ISSUE ONE

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Commercial & Complex Litigation

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DATA STORED ON EMPLOYEE-OWNED MOBILE DEVICES IS INCREASINGLY RELEVANT IN LITIGATION DISCOVERY

Most businesses understand that relevant electronically stored information found on company-owned hardware and software may become key evidence if the company finds itself embroiled in a lawsuit. Email, for instance, chronicles the daily activities of a business both internally and externally and can prove critical to the success of a party's claims or defenses. It may come as a surprise to some to learn that collecting and producing data from an employee's personal mobile device may also be the responsibility of the company as a party to litigation.

Increasingly, courts are examining whether they should require a party to produce data such as text messages and emails from its employees' or agents' personal cell phones and, on the other hand, whether the litigating company can be sanctioned for the failure to preserve such data.

Federal courts, including those in Pennsylvania, have addressed bring-your-own-device ("BYOD") policies through which companies allow or require employees to use personal mobile devices to transmit work-related information. In several of these cases, courts have relied on formal and informal company policies as the basis to order companies to obtain and produce data from a mobile device owned by an employee. For example, in adopting the recommendation of a special master, Judge Schwab in the Western District of Pennsylvania concluded that the plaintiff company must obtain and produce data from certain of its employees' cell phones.[1] The company's BYOD program specifically stated that information and emails on the devices were the company's property. Accordingly, the court found that the company had custody and control over company emails and text messages on the devices and, as a party to the suit, could be ordered to produce any such responsive data from employees' mobile devices.

Another area of concern is data that employees send neither through company servers nor on company devices, such as text messages sent on BYO devices. If that data is relevant to a company's litigation, consideration must be given to what obligation, if any, the company has to obtain, preserve, and produce it. By way of example, a federal court in New York addressed a situation where a non-party screenwriter acquired a new mobile phone, losing his text messages during the process.[2] The screenwriter had exchanged a significant number of text messages with an individual defendant as part of the transaction leading to the lawsuit. Because the text messages had been deleted upon the acquisition of the new device and could not be produced, the plaintiff requested and received spoliation sanctions in the form of an adverse inference against the film studio

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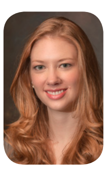
defendant. The court concluded that the film studio had control over the text messages as a matter of "common sense" because the screenwriter worked closely with the film studio, had a financial interest in the film at issue, participated in the suit by being deposed by the plaintiff, and had a financial interest in the outcome of the litigation.

The potentially relevant pool of data subject to discovery in litigation has expanded. Accordingly, companies must establish proactive policies and take the appropriate collection and preservation steps when litigation is reasonably anticipated—not just of paper documents, emails, and office files, but also of text messages, app data, social media messages, and other data over which the company may be deemed to have possession, custody, or control.

[1] See H.J. Heinz Co. v. Starr Surplus Lines Ins. Co., No. 2:15-CV-00631-AJS, 2015 WL 12791338, at *4 (W.D. Pa. July 28, 2015), report and recommendation adopted, No. 2:15-CV-00631-AJS, 2015 WL 12792025 (W.D. Pa. July 31, 2015).

[2] Ronnie Van Zant, Inc. v. Pyle, 270 F. Supp. 3d 656, 656-68 (S.D.N.Y. 2017).



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ADDITIONAL INSUREDS – WHO ARE THEY AND HOW DO THEY GET COVERAGE?

Who is entitled to coverage under an insurance policy? The question is simple, but the answer sometimes is not. Obviously, any company that the policy identifies as a "Named Insured" is covered, as are companies and individuals that the policy specifically identifies as insureds, either by name or by their connection to the named insured (such as subsidiary companies, shareholders or officers/directors of the named insured).

But what about companies that are not identified in the policy? For example, a subcontractor might have to extend coverage under its policy to a general contractor or owner as a condition for obtaining work. Or a tenant might have to add a landlord to its policy under the terms of a lease. In those situations, the subcontractor or tenant can extend coverage to additional parties by obtaining an endorsement from the insurer. If drafted properly, the endorsement should eliminate or at least minimize any uncertainty about the coverage the additional party will receive under the policy.

The picture is less clear if there is not an endorsement specifically naming a party as an additional insured. Liability policies frequently contain two provisions – the definition of the "Insured" and the so-called vendor endorsement – that can extend coverage automatically to parties unrelated to the policyholder under certain circumstances.

DEFINITION OF THE "INSURED"

When defining who is an "Insured," liability policies often include any company for whom the policyholder has agreed by contract to provide coverage. Because such a provision relies on the terms of a contract between the policyholder and an unrelated third party, it is extremely helpful if the contract clearly identifies the limits and scope of coverage that is to be provided. Courts have enforced contracts that include such terms.

When a contract requires a party to provide insurance for another party (as in the subcontractor/general contractor or tenant/landlord scenarios mentioned above), the contract also might require the party to provide a certificate of insurance to the other party. Many certificates expressly state that they are issued as a matter of information only and do not confer any rights on the holder. Notwithstanding this disclaimer, the coverage available to a party who holds a certificate of insurance depends on the language in the certificate, the facts of the case and the jurisdiction in which the case is pending.

Contracts that require a policyholder to provide insurance coverage for another party also commonly require the policyholder to indemnify the other party. It is important for the parties to consider whether they want to synchronize the two requirements so that the duty to indemnify is coextensive with the duty to provide coverage. For example, if the contract limits the duty to indemnify to liabilities arising solely from the conduct of the policyholder, the parties might (or might not) want the contract to impose the same limit on the insurance coverage the policyholder must provide to the other party.

VENDOR ENDORSEMENT

The vendor endorsement typically amends the policy definition of "Insured" to include distributors or wholesalers of a manufacturer. Where a manufacturer's liability policy includes a vendor endorsement, a vendor might be entitled to coverage under the policy even if the manufacturer is not contractually required to provide insurance for the vendor. Because coverage can apply automatically to vendors without the insurer's knowledge, the vendor endorsement usually contains language that purports to limit the coverage available to the vendor. For example, a standard vendor endorsement states that coverage does not apply to bodily injury or property damage arising out of changes the vendor makes to the condition of the manufacturer's product.

The existence and scope of insurance coverage can dramatically alter the fortunes of policyholders and the companies with whom they interact either through contract or by virtue of vendor relationships. For

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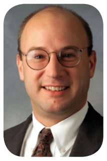
that reason, it is important to be aware of insurance provisions that can automatically extend coverage to parties who are not named in the policy.



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DUE PROCESS MATTERS, PENNSYLVANIA'S CORPORATE REGISTRATION STATUTE NOTWITHSTANDING

In a recent opinion, Judge Arnold New of the Philadelphia County Court of Common Pleas rejected the argument that Pennsylvania's unique corporate registration statute provides Pennsylvania courts with general jurisdiction over out-of-state companies. The potential ramifications of this ruling are significant. For plaintiffs, Judge New's ruling guts the broad jurisdictional hook on which they frequently rely; while for companies, they might no longer face coercive jurisdiction as a condition of doing business in the Commonwealth.

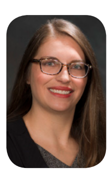
Courts have long held that foreign companies may consent to a state court's jurisdiction ("consent jurisdiction"). Pennsylvania's general corporate registration law is unique, however, in that it *requires* out-of-state companies to submit to general personal jurisdiction (*i.e.*, consent to suit in the state for any type of action, unrelated to the company's business dealings with the state) as a condition of doing business in Pennsylvania. *See* 15 Pa. C.S. §§ 411(a), 102(a), 411(b); 42 Pa. C.S. § 5301.

Putting aside momentarily the concept of consent jurisdiction, a recent wave of rulings, particularly in the wake of Supreme Court decisions, rein in state jurisdictional statutes that provide for general jurisdiction over a foreign business merely because it has interactions within a state. These recent rulings have curbed those state laws by tethering general jurisdiction over companies to states in which the company either maintains its principal place of business or is incorporated—where it is "at home."

Judge New's ruling is notable because it ties together the concepts of consent jurisdiction and general jurisdiction. Judge New determined that consent as a condition of doing business is not really consent at all: "By wrapping general jurisdiction in the cloak of consent, Pennsylvania's mandated corporate registration attempts to do exactly what the United States Supreme Court prohibited."

Judge New's ruling sets the stage for an interesting appellate battle. While the ruling appears to be consistent with federal precedent regarding general jurisdiction, its characterization of consent jurisdiction—and specifically, the type of consent jurisdiction mandated by Pennsylvania's corporate registration statute—as violative of the Due Process Clause of the U.S. Constitution is a novel interpretation that has potential far-reaching consequences both for plaintiffs seeking to sue foreign companies in Pennsylvania and for foreign companies seeking to do business in Pennsylvania without subjecting themselves to significant legal exposure for conduct unrelated to their business activities.

The case is Mallory v. Norfolk Southern Railway Co., No. 1961 (May 30, 2018).



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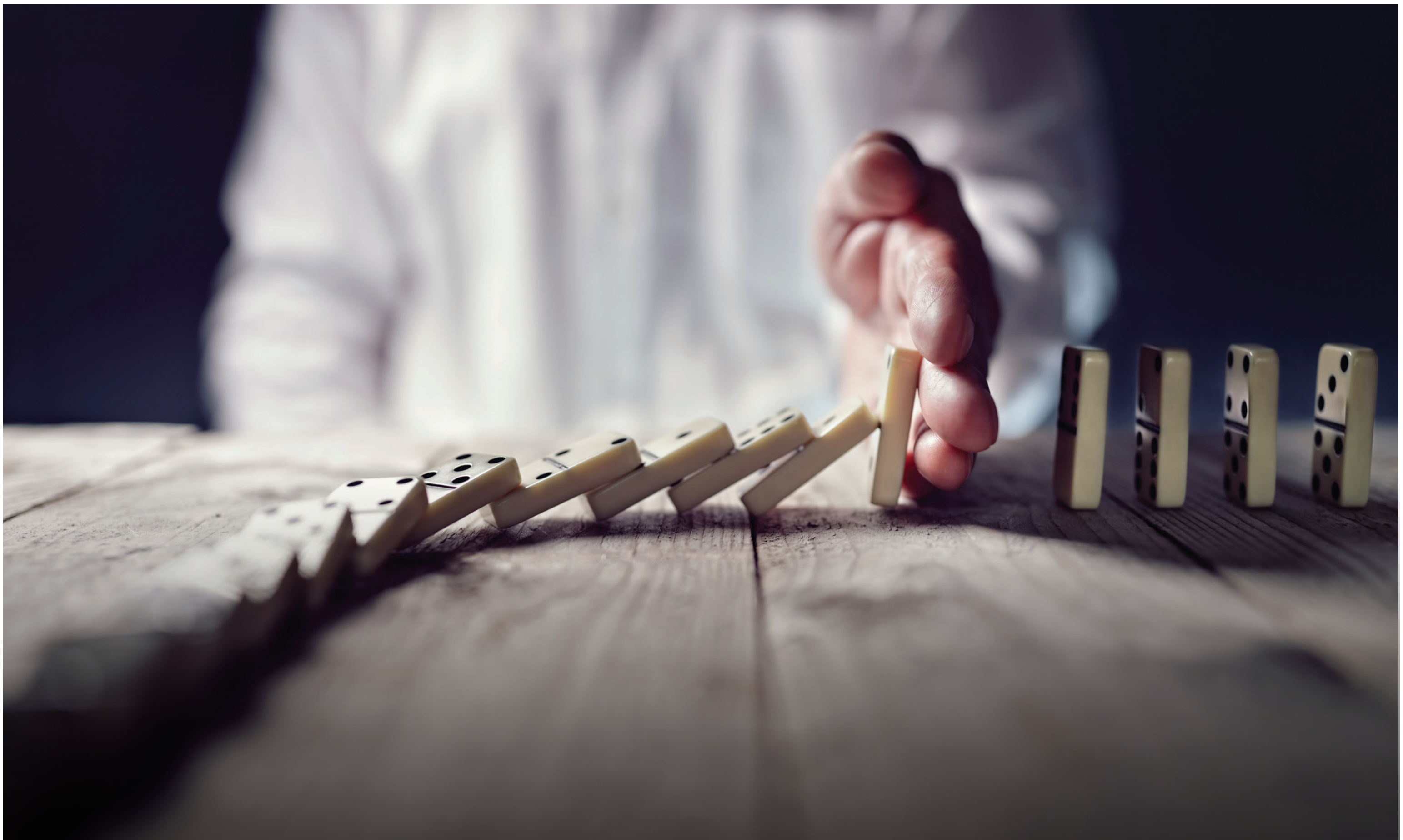

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