an examination is material, in the sense that a true answer to it is of the substance of the obligation of the assured. A false answer as to any matter of fact material to the inquiry, knowingly and willfully made, with intent to deceive the insurer, would be fraudulent.

The examination under oath is a useful tool in gathering information regarding the insured, such as the insured's financial condition at the time of the loss, if there are indications of fraud in the claim. In *Halcome v. Cincinnati Ins. Co.*, 778 F.2d 606 (11th Cir. 1985), for example, the insureds took a trip to Disney World with their son, during which their car containing valuable jewelry was allegedly stolen. The insureds filed a claim with their insurer for a total property loss of $128,495. Based on information that the insureds had submitted prior questionable claims with other carriers, as well as their state of unemployment at the time of the loss, the carrier requested information relating to the insureds' income, prior claims and criminal history. The insureds refused to provide the information and filed an action against Cincinnati Insurance. The Eleventh Circuit, in affirming the District Court's grant of summary judgment to the insurance company, held that the insureds' claim raised questions of fraud, making their income relevant to the insurance company's investigation. *Halcome* at 609. Therefore, the insureds breached their contract of insurance by failing to provide the information requested by the insurer during the examination under oath process. *Halcome* at 611.

The insured is obligated to submit to an examination under oath, even when the insured claims Fifth Amendment protection. In *Pervis v. State Farm Fire & Casualty Co.*, 901 F.2d 944 (11th Cir. 1990), the Eleventh Circuit Court of Appeals held that the insured, who filed an action to recover fire insurance proceeds, was required to submit to an examination under oath before he could initiate an action to recover under the policy. The insured argued that because he was facing criminal arson charges, submitting to an examination under oath would violate his constitutional rights against self-incrimination. The court held that the insured had a contractual duty to submit to the examination under oath as a condition precedent to filing his action and his constitutional right did not excuse him from complying with the insurance contract he wished to enforce. *Pervis* at 946. As a result, in failing to submit to the examination under oath, the insured had no rights under the insurance contract. *Id.*

It should be noted, however, that the right to take an insured's examination under oath is not without limits. For example, it is necessary that the examination under oath be timely. In *Appleby v. Merastar Ins. Co.,* 223 Ga. App. 463, 477 S.E.2d 887 (1996), the Georgia Court of Appeals held that the insurer waived the contractual suit limitation period when it agreed to take the examination under oath of the insured outside the suit limitation period.

Georgia and federal law uphold the enforceability of the conditions to coverage provisions contained in most insurance policies. Especially where fraud or arson are suspected, the examination under oath is an important tool to further the claims investigation and reach the correct decision regarding a claim in the shortest period of time.

For further information regarding taking effective examinations under oaths, please contact Steven DeFrank at 404.888.6130 or steven.defrank@swiftcurrie.com.

## THE VOLUNTARY PAYMENT DOCTRINE: A POTENTIAL BAR TO SUBROGATION

***By Jeremy E. Catlin***

Under the voluntary payment doctrine, insurance companies pursuing subrogation may face unexpected difficulties if the insurer issued payment under the policy when it was under no legal obligation to do so. *Transp. Ins. Co. v. Maryland Cas. Co.*, 187 Ga. App. 361, 364 (1994). In other words, when an insurer brings suit as a subrogee, the defendant may successfully defend the suit under the voluntary payment doctrine if the insurer had no duty to pay the claim under the policy.

The United States District Court for the Northern District of Georgia recently discussed the effect of the "voluntary payment doctrine" on an insurer's right of subrogation in *Mass. Bay Ins. Co. v. Sunbelt Directional Drilling, Inc.* 2008 U.S. Dist. LEXIS 20066. In *Sunbelt*, Massachusetts Bay Insurance Company ("Massachusetts") issued a comprehensive general liability ("CGL") policy to World Fiber Technologies ("WFT"). WFT entered into a contract with the Georgia Department of Transportation ("GDOT") to install underground cable for a camera surveillance system along a roadway. WFT hired subcontractor Sunbelt Directional Drilling, Inc. ("Sunbelt") to perform drilling on the project. After Sunbelt performed the drilling work, the GDOT notified WFT there was damage to the surface of the roadway. WFT requested that Sunbelt repair the damaged roadway, but after Sunbelt failed to make repairs, WFT hired another outside company to perform the corrective work. WFT was subsequently billed $169,200.70 for the road repairs.

WFT submitted a claim to Massachusetts for the costs associated with the corrective work. Massachusetts eventually paid WFT's claim. Massachusetts brought suit as subrogee against Sunbelt. Sunbelt (represented by Swift Currie) prepared a motion for summary judgment in which it argued the payments made by Massachusetts to WFT constituted a voluntary payment and, therefore, Massachusetts held

no subrogation rights under the voluntary payment doctrine. In discussing the application of the voluntary payment doctrine, the court explained that the burden was on the subrogee insurer to prove that the payment was not made voluntarily. The court also noted that Georgia courts have applied the voluntary payment doctrine to bar recovery by the insurer where the insured's policy did not provide coverage for the claimed loss or explicitly excluded coverage. In the end, the court relied on its interpretation of the policy provisions to hold that no coverage existed for the loss in granting Sunbelt's motion for summary judgment.

In its decision, the district court held that no coverage was forthcoming under Massachusetts' policy with WFT because the alleged damage to the roadway, and subsequent claim for reimbursement by WFT, arose in contract and not tort. The court approvingly cited well-established Georgia law holding that CGL policies, in general, provide coverage for amounts the insured becomes "legally obligated to pay as damages" arising out of either "bodily injury" or "property damage" and do not cover economic loss resulting from a contractor's duty to repair or replace its own work. *See McDonald Construction Co. v. Bituminous Cas. Corp.*, 297 Ga. App. 757 (2006); *Sawhorse, Inc. v. Southern Guaranty Ins. Co.*, 269 Ga. App. 493 (2004). Furthermore, the damages were excluded under the "business risk" exclusions of the policy. Therefore, consistent with the decisions in *McDonald* and *Sawhorse*, because the damages arose in contract to correct or replace the contractor's "own work," the policy provided no coverage for the amount spent repairing the roadway.

Based upon the coverage analysis, the district court concluded that Massachusetts was not obligated to WFT under the insurance policy, and thus its payment to WFT was deemed a voluntary payment. The court found that based on the voluntary payment doctrine, Massachusetts was barred from recovering against Sunbelt and subsequently granted Sunbelt's motion for summary judgment.

As the *Sunbelt* case illustrates, the voluntary payment doctrine may have a significant impact on an insurer who pays a claim that may not be covered under a policy of insurance if the insurer seeks reimbursement through a subrogation action. *Sunbelt* underscores the fact that insurers should be encouraged to analyze issues of coverage independently from the possibility of recovery through subrogation, and to take care in making a voluntary payment directly to its insured for work performed by a third-party that is a stranger to the policy of insurance. An insurance carrier's failure to consider these issues may preclude the company from successfully pursuing a subrogation action in the future.

For more information on this topic, contact Jeremy Catlin at 404.888.6144 or jeremy.catlin@swiftcurrie.com.

## E-mail List

If you would like to sign up for the E-Newsletter version of The 1st Party Report, please send an e-mail to info@swiftcurrie.com with "First Party Report" in the subject line. In the e-mail, please include your name, title, company name, mailing address, phone and fax.


## Save the Date


**Swift Currie's Annual Workers' Compensation Seminar**
September 12, 2008
9:30 AM - 3:00 PM
Villa Christina


**Swift Currie's Annual Property and Liability Seminar**
November 7, 2008
9:30 AM - 3:30 PM
Villa Christina



1355 Peachtree Street, NE • Suite 300 • Atlanta, Georgia 30309
404.874.8800 • www.swiftcurrie.com



**The First Party Report is edited by Steven J. DeFrank and Melissa K. Kahren. If you have any comments or suggestions for our next newsletter, please contact Steven at steven.defrank@swiftcurrie.com or Melissa at melissa.kahren@swiftcurrie.com.**