Hostile 30(b)(6) Witness Presentation

New Orleans Bar Association

June 12, 2019

Examining attorney: Chris Ralston, Commercial Litigation Partner at Phelps Dunbar

IT witness: Tom O'Connor, Director Gulf Coast Legal Tech Center

Fact scenario

This is a matter of insurance claims against a national insurance company with a network of local offices nationwide for failure to promptly pay post flood claims in Nov and Dec 2018. Several states have a penalty of up to 12% if claims are not paid within 90 days and

Plaintiffs are trying to establish that the claims system routinely violates the 90 day requirement. They wish to establish how many insureds within a certain time frame were paid on time, paid late or still have not been paid. They wish information from prior years as well to see if there is a common the custom and practice within the company of such delays.

Plaintiffs have asked for a native file production of claims documents. Defendants countered that such a production is too costly and thus it is not "reasonably accessible" under the FRCP. They have offered instead to provide PDF images of the claims files which they say is the manner their files are stored in the ordinary course of business, but Plaintiffs must name the insureds whose records they want since Defendants claim they cannot do broad searches by date ranges.

Plaintiffs have noted a 30(b)(60) deposition to explain how this works. Defendants have produced an IT manager from their claims department. as the witness to answer the scope of the inquiry.

After qualifications, these questions were asked:

Q.   How is a claim handled in your IT structure?

A.   A claim is submitted by a claims agent via email and is entered into our system and assigned a claims number automatically.

Q. That is an electronic form?

A. It may be a form, which can vary from office to office or it may be handwritten. All of those are captured as a PDF when they come in.

Q. And then stored electronically?

A. Yes

Q. What is the name of that storage system?

A. The "Current Claims Database"

Q. So it is a specific independent database on your system?

A. Yes

Q. And is it on your servers at a site somewhere or in the cloud?

A. The cloud

Q. Is there an on-premises counterpart or copy of the CCD in any corporate or local offices?

A. Local offices who take the claim may store data locally until they submit it. Once they receive a claims number they are told to destroy all local data.

Q. Including paper notes?

A. Yes

Q. What about claims people in the field?

A. They may have a laptop and written records. They are given the same instructions. Some of them have tablets which access the main system directly.

Q. But either way they are all told to destroy all paper records?

A. Yes

Q. What is in the original claim once it is opened?

A. The original claim plus any reports prepared by corporate claims staff

Q. So a report may be entered after the initial claim is filed and opened?

A. Yes

Q. How is that done?

A. It may be submitted electronically, it may be sent in as paper and scanned to PDF or it may be entered electronically by claims staff.

Q. And how are documents "filed" in the CCD?

A. By name or claims number.

Q. And all adjustors and claims people can access that system?

A. Yes

Q. How does someone find a claim?

A. By claim # or insured name

Q. You cannot search by date?

A. Only for the current year, not past years.

Q. Why is that?

A. A field is in the database claims entered in the current year, sorted by month. Once the year ends, that field is not available.

