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Commercial Banking, Collections and Bankruptcy

The newsletter of the Illinois State Bar Association's Section on Commercial Banking, Collections and Bankruptcy

The New World Order Is Here, But We Remain a Profession

BY JUDGE MICHAEL CHMIEL

The beginning of the new bar association year of the Illinois State Bar Association—and the New World Order—is here, after a successful Annual Meeting at which the ISBA organized itself. As we continue to work our way out of the pandemic, adjustments and pivots continue to evolve and become a part of the fabric. Remaining, however, is the fact that we operate as a profession. It is what we make of it!

Personally, I am happy to see remote proceedings stitched more into the fabric

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Bank Loses Claim to Collateral

BY MICHAEL WEISSMAN

In a decision by the Court of Appeals of Georgia, 2022 Ga. App. LEXIS 230; 2022 WL 1492854 (1st Div. May 5, 2022), the bank lost its claim to certain collateral because it was unable to provide sufficient evidence that both it and the borrower intended to include the collateral but failed to do so as a result of a mutual mistake.

The borrower's relationship with the bank began before 2004 with a commercial loan secured by real estate. After 2004, the borrower acquired two additional tracts, named tracts 6 and 7, but they were not added to the collateral description in the bank's security documents. In 2012, the bank and the borrower consolidated separate loans into one secured by real estate, but the collateral description was not modified. Subsequently, the borrower built a loading dock on its property that extended over tracts 6 and 7. In 2015 and 2016, the

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of our legal system. Without trying to date myself, I utilized telephonic appearances in federal court (back when I was handling bankruptcy cases) 20 or so years ago. In my Courtroom 202 in Woodstock, I have utilized remote proceedings since 2014; each of our civil courtrooms in the 22nd Judicial Circuit has utilized remote proceedings for five or more years. It just makes too much sense, as counsel can tell us by telephone that discovery, for example, is still being handled without the need for a three-hour round trip to our collar county.

As we continue to work to exit the pandemic, we have continued to help litigants with their issues. Two things come to mind. First, as I wrote in our last edition, Time Standards are in place. However, please note we—judges—will take the necessary time to handle matters properly in our courtrooms. Noting this, at the direction of the Supreme Court of Illinois, we need to keep moving cases forward, with an eye to meeting the court's standards. Second, civility and professionalism remain as important as ever. In a recent interview with Erika Harrold—the new executive director of the Commission on Professionalism of the Supreme Court of Illinois, I explained newer items like social media challenge us more and more, but we need to show up. We need to respect the medium, thoughtfully consider posts and the like, and fully and respectfully address posts, especially when they may be—or seem to be—off. Again, our profession is what we make of it. The rule of law is counting on us!

In this issue, we have one article from the most prolific author of our section council, Michael Weissman, who writes about a recent rendering in the commercial law arena. We are also republishing an article authored by a long-time coordinator of continuing legal education for our section council—Samuel Levine—on construction stoppages, which was originally published in the newsletter of the Real Estate Law Section. We are also republishing an article authored by George Bellas and Joseph Dybisz on electronically stored information ("ESI"); George has been working on ESI for many moons, and this article is helpful to consider. We are also republishing an article authored by Edward Casmere of the Bench and Bar Section Council of the ISBA, who reviews the work of Joel Shapiro and the mediation program of the United States Court of Appeals for the Seventh Circuit; before taking the bench, I worked with Mr. Shapiro on the reorganization of a client in Chapter 11, and he facilitated the resolution of a seven-digit claim! Lastly, we are also republishing an article authored by Retired Judge Al Swanson on the longest (until she retired) sitting jurist in Illinois—former Chief Justice Rita Garman; thanks to her for serving with distinction for five decades!

Otherwise, once again, we are looking for two things—articles which might add value to the practices of the members of our Section, and a collaborator who might want to take the baton from yours truly. Please email me if you have an article for publication or may want to be the next editor of our newsletter. Please send any such things to mjchmiel@22ndcircuit.illinoiscourts.gov. Be well, and please show up!■

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OFFICE
ILLINOIS BAR CENTER
424 S. SECOND STREET
SPRINGFIELD, IL 62701
PHONES: 217-525-1760 OR 800-252-8908
WWW.ISBA.ORG

EDITORS
Hon. Michael J. Chmiel

PUBLICATIONS MANAGER
Sara Anderson
sanderson@isba.org

Postmaster: Please send address changes to the Illinois State Bar Association, 424 S. 2nd St., Springfield, IL 62701-1779.

Bank Loses Claim to Collateral

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bank's security documents were modified again, but again no changes were made to the original collateral description.

The borrower later defaulted and in 2019 the bank conducted a nonjudicial foreclosure under a power of sale. The bank was the purchaser at the sale. Thereafter, for a year following the sale, the parties acted as though the bank had foreclosed on all of the property owned by the borrower including tracts 6 and 7. But in 2020 the borrower learned that it still owned tracts 6 and 7 and it quitclaimed them to a limited liability company organized by the owner of the borrower.

Once it became aware of the fact that it did not own tracts 6 and 7 the bank sued to reform the loan documents to include tracts 6 and 7 as collateral because they had been excluded as a result of a mutual mistake of the parties. The trial court denied the bank's request for reformation of the loan documents and the appeals court confirmed the decision.

The appeals court said the burden on the party attempting to prove mutual mistake is a heavy one and that a court will relieve mistakes only if the evidence to support it is "clear, unequivocal and decisive as to the mistake."

Reviewing the evidence, the court found it conflicting. There was testimony by bank officers that they believed that all of the borrower's real estate was covered by the security documents. There was evidence that tracts 6 and 7 were located at the same street address mentioned in the security documents as well as testimony from the borrower's owner that he did not realize that tracts 6 and 7 were not covered by the security documents.

Conversely, the court found no evidence of specific discussions concerning the collateral to secure the borrower's indebtedness in the 2012 documentation. The bank officers did not inform the borrower that it intended tracts 6 and 7 to be covered by its security interest. The borrower's owner testified that he signed the 2012 loan documents without giving any thought as to whether tracts 6 and 7 were included. The court also noted that the 2012 transaction did not involve any additional financing, that the real estate appraisal for the 2012 transaction did not reference tracts 6 and 7, and that the title insurance policy issued in 2012 did not cover tracts 6 and 7.

Based on the foregoing, the court said the bank had not established clearly, unequivocally and decisively that tracts 6 and 7 were excluded from the 2012 loan documentation due to a mutual mistake.

What's the point? Although after-acquired personal property collateral can be included in a bank's collateral by using an after-acquired clause in the collateral description, that is not true of real estate. If it is intended that after acquired real estate is to be part of the collateral securing the borrower's indebtedness, appropriate modifications must be made to the loan documentation.■

Michael Weissman practices with Levin Ginsburg in Chicago. He is a member of the Commercial Banking, Collections & Bankruptcy Section Council, and chairs its UCC/Commercial Banking Committee.

Consequences of Stopping Construction: Delays and Disruptions Resulting From Catastrophes

BY SAMUEL H. LEVINE

A reason construction projects stop, in whole or in part, is because of catastrophes. Examples of catastrophes include extreme weather, strikes, a catastrophic injury and other property damage. The consequences of stopping construction are delay and disruption. This paper will define suspension and address industry contract provisions governing suspension, clauses addressing catastrophes, delays and disruptions and claims arising out of suspension of a project.

Introduction

Construction projects stop for many reasons. Disputes arise between an owner and the prime contractor or between the contractor and a key subcontractor over money, access or design issues. A contractor defaults as a result of bad work, slow process or safety issues. Work is suspended because contractors cannot find enough labor. The costs of materials become prohibitive threatening the ability of a contractor to perform. A necessary party to the construction process files bankruptcy.

Then there are catastrophes and causes beyond the parties' control. There may be adverse weather conditions, epidemics, orders of governmental authorities, acts of nature such as earthquakes. What guidance do the industry form contracts provide to the parties? What rights and remedies belong to the owner or contractor in the event of an act of God?

Suspension of a project has serious consequences for an owner, prime

contractor, subcontractor, surety and lender. Protection of the parties to the construction project begins with the contract. The parties must define the parameters of suspension. The standard form industry contracts contain provisions governing the rights of a party to suspend work under the contract and the obligations of a party upon suspension. These suspension clauses differ depending on whether the contract is public or private. Suspension of work clauses in industry form contracts is similar in many respects but contain differences. Suspension of work clauses are a starting point for addressing the consequences of stopping construction.

Suspension Defined

What is suspension? Suspension is a pause, delay or interruption of all or part of the work called for under the contract. A suspension typically occurs when an owner directs a contractor to stop working on all or part of a project. Suspension can be either for a defined or undefined or known or unknown period of time. Suspensions can affect all or only a portion of the work.

Suspension has been defined as a contractually allowable delay during the course of construction of a project. *"Richard J. Wittbrodt and Lynsey M. Eaton, Project Suspension: What Owners and Contractors Need to Know Now"*, Summer 2009, www.cmaa.org. According to construction law scholars Philip L. Bruner and Patrick J. O'Connor, Jr., the modern "suspension of work clause" is "nothing more than a compensable delay authorized and addressed by the contract. The "modern trend toward inclusion of a "suspension of work clause in construction contracts has as its motivation:

1. Authorization by contract of, and creation of a contractual remedy for, owner-caused compensable delays that otherwise would constitute a breach of the owner's implied duty of cooperation;
2. Definition and limitation of the contractor's compensatory damages recoverable as a result of the owner's authorized suspension;
3. Referral of disputes regarding the owner's suspension to the forum designated in the contractual dispute resolution provisions; and
4. Waiver of the contractor's utilization of traditional breach of contract "self-help" remedies, such as abandonment of the contract. " 5 Bruner & O'Connor Construction Law Section 15.84 (West August 2020")

Federal cases addressing government contracts address directed and constructive suspensions. A directed suspension of work arises out of a written or verbal directive from an owner or their representative to a contractor to suspend all or a portion of the work. On the other hand a constructive suspension is subject to a four part test: "(1) contract performance was delayed; (2) the government directly caused the delay; (3) the delay was for an unreasonable period of time; and (4) the delay injured the contractor in the form of an additional expense or loss." ***W.M. Schlosser, Inc. v. United States***, 50 Fed. Cl. 147, 152 (2002). Examples of **constructive** suspensions are delays resulting from the unavailability of the site, delays caused by interference with the contractor's work, delays in issuance of notices to proceed or change orders or delays in inspection of work. The constructive suspension doctrine is followed in many jurisdictions.

Suspension is different from termination and treated differently by the standard industry form contracts. However, a consequence of suspension is that it may ripen into termination if a suspension lasts for an extended period. Suspension is also different from delay. However delay is a consequence of suspension.

Industry Contract Provisions Governing Suspension

The standard industry contracts each have provisions governing suspension of work. There are similarities and differences among the form contracts. A common thread among the contracts is the broad right of the owner to suspend the contract for convenience.

The AIA A201-2017 General Conditions of the Contract for Construction contains suspension clauses found at Section 14.3.1 and Section 14.3.2. These provisions allow an owner to order the contractor to suspend, delay or interrupt the work in whole or part "without cause" for such period as the owner determines. AIA A201-2017 General Conditions, Section 14.3.1. The AIA A201-2017 suspension clause allows for an adjustment of the contract sum and time for increases in the time and cost arising out of an owner imposed suspension. A price adjustment shall include profit. AIA A201-2017 General Conditions, Section 14.3.2. However, a double recovery will not be allowed. Furthermore "profit" is not defined by the AIA. There is no limitation of suspension to a reasonable amount of time. On the other hand the Federal Acquisition Regulations governing Federal government suspensions limit suspensions to a reasonable amount of time. FAR Section 52.242-14(b)

Under the AIA, a contractor may recover the costs of delay under another contract provision. AIA A201-2017 General Conditions, Section 8.3.3. The contract time and contract price are to be equitably adjusted by change order for the cost and delay resulting from the suspension.

A contractor has certain rights in the face of a suspension or repeated suspensions. A contractor may terminate the contract if through no act or fault of the contractor, the lesser of repeated suspensions of the work by the owner constitute in the aggregate more than 100 percent of the total number of days scheduled for completion, or 120 or more days in any 365 day period. AIA A201-2017 General Conditions, Section 14.2.1

Additionally, AIA A201 2017 General Conditions Section 14.1.4 allows the contractor to terminate the contract if the work is stopped for a period of 60 consecutive days through no act or fault of the Contractor because the Owner has failed to fulfill the Owner obligations under the Contract Documents with respect to matters important to the progress of the work upon 7 additional days' notice to the owner and architect and recover from the owner as provided in Section 14.1.3.

Under the AIA General Conditions the contractor has certain rights in the event of an emergency. Under Section 10.4, "(I)n an emergency affecting safety of persons or property, the Contractor

shall act, at the Contractor's discretion, to prevent threatened damage, injury, or loss." Furthermore, additional compensation or extension of time claimed by the Contractor on account of an emergency shall be determined as provided by other provisions of the general conditions. See Article 7 (Changes in Work) and Article 15 (Claims). The word emergency is not defined by the AIA201- 2017.

The ConsensusDocs also contain a suspension provision allowing the owner to suspend performance of work for convenience. The Consensus Docs200 Standard Agreement And General Conditions Between Owner and Constructor (Lump Sum Price) at Article 11.1.1 allows for the owner to suspend performance at any time and for any amount of time for the "owner's convenience". The Consensus documents identify the contractor as the constructor. However, the contract price and contract time shall be equitably adjusted by change order for the cost and delay resulting from the suspension. See ConsensusDocs200 Lump Sum Price Standard Agreement. Change orders are discussed in Article 8 of the ConsensusDocs200 form contract. The Consensus Document provision specifically mentions that adjustment is to be by a change order. The document also appears to provide for an unlimited suspension subject to an equitable adjustment of contract time and price.

The Consensus Lump Sum Price Standard Agreement also has an emergency provision which allows the constructor to act in a reasonable manner to prevent threatened damage, injury or loss. Any change in the Contract Price and Time resulting from the actions of the constructor in an emergency situation are to be determined by a change order.

The Engineers Joint Contract Documents Committee (EJCDC) also addresses suspensions. Article 15 of the EJCDC Standard Conditions of the Construction Contract, C-700 states that at any time and without cause the owner may suspend the work or any portions thereof for a period of not more than 90 days written notice to the contractor and engineer. The notice must fix the date on which work will resume. The contractor is granted an adjustment in the contract price or an extension of time or both directly attributable to any final suspension if the contractor makes a claim. However, the C-700 does not allow an adjustment of price for delays resulting from unforeseeable and unavoidable delays.

The Design Build Institute of America promotes a contract. The Standard Form of General Conditions of Contract Between Owner and Design-Builder permits the owner, without cause and for its convenience to order the design builder in writing to stop and suspend the work. The period of suspension shall not be more than 60 consecutive days or aggregate more than ninety days during the duration of the Project. As with other contracts, the design builder is entitled to seek an adjustment of the contract price and or contract times if its cost or time to perform the work has been adversely impacted by any suspensions or stoppage of the work by the owner.

With regard to federal projects, a standard suspension of work clause provides that if the contracting officer orders the suspension, delay or interruption of the contract for an unreasonable period of time, an adjustment will be made. FAR.52.242-14. the clause is intended to allow the contractor to be compensated for delays or suspensions, without profit, so long as the contractor did not cause the delay. The suspension clauses in government contracts do not permit profit.

Clauses Addressing Catastrophes

There are clauses in industry form contracts addressing catastrophe, force majeure, acts of God and other issues related to suspension of work.

In particular AIA, A201, Section 8.3.1 states:

"If the Contractor is delayed…by changes ordered in the work, by labor disputes, fire, unusual delay in deliveries, unavoidable casualties, documented adverse weather conditions or other causes beyond the contractor's control then the contract time shall be extended for such reasonable time as the architect may determine." The AIA A201 does not expressly allow for an increase in the contract amount as a result of a force majeure event. However, recovery of damages is not precluded for delay by either party under other provisions of the contract. AIA A201, Section 8.3.3.

The AIA General Conditions at Section 14.1.1 allow the Contractor to terminate the contract if the work is stopped for a period of 30 consecutive days through no act or fault of the Contractor in the event of issuance of an order of a court or other public authority having jurisdiction that requires all work be stopped or an act of government such as a declaration of national emergency that requires all work to be stopped.

On the other hand the ConsensusDocs 200 Lump Sum Price Standard Agreement at Section 6.3.1 provides that if the constructor is delayed beyond the control of the constructor, it shall be entitled to an equitable extension of the contract time. Examples of causes beyond the control of the constructor include epidemics and adverse governmental action and unavoidable accidents or circumstances.

Section 11.5.1 of the ConsensusDocs 200 Lump Sum Price Standard Agreement provides that the constructor (the Consensus Documents identification of a contractor) may terminate the contract upon seven days' written notice to the owner if work has been stopped for a thirty day period through no fault of the constructor for any of the following reasons:

A. under court order or order of other governmental authorities having jurisdiction; (11.5.1.1)

B. as a result of the declaration of a national emergency or other governmental act during which, through no act or fault of the constructor, materials are not available; (11.5.1.2), and

C. suspension by the owner for convenience pursuant to section 11.1 (11.5.1.3)

The EJCDC Document C-700 2018, Standard Conditions expressly references epidemics as a basis for excusable delay. EDJDC Paragraph 4.05C includes as bases for excusable delays, severe and unavoidable natural catastrophes such as fires, floods, epidemics, and earthquakes and abnormal weather conditions entitling a contractor to an equitable adjustment in contract

times conditioned on such adjustment being essential to the contractor's ability to complete the work within the contract times.

The DBIA Standard Form General Conditions define Force Majeure Events as:

> "(T)hose events that are beyond the control of both Design-Builder and Owner, including the events of fire, flood, earthquake, hurricane, elements of nature or acts of God, acts of war, terrorism, riots, civil disorders, rebellions or revolutions or court order as set forth in Section 8.3"

Section 8.3 is the force majeure provision.

With regard to federal projects, Federal Acquisition Regulations provide that the contractor shall not be in default because of any failure to perform its contract within the contract time if the failure arises from causes beyond the control and without the fault or negligence of the contractor. 48 CFR Section 52.249-14. Examples of such excusable delays include acts of God, acts of the public enemy, acts of government, epidemics and quarantine restrictions, as well as floods and unusually severe weather. Of significance, The FAR Regulations specifically excludes profit from recovery by the contractor.

Delay and Disruption

Consequences of suspension are delay and disruption. A delay claim redresses a contractor's loss from being unable to work. On the other hand a disruption claim compensates a contractor for damages it suffers from actions that make its work more difficult or expensive than anticipated. ***U.S Industries, Inc. v. Blake Construction Co., Inc***. 671 F.2d 539, 546 (1982). Delay and disruption claims often arise together in the same project.

There are multiple classifications of delays. There are critical or non-critical, excusable or inexcusable and compensable or non- compensable delays resulting from suspensions. A critical delay affects the critical path of the project, the project completion or an important milestone event of the project.

An excusable delay is one resulting from factors outside of the owner's or contractor's control such as acts of God, strikes and weather or natural disasters. On the other hand, inexcusable delays are within the contractor's control. Examples are improper scheduling, equipment failure or insufficient labor. A compensable delay is one caused by the owner or one under the control of the owner such as failure to make the site ready, delayed mobilization, late submission or quality issues.

Disruption claims often arise from permissible events of delay that impact the sequence of work and capture the inefficiencies resulting from adverse impacts. Examples are changes to work, acceleration, scheduling and trade stacking.

Damages recoverable under a suspension of work clause depend upon the language of the contract. There are differences between private and government contracts. Usually, but not always, the contractor is entitled to a time extension. The contractor may have to demonstrate a project or critical path delay.

The 2018 version of the EJCDC C700 General Conditions at Paragraph 4.05 distinguishes between instances where the owner, engineer or anyone for whom the owner is responsible for delays or disruptions and unanticipated causes of delay and disruption which are not the fault of or beyond the control of the owner, contractor and those for which they are responsible. In the former situation, the contractor shall be entitled to an equitable adjustment in the contract price or contract times. See Paragraph 405A. In the latter situation, the contractor shall be entitled to only an adjustment in contract times. See Paragraph 405C. A contractor is not entitled to an equitable adjustment for delay or disruption attributable to a subcontractor or supplier within its control See Paragraph 405B.

There are direct and indirect costs resulting from delay. There are impact damages due to the indirect results from suspension or delay. These damages include lost labor productivity, idle labor and equipment, material escalation cost, increased wage rate costs, and increased cost of winter construction. James Zack, *Suspend Work "…Remain on Standby…" - Three Key Words*. http://www.cmaanet.org.

There are overhead costs, cost of demobilization and remobilization. Overhead costs may include field overhead and office overhead. Meanwhile there may be equipment standby costs. Equipment standby costs arise because equipment may be idle but it is not practical to move the equipment to another job.

It is critical that the contractor document the condition of the site at the time of demobilization. It needs to take videos and photographs of the site and document in detail its damages which are the consequence of suspension.

"No damage for delay clauses" are often added to the contract. These provisions are enforceable but strictly construed against those who seek their benefit. Exceptions to no damage for delay provisions include delay caused by bad faith, delay not within the contemplation of the parties, delay of unreasonable duration or delay attributable to the inexcusable ignorance or incompetence of engineer. ***Asset Recovery Contracting, Walsh LLC v. Construction Co. of Illinois,*** 2012 IL App (1st) 101226.

Claims

It is imperative that a contractor follow the contract in order to recover for additional time or costs resulting from a suspension. Failure to timely submit a claim will prejudice the contractor's right to recover. Section 15 of the AIA General Conditions governs claims. It defines a "Claim" as "a demand or assertion by one of the parties seeking, as a matter of right, payment of money, a change in the contract time, or other relief with respect to the contract." AIA 201-2017, Section 15.1.1. Section 15.1.1 additionally states that "the term "Claim" also includes other disputes and matters in question between Owner and Contractor arising out of or relating to the Contract. Notice of a claim arising prior to or during construction of the work period must be submitted within 21 days after occurrence of the event giving rise to such Claim or within 21 days after the claimant first recognizes the condition giving rise to the Claim, whichever is later.

There are some potential traps in the AIA 2017 documents in asserting a claim. Since Claims now are expressly within the ambit of the new Section 15.1.1 there is a potential ambiguity with Section 15.1.1 and Section 8.3.1 relating to delays. Section 8.3.1 suggests that, in certain circumstances, the Architect

alone can decide issues involving time extensions while Section 15.1.1 suggests that all requests for extensions would be governed by Section 15. The parties need to clear up any ambiguity between the two sections in negotiating an AIA contract.

Under the AIA scheme, the contractor's claim shall include an estimate of cost and of the probable effect of delay on the progress of the work. AIA A201-2017 General Conditions, Section 15.1.3. Claims for additional costs require notice to be given before proceeding to execute the portion of the work that is the subject of the Claim. However, prior notice is not required for Claims relating to an emergency endangering life or property. AIA-2017 General Conditions, Section 15.1.5.

Conclusion

Suspension of a project creates a myriad of issues relating to the project. Primarily the parties are encountering delay and disruption impacting the timeliness and price of the project. The responsibility of the owner, contractor, subcontractor and surety for the consequences of suspension can be addressed in the drafting of the underlying contract(s). It is upon the contractor to comply with all conditions precedent entitling it to additional time or money. It is also upon the contractor to document the condition of the project at the time of suspension and its costs resulting from suspension of the project. ■

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ESI: A Primer

BY GEORGE BELLAS & JOSEPH DYBISZ

Understanding how to identify, preserve, and admit electronically stored information (ESI) as evidence in court is the key to a successful litigation strategy. Although a lawyer's goal should be always obtaining favorable outcomes for his or her clients, one cannot be a competent and effective litigator without appreciating the importance of ESI and its role in adversarial proceedings. Thus, knowing how to manage ESI as an attorney in a society fixated on technology is a bare necessity, however, it is also much more than that. Lawyers have an ethical duty to educate themselves about the benefits and risks of using technology, including ESI that is relevant to litigation.[1] In addition to the duty set forth by the ABA's Model Rules of Professional Conduct and the Illinois Code of Professional Responsibility,[2] courts today expect a lawyer's competence in handling ESI and using it at trial. Therefore, lawyers must be proficient in understanding ESI to avoid court-imposed sanctions for failure to properly manage ESI and so as not to abdicate their ethical duty owed to their clients.

Competence in identifying and preserving relevant ESI is critical to every case featuring electronic discovery. eDiscovery is "the process of identifying, preserving, collecting, processing, searching, reviewing, and producing [ESI] that may be relevant to [any] civil, criminal, or regulatory manner."[3] ESI is any information that can be stored on a computer or a computer network.[4] This includes electronic documents (e.g., memoranda and spreadsheets), email and other forms of electronic communications, computer data, and files downloaded from the internet.[5] ESI could also include instant messages and voice messages.[6] Knowledge of technical concepts, such as how information is stored on a computer or a network, is important to understanding ESI and its intricacies. Nevertheless, it is critical to differentiate between technical concepts pertaining to ESI and the legal consequences of utilizing ESI in litigation. Below are some objectives lawyers should consider in developing an effective plan for electronic discovery.

Duty to Preserve

The law is clear that litigants have a duty to preserve evidence that may be relevant to anticipated litigation.[7] Courts generally find that a duty to preserve evidence arises when a party had "notice" of the anticipated or pending litigation.[8] This "notice" is normally referred to as the "triggering event."[9] The duty to preserve ESI attaches once a triggering event occurs.[10] More specifically, the obligation to preserve ESI arises when "reasonable anticipation" of litigation occurs.[11] The duty to preserve often arises before a summons or complaint is ever filed.[12] Although triggering events are generally fact-specific scenarios, some examples include when a company has a history of previous litigation involving similar circumstances, or when an organization has reason to believe litigation against it is imminent due to industry-wide litigation having commenced against similarly-situated companies.[13] Although intentional spoliation of ESI is a conclusive way to draw the fury of any court, scienter is not required for a party to be subject to case-terminating sanctions for failing to preserve relevant ESI.[14] At least one court issued sanctions for negligent spoliation of ESI,[15] and courts will continue to impose sanctions for failure to properly issue legal holds until counsel meet their ESI identification and preservation obligations.[16]

Prepare for Litigation

As such, it is vital for counsel to establish a litigation readiness plan[17] and should:

1. Implement appropriate ESI **preservation** procedures even before any litigation commences.[18]
2. Familiarize themselves with the client's ESI system and storage of the various forms in which ESI is stored.[19] This is integral to forming a competent and effective ediscovery strategy, which necessarily includes filtering the amount of ESI opposing counsel discloses.[20]
3. **Identify custodians** of relevant ESI

to increase efficiency in cases where the sheer volume of ESI requires focused efforts to avoid giving the impression of conducting a "fishing expedition."[21]

4. **Collect and preserve** all ESI to protect the integrity of relevant ESI.[22]
5. **Meet and confer** with opposing counsel to discuss and negotiate compliance with discovery requests and the cost of disclosing relevant ESI.[23]

