The Weekly Update of Texas Insurance News
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A Service of Martin, Disiere, Jefferson & Wisdom L.L.P.
Principal Office 808 Travis, Suite 1800 Houston, Texas 77002 713.632.1700 FAX 713.222.0101
106 East Sixth Street, Suite 900 Austin, Texas 78701 512.322.5757 FAX 512.322.5707
900 Jackson Street, Suite 710 Dallas, Texas 75202 214.420.5500 FAX 214.420.5501

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******** SPECIAL EDITION ********
NEW FEDERAL COURT DISCOVERY RULES BEGIN THIS WEEK

Many changes to the Federal Rules of Civil Procedure take effect December 1st and will impact many of our readers who litigate insurance cases in Federal courts in Texas and elsewhere. As such, we wanted to take time to update our readers on these new rules which will impact federal court discovery after December 1st.

Many of the new changes involve electronically stored information. The new rules will likely have a significant impact on the production of evidence during discovery. This special edition of the Newsbrief will summarize and explain these changes and how they will likely impact you.

As many of these changes relate to what the rules call "electronically stored information," it would be worthwhile to take a moment and define this term. The issuing a decision that served as the basis for many of the new rules, a Federal District Court in the Southern District of New York, in *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 318-19 (S.D.N.Y. 2003), described electronically stored information as including:

(1) Active, online data (which the court described as on-line storage on a data disk, such as a hard disk).
(2) Near-line date (which the court described as a storage device that uses robotic arms to access the media, such as optical disks).
(3) Offline storage/archives (which the court described as removable optical or magnetic disks).
(4) Backup tapes (which the court described as a magnetic-tape device, like a tape recorder, that typically use date compression).
(5) Erased, fragmented or damaged data (which the court described as data that had been erased and then broken up into fragments that could be accessed after "significant processing").

Federal Rule of Civil Procedure 16

Under new Rule 16. the district court is to enter a scheduling order that provides "for disclosure or discovery of electronically stored information [and] any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after production." FED. R. CIV. 16 (b)(5)-(6). Now, scheduling orders will have to specifically address the issue of the discovery of electronically stored information. The link between electronically stored information and asserting claims of privilege is not obvious, but a practical concern nonetheless. With the emergence of the mass production of electronic information, it will be increasingly easier to inadvertently produce privileged information. This rule contemplates a scheduling order that will establish procedures to minimize damage and protect the privilege. As the committee note to Rule 16 states, the parties "may agree to initial provision of requested materials without waiver of privilege or production to enable the party seeking production to designate the materials desired or production for actual production, with the privilege review of only those materials to follow."

Federal Rule of Civil Procedure 26 (a)(1)

New Rule 26 adds to the list of documents to be produced by all parties as part of the initial disclosures "electronically stored information . . . that the disclosing party may use to support its claims or defenses." FED. R. CIV. 26 (a)(1)(B). In other words, if a party plans to use any electronically stored information to support a claim or defense, this information must be produced as part of the initial disclosures under the new Federal Rules.

Federal Rule of Civil Procedure 26 (b)(2)

The new Federal Rules certainly will lead to increased costs associated with the production of electronically stored information (especially when considering the potentially massive volume of electronically stored information that may be at issue even in "basic" insurance lawsuits). New Rule 26 addresses this potential problem. A party is not required to produce electronically stored information if it is "not reasonably accessible because of undue burden or cost." FED. R. CIV. 26 (b)(2)(B). On a motion to compel, the party resisting discovery carries the burden to demonstrate the undue burden or cost of complying with producing the requested electronically stored information. *Id.* If that burden is met, the requesting party may still receive the information by showing good cause. *Id.* However, the court may split the proverbial baby and shift the cost to the requesting party.

The court in *Zubulake* articulated a test for determining whether cost shifting is appropriate:

(1) The extent to which the request is specifically tailored to discover relevant information.
(2) The availability of such information from other sources.
(3) The total cost of production, compared to the amount in controversy.
(4) The total cost of production, compared to the resources available to each party.
(5) The relative ability of each party to control costs and its incentive to do so.
(6) The importance of the issues at stake in the litigation.
(7) The relative benefits to the parties of obtaining the information.

Zubulake, 217 F.R.D. at 322. These factors are not evenly weighed, but are considered in a descending order of importance. *Id.* Accordingly, the court may grant the discovery request regarding electronically stored information, but may require the party seeking the information to pay for its production.

Federal Rule of Civil Procedure 26 (b)(5)

Rule 26 (b)(5) does not address whether a party has waived a privilege by inadvertently producing a document. Courts have developed principles to determine whether, and under what circumstances, waiver results from the production of inadvertently disclosed privileged or otherwise protected information. Rather, Rule 26 (b)(5) provides procedures for addressing these issues. If information is produced that is subject to a claim of privilege or other protection, the party seeking to assert this privilege must notify the other party of the privilege and the basis for it. FED. R. CIV. 26 (b)(5)(B). The party who has received this information must then "promptly return, sequester, or destroy the specified information" and "not use or disclose the information until the claim is resolved. . . . The producing party must preserve the information until the claim is resolved." *Id.*

Federal Rule of Civil Procedure 26 (f)

Because of the increased potential and ease of erasing electronically stored information, the rules have been amended to encourage the parties to specifically address this problem early on in the discovery process. The parties "must" conference amongst themselves (before the scheduling conference with the court) and "discuss any issues relating to preserving discoverable information." FED. R. CIV. 26 (f). For example, the plaintiff should disclose that it will be seeking certain information in upcoming discovery that may be stored in some electronic format. This puts the defendant on notice not to destroy or remove this information. Therefore, if the defendant has a document retention policy that may destroy some electronically stored information that the plaintiff has indicated may be relevant to the resolution of the claims asserted against the defendant, the defendant should break from the document retention policy (or document elimination policy, as the case may be) and preserve such information.

Federal Rule of Civil Procedure 34

New Rule 34 specifies that electronically stored information is subject to discovery. The Rule broadly defines discoverable information as including any "test or sample . . . or electronically stored information . . . sound recordings, images, . . . date or data compilations stored in any medium." FED. R. CIV. 34 (a). In a request for production, a party "may specify the form or forms in which electronically stored information is to be produced." FED. R. CIV. 34 (b). A response may include an objection to the requested form for producing electronically stored information, including an alternative form that the responding party intends to use. *Id.* If a request does not specify the form for producing electronically stored information, the responding party must produce the information "in a form or forms in which it is ordinarily maintained or in a form or forms what are reasonably usable; and a party needs to produce the same electronically stored information in more than one form." FED. R. CIV. 34 (b) (ii)-(iii). Regardless of what "ordinarily maintained" or "reasonably usable" may mean, the obvious purpose of this Rule is to produce the information is some form that the other party can use. For example, the production of volumes of pages with binary digits (0's and 1's) would probably not satisfy the requirements of this rule and likely be grounds for sanctions.

Federal Rule of Civil Procedure 37

New Rule 37 is called the sanctions "safe harbor" rule. A court "may not" impose sanctions for failure to produce electronically stored information that is "lost as a result of the routine, good-faith operation of an electronic information system." FED. R. CIV. 37. However, this safe harbor provision may not be available to a party after they have been placed on notice of the need for such electronically stored information during a Rule 26 (f) conference.

CONCLUSIONS

While there are other minor changes to the rules, the primary emphasis under the most recent amendments to the Federal Rules of Civil Procedure is a clear emphasis on the discoverability of electronically stored information and the resolution of problems associated therewith. More and more claim, underwriting, and other information is being stored (sometime exclusively) by insurers in an electronic format.

Most insurers will be significantly impacted by the new Rules because of the increasing frequency with which most insurers store data electronically. Emails among claims representatives and their managers are the most obvious set of information potentially impacted by the new Rules. Additionally, electronic versions of documents previously available in "hard copy"—such as claims handling guidelines, underwriting guidelines, "CAT" operation manuals, and other similar items—will be the focus of additional discovery battles under the new Rules. The existence of different data and information on different computer systems, or on different laptop computers, could prove very burdensome for some insurers. The new Federal Rules emphasize the need to make all "relevant" electronic data and information accessible during discovery. Unfortunately, litigants will be fighting over the scope and meaning of these new Rules for many years.

If you have questions about how the new Federal Rules of Civil Procedure may impact any of your cases in federal court, feel free to contact any of our lawyers to discuss your particular issues and questions.