Q. So the date of the original claim is not in a separate field?

A. It is for the current year only

Q. And at the end of the year it is removed?

A. No

Q. Well if it isn't removed why can't anyone access it?

A. It is made inactive

Q. Why?

A. I can't answer that, I didn't build the database.

Q. Can IT staff search inactive fields?

A. Some can

Q. Which IT staff can perform such a staff?

A. Anyone who has Administrative rights

Q. And how does one obtain Administrative rights?

A. The senior administrator assignes them.

Q. And who is the Senior Administrator for this system?

A. Me

Q. So you can assign rights to search the database by date to anyone you want?

A. Yes

Q. Can you assign those rights to local or staff claims people?

A. No

Q. Why not?

A. All claims people, by definition, belong to a specific uer group which does not have that right

Q. And the system is designed that way?

A. I don't understand the question

Q. Is the database software built in such a way that this designation is a standard feature?

A. No,

Q. So how does this type of designation happen?

A. It is done when the software is installed

Q. And who makes that decision?

A. I don't know. I was not involved with the installation of this program.

Q. But to be clear, you and anyone in the IT department you designate can search the database by date across all years?

A. Yes

Q. Do the members of the legal department know that?

A. I don't know what they know

Q. Who above you in the company hierarchy knows that?

A. My direct report is aware of it

Q. And who is that?

A. The Chief Operating Office of the company.

Q. Where is the original application and policy?

A. In a different database

Q. Does that database have a date field?

A . Yes

Q. Can it be searched?

A. Yes

Q. Is that db linked to the claims db?

A. Yes

Q. How

A. by policy number

Q. So the claims form has the policy number?

A. Yes

Q. And the policy database can be searched by date?

A. Yes

Q. What type of databases are these?

A. I don't understand the question

Q. Are these flat file db's like Access or SQL databases

A. SQL

Q. So they can be joined and searched by common fields.

A. I have no idea.

Q. Why is that?

A. We bought these programs from a vendor

Q. Did you customize them at all?

A. I did not, no

Q. Do you know if anyone at the company did?

A. Yes

Q. Do you know who that was?

A. No

Q. Did you bring the schema lists for all the relevant databases as noted in your deposition?

A. No I don't have time to do things like that

Q. Let's go back to the CCD. Are closed claims archived into a separate system?

A. Yes That's why we call this one the Current Claims DB

Q. And are those archived files all in one location?

A. Yes, the Internet

Q. How are they broken down, also by claims number

A. No by state

Q. So all closed claims are sorted and stored by state

A. Yes

Q. And they are still in PDF?

A. Yes

Q. Are all documents in all your systems stored in PDF?

A. No

Q. Which are not?

A. Word processing, email, financial systems, HR documents

Q. So you can only search the CCD by claims # or customer name, except for current year where you can also search by date?

A. Yes

Q. What if the claims adjustor or local agent doesn't know the claims name and forgets the customer name?

A. They won't forget a customer name .. not the local office.

Q. Let's say they do. Or let's say the name is Schwarzenegger and he or she can't spell it correctly?

A. We have a master index.

Q. A "Master Index? What is that?

A. An index of names with policy numbers and claim numbers

Q. And does that have a date?

A. Yes

Q. What is the date?

A. There are several

Q. And they are?

A. Date the policy was issued and date of any claims

Q. And can anyone access that

A. No just IT

Q. So if asked to, you could produce a list of names by claim date with an associated claim file?

A. Yes

Q. Does it have anything else?

A. Date paid if it was paid

Q. Anything else?

A. Check number and amount

Q. So while it is true your claims files can't be searched by date beyond the current year, the fact is that your IT department could do such a search?

A. Not in that database no

Q. In your separate index?

A. Yes

Q. One last question, are all your files are in PDF?

A. No. I already said that

Q. But all the CCD documents are in PDF

A. Yes

Q. Do you have current versions of Adobe Acrobat?

A. Of course

Q. So you could use the Adobe OCR to make those claims files fully searchable?

A. No

Q. Really. Why not?

A. Many of them are handwritten documents and many of the electronic documents were originally printouts which had handwriting on them and were scanned into PDF.

Q. So you could OCR the documents with varying degrees of searchability, just not "full" or 100%

A. Yes

COMMENTS

It appears the Defendant built a claims system that was basically a "black hole". Enter everything as a PDF, destroy all original copies, archive everything at the end of every year and make it searchable by only two fields (name and claim) while leaving out a very common search field: date.

They then linked that database to other information in the system but limited who could use it. Thus, for claims people to get past years information on claims from the claims system they would have to print the data out one by one and even then, only if they knew the claims # or customer name.

Is the claim of "not reasonably accessible" one of their own making and somewhat disingenuous given that IT staff could do the searches being asked for by the Plaintiffs? Two notes of interest:

1. Did the corporation deliberately make the system difficult to search not only by the search limits in the database but also by not using OCR to make the PDF's searchable.
2. In times of major disaster such as a major flood or hurricane isn't there a "reasonable likelihood of litigation" from the moment the disaster occurs which should have precluded this workflow from being implemented?