This 5-step approach aims to reduce confusion because the manifold nature of complex e-discovery increases the likelihood of protracted litigation resulting in significantly higher costs for clients.[24] The potential for higher costs is due in part because sources of ESI are generally classified into two categories: sources that are "accessible" and sources that are "inaccessible." In *Zubulake v. UBS Warburg*, the court held that each party is responsible for its own e-discovery expenses provided that the data being sought out is reasonably accessible.[25] If a party stores ESI in a medium considered to be not reasonably accessible (such as preserving old emails on physical back up tapes as opposed to a network server), that party must bear its own expenses in preserving the ESI and producing it upon request.[26] Notably, "[i]n determining whether data is not reasonably accessible, the focus is more on the source or location of the data rather than the substance of the data."[27] Therefore, an early agreement between parties as to what form the ESI is to be produced in may help mitigate costly e-discovery disputes. This is important in instances when parties have failed to anticipate issues that otherwise could be resolved through timely negotiation, such as agreeing to methods by which each side can reduce the volume of documents that need to be preserved and reviewed.[28]

Full Disclosure

Amendments to Rules 16 and 26 of the Federal Rules of Civil Procedure, respectively, highlight an emphasis on promoting disclosure between adversaries in litigation. These amendments require parties to disclose what kinds of ESI the parties believe are relevant to the litigation and what ESI each party will preserve.[29] These amendments illustrate the recurring tension between the sheer volume of ESI versus the potential relevance of specific data to litigation proceedings. Assessing the relevance of certain ESI contains ramifications regarding a party's tolerance for costly review of troves of data in addition to weighing on a party's duty to preserve ESI. To help alleviate the financial (and mental) stress of balancing relevant data against the volume of discoverable ESI, courts will consider the expense, burden, and practicality of preserving the evidence in question.[30] In addition, the pre-discovery conference requirement under rule 26 reflects the Advisory Committee on Civil Rules' normative judgment that "hiding the ball" in litigation as it pertains to ESI is no longer an acceptable strategy.[31] For example, Rule 26 confers the presumption that ESI is beyond the scope of discovery if it cannot be obtained without undue burden or cost to determine whether it is relevant to the claims or defenses of each party in litigation.[32] Therefore, understanding what ESI is located in a client or adversary's system allows for counsel to negotiate compliance favorably and, perhaps most importantly, reduce the cost of disclosure considerably.[33]

Summary

Because exorbitant litigation costs resulting from complex e-discovery could materially impact a client's ability to prove a given claim or defense, knowing how to identify, preserve, and negotiate with opposing counsel to obtain relevant ESI presents critical leverage points during e-discovery. Moreover, the current litigation ecosystem is controlled by those who have adapted their practice to become proficient in handling ESI to help establish and prove their respective claims or defenses. Embracing the role of ESI is paramount to a lawyer's success and in keeping up with one's duty to their client. In a world filled with incomplete information, knowing how to identify the right information is the key to staying on top.■

George Bellas is a member of the ISBA Civil Practice & Procedure Section and was a member of the 7th Circuit Council on eDiscovery and Digital Information which developed Principles Relating to the Discovery of ESI ("Principles"). (https://www.ediscoverycouncil.com/about-us).

Joseph Dybisz is a third-year student at Chicago-Kent College of Law.

1. Model R. Prof. Conduct 1.0 Comment 8 and Comment 8 to Rule 1.1 of the Illinois Code of Professional Responsibility added in 2015.
2. *See Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co., Inc.* 2005 WL 67071 (Fla. Cir. Ct. Mar. 1, 2005), *rev'd on other grounds*, 955 So.2d 1124 (Fla. 4th CA 2007) (the jury returned a 1.4 billion dollar verdict after the court found the defendant's counsel failed to properly implement a legal hold.).
3. Michael R. Arkfeld, Information Technology Primer for Legal Professionals 6 (LawPartner Publishing 2019–2020 ed. 2019).
4. Allison Brecher & Shawna Childress, eDiscovery Plain and Simple xxi (AuthorHouse copy. 2009).
5. *Id.*
6. *Id.*
7. Arkfeld, *supra* note 3, at 14.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. Brecher & Childress, *supra* note 4, at 20.
13. *E.g.*, Brecher & Childress, *supra* note 4 citing *Micron Technology, Inc. v. Rambus, Inc.*, 2009 U.S. Dist. 54887 LEXIS 1260 (D. Del. Jan. 9, 2009).
14. Brecher & Childress, *supra* note 4, at 13-14.
15. Brecher & Childress, *supra* note 13, at 7.
16. Arkfeld, *supra* note 3, at 10.
17. Arkfeld, *supra* note 3.
18. *Id.*, at 10.
19. Some examples include native files, databases, spreadsheets, images (TIFF and PDF), video and audio files, paper, etc.
20. Arkfeld, *supra* note 3, at 10.
21. *Id.* at 96-97.
22. *Id.* at 10.
23. *Id.*
24. *See generally* Allison Brecher & Shawna Childress, eDiscovery Plain and Simple xxi (AuthorHouse copy. 2009).
25. Brecher & Childress, *supra* note 4, at 11; *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003).
26. Brecher & Childress, *supra* note 4, at 49 ("In order to collect even a single email off of a backup tape, every tape used to create the server backup must be manually restored to, essentially, recreate all of the data on the server.").
27. Brecher & Childress, *supra* note 4, at 10.
28. *Id.*, at 18.
29. *Id.*, at 10.
30. *Id.* at 26.
31. *Id.*, at 10.
32. *Id.*
33. Arkfeld, *supra* note 3, at 8.

Keys to Increasing Your Prospects for Success in Mediation: Insights from Chief Circuit Mediator for the U.S. Court of Appeals for the Seventh Circuit

BY EDWARD CASMERE

As a mediator at the U. S. Court of Appeals for the Seventh Circuit for the last 28 years, Joel Shapiro knows how to successfully mediate disputes. He and his colleagues in the Circuit Mediation Office conduct confidential mediations in fully counseled civil appeals in accordance with Federal Rule of Appellate Procedure 33 and Circuit Rule 33. They handle over 400 mediations every year with a success rate of around 40 percent. That is quite an impressive statistic given how the underlying district court proceedings resolve so many cases by ruling, disposition, or settlement. As a result, cases typically come to the Seventh Circuit mediators with a history that includes clearly drawn lines and vexing issues which often polarize parties and cement positions increasing the degree of difficulty of the mediation.

Through a series of interviews in early 2022 Mr. Shapiro graciously shared some of the insights he has gained mediating cases over the past three decades. What follows are some distilled down highlights from those conversations with Chief Circuit Mediator Shapiro:

What are the benefits of mediation?

Mediations are a great way for parties to maintain control over the outcome of litigation through a guided resolution process with an independent third party who can bring perspective to, and provide a sounding board for, litigants. Mediators can accomplish that without the burden or stigma of declaring "winners" or "losers." Being a different species from judicial settlement conferences, mediations have an ability to delve deeper into the needs and interests of participants with less pressure to try to broker a quick deal. Mediations are, therefore, a bit enigmatic with an arguably more ambitious objective than a judicial settlement conference, but with less leverage because mediators do not carry the power of being an ultimate decision-maker.

Besides the sympathetic ear of their counsel, mediators are often the first (and sometimes only) independent person connected with the litigation process that will listen directly to a client's side of the story. That can provide a form of catharsis – sometimes people just need to get something off their chest, to say things out loud to someone who will listen and not judge. As such, mediations provide a forum for clients to obtain acknowledgement (and sometimes "tough love") from an independent source – someone who can let both lawyer and a client feel heard while also providing an unbiased reality check.

Mediations also provide an opportunity to bring together all the main faculties of lawyering: counseling, advocacy, negotiation, documenting, and oversight. Lawyers can get creative in solving problems for clients and help limit or mitigate risk and uncertainty. According to Mr. Shapiro, "lawsuits are really coins thrown into wishing wells, and lawyers are the plumbers that try to turn those wishes into some kind of reality," with mediation serving as a critical tool in the lawyer's ability to do that.

What are some mediation insights learned over the years?

Technique is secondary to mindset. Having the parties and their counsel engage in the mediation process with the right mindset – one open to understanding the other side's point of view, open to compromise, and realizing that everyone cannot get everything they want – is more important to increasing the chances of a successful mediation than any strategy or technique. "Too often," Mr. Shapiro observes, "parties attach a symbolic significance that the mediation cannot bear." Mediations are not designed to give any party total victory, domination, or oppressive punishment. If that is a party's mediation goal, they will be disappointed.

Try to listen more than you talk. The key to compromise is focusing not on a party's own interests, but considering the other side's needs as well. Parties must listen to each other to understand what they really want, and really need. Addressing your counterpart's needs is often necessary to be able to meet yours. "It is surprising," Mr. Shapiro notes, "how often people are wrong about what their counterpart actually wants or will agree to." Listen and observe to understand, not just to figure out your counterargument.

There is no optimal tactic, move, or game theory. Each mediation is unique, and life is a lot messier than academics. Parties need to adjust expectations, embrace uncertainty, and get comfortable with feeling their way to a resolution in unanticipated ways. These journeys often mysteriously deliver solutions and accommodations that were never anticipated. "Mediation is not like a juicing machine, where you put a bunch of material in one end and a settlement instantly comes out the other," says Mr. Shapiro. The mediation process evolves over time and makes use of all the inputs. Take each step as it comes. Do not worry about being perfect. There are very few mistakes in

a mediation that cannot be fixed.

Take as little as possible for granted. This frees you up to respond to what is *actually* happening, as opposed to what you *thought* would happen.

Success does not happen by chance. Mediation is a collaboration. Everyone must be prepared to do their part to have a successful outcome, however that is defined (resolution or some other positive outcome).

How can counsel best use mediation to benefit their clients?

On this score, Mr. Shapiro said he could not improve on the advice he put forward many years ago, which still appears at the Circuit Mediation Office webpage: "Recognize that the mediation is an opportunity to achieve a favorable outcome for your client. Without laying aside the advocate's responsibility, approach the mediation as a cooperative, rather than adversarial, exercise. Help your client make settlement decisions based not on overconfidence or wishful thinking, but on a realistic assessment of the case. Assist clients to make decisions not on emotion, regardless of how justified they may be, but on rational self-interest. Suggest terms of settlement that maximize the benefits of settlement for all parties. Take advantage of the opportunity to talk confidentially and constructively with counsel for the other parties. If clients are present, address them respectfully but convincingly. Let the mediator know how he or she can assist you in obtaining a satisfactory resolution. Be candid. Don't posture. Listen closely to what other participants have to say. Give the process a chance to work."

What is one thing that has been a surprise?

Prior to the pandemic, the Seventh Circuit program hosted about 40 percent of its initial mediation sessions in person. From Mr. Shapiro's point of view, conducting all mediations remotely has not been a hardship because, in his experience, there is no meaningful difference in success between telephonic and face-to-face mediations. In fact, there are some significant benefits to conducting mediations by phone. In telephone mediations you can focus on listening without distractions and reading or misreading body language and facial reactions. Thus, there is a level of protection against mental background noise and the barrage of sensory information that is often misinterpreted. There is also protection for parties and counsel from the discomfort of sitting across the table from people they have reason to dislike. Parties are present to one another without the disadvantages of being face-to-face. In Mr. Shapiro's experience, "phone discussions allow the litigants and the mediator to develop a sense of intimacy that is not always achieved in person."

Is there a secret to the success of the Seventh Circuit mediators?

First, mediation is all the Circuit mediators do. It is their full-time job**,** and they take seriously the privilege and delicacy of their work. Second, because they are cloaked with the court's authority, they take their responsibility to the court – and their identification with the court – very seriously. They are dedicated to the integrity of the process. Third, being an extension of the court, the Rule 33 mediation process is extraordinarily respectful of the litigants and demands the same of them toward one another and toward the mediation. Fourth, through years of experience with every kind of case, situation, conduct and negotiating tactic, they have accustomed themselves to making no assumptions. They take each case as it comes, practicing the "Three P's:" Preparation, patience and persistence.

In Mr. Shapiro's view, his work is less about pulling rabbits from hats than about helping people to find their way out of a jam. His parting insight is perhaps as obvious as it is profound: **Mediators don't settle cases, parties and counsel settle cases.** The mediator provides guidance, a steady hand, and a calm influence, but does not make the settlement happen. Only the parties can do that. As such, parties and their counsel need to take ownership of, and responsibility for, the process and the outcome.

To learn more about the Circuit Mediation Program of the U. S. Court of Appeals for the Seventh Circuit visit https://www.ca7.uscourts.gov/mediation/mediation.htm.■

Edward Casmere is a litigator, negotiator, and trial lawyer at Riley Safer Holmes & Cancila LLP in Chicago.

Justice Rita Garman, the Longest Tenured Sitting Judge, Is Retiring: A Look at Her Career and Legacy

BY HON. ALFRED SWANSON (RET.)

After 48 years, six months as a judge, Supreme Court Justice Rita Garman is retiring effective July 7, 2022. That is the second longest continuous tenure of a judge in Illinois court history. Her career includes service at every level of the Illinois courts, from associate judge to chief justice of the Illinois Supreme Court.

When she graduated from the University of Iowa Law School in 1968, Justice Garman didn't expect to be a judge. Her goal was to find a job as an attorney, which was not an easy task for a woman at that time. Nor did she expect to have a number of "firsts" on her career resume.

Looking back on her career, Justice Garman recounts many uphill challenges. When she decided to attend law school, there were no women judges on the Illinois supreme or appellate courts. She was one of eight women in her law school class. She recalled a professor telling her that she was "only in law school to catch a husband" and that she should give up her seat to "a more deserving male candidate who would have a family to support."

After law school, she had difficulty finding a job as a lawyer. She was turned down for several position, once being told: "I don't know what I would do with you because no one wants to talk to a woman lawyer." One position she told me, went to a man who was offered $1,500 more than she was offered. She said the state's attorney in Vermillion County wouldn't even interview her for an open position. Justice Garman said she is pleased that those times are in the past. But, she said, women still face challenges even though they have more opportunities now in the law.

Finally, Justice Garman landed her first job as a lawyer when the head of the legal aid office left and the board chairman asked her to assist just to keep the agency doors open. She received valuable assistance from two experienced legal secretaries at legal aid. More assistance came from court clerks and judges who "were very gracious to [her]." With this assistance, she said she was able to keep the doors to legal aid open and the office running until a new director was retained.

After about six months at legal aid, and with a new director coming on board, the state's attorney called and asked her to join his prosecutor's staff to handle juvenile and family cases. Four years later, she joined a law firm in Danville. Then, on Christmas Eve 1973 while driving with her husband and two-year-old daughter to a family Christmas gathering, she heard on the radio that a woman had been selected to become a judge in downstate Illinois. That's how she learned she would become an associate judge in Vermillion County. When she was sworn in on January 7, 1974, she became the first woman judge in the fifth circuit.

Justice Garman was elected a circuit judge in 1986 and a year later she became the first woman presiding Judge in Vermillion County. In 1995 when she was assigned to the appellate court, Justice Garman became the first woman to serve on the fourth district bench. In January 2001, she became the second woman to sit on the Illinois Supreme Court.

Justice Garman's retirement on July 7, 2022, is 48 years, six months to the day from when she was first sworn in as an associate judge. Justice Garman told me she has been privileged to work with exceptional jurists throughout her career. Colleagues told me it was they who were privileged to have worked with Justice Garman. As a colleague, retired Justice Lloyd Karmeier described Justice Garman as "outstanding, pleasant, delightful, prepared." Justice Mary Jane Theis said that Justice Garman brought her personality to the courts she served: "calm, wise, respectful," and a good leader.

Justice Theis added that Justice Garman's "impact on Illinois courts and her legacy is in the body of her work" and her "clear writing and thinking." In more than 21 years on the Illinois Supreme Court, Justice Garman wrote 240 majority opinions plus numerous dissents and special concurrences. Justice Theis described a Garman opinion as "crisply written" in which the reader readily "knows the issue presented and the standard of review applied." She said Justice Garman "knows and writes to her audience of lawyers, trial judges and the public. She is writing also to future readers to provide a clear understanding of the law."

Justice Garman told me this is the right time to retire so she can travel and, more importantly, spend more time with family. Another factor in her decision to retire now, she said, is the new judicial district map that greatly altered the boundaries of the fourth district, which she served at both the appellate and supreme court levels. She said neither retention option of running in the counties of the old fourth district nor the new fourth district was appealing given her desire to have more time with family, particularly her three youngest grandchildren who live in Iowa and whose activities she likes to support. At age 78, Justice Garman still loves to travel and looks forward to the chance "to go where I want to go and when."

A final example of Justice Garman's wisdom and leadership, according to Justice Theis, came in her recommending Fourth District Appellate Justice Lisa Holder White be appointed to take her place on the Illinois Supreme Court. When she takes the oath of office on July 8, 2022, as the 121st Justice, Justice Holder White will become the first woman of color to serve on the Illinois Supreme Court and the fifth woman Justice in the Court's history. Like Justice Garman, Justice Holder White will have served as a judge at every level of the Illinois courts.■