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Discussion Following the Remarks of Mr. Spencer, Mr. Zakaib, and Mr. Wheeler

Discussion

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DISCUSSION FOLLOWING THE REMARKS OF MR.
SPENCER, MR. ZAKAIB, AND MR. WHEELER

QUESTION, MR. FITZ-JAMES: I have a question for Mr. Wheeler. You made a really interesting point by producing a really good document. Does that necessarily mean that you basically have to take all documents that are not really good and destroy them? I am thinking about the practice of some newspapers where early drafts of stories, or outtakes, and photographs or video outtakes are destroyed because the newspaper fears a libel suit or some litigation. Is that the kind of thing you are suggesting?

ANSWER, MR. WHEELER: No, that is a different issue altogether. I am talking about creating a good document. By "bad" documents I mean documents that honestly state some issue for discussion purposes, but that can be misconstrued and mischaracterized very easily by an effective plaintiff's lawyer.

I have two comments about that. First of all, Japanese companies tend not to create documents in the first place, or they have document retention policies that get rid of the documents immediately after they are created. When Japanese companies litigate in the United States, they get these document demands, and they will produce literally somewhere on the order of ten-to-the-third to ten-to-the-fourth fewer documents than an American company in the same industry will produce. The Japanese do this by not producing documents, or, as soon as the document has outlived its business utility, it is destroyed. Secondly, if you have created bad documents and litigation has commenced, you cannot, as a legal matter, destroy those documents. So the timing becomes very important.

What really forward-looking companies have done in the last ten years is to revisit their document retention policies very carefully to try to approximate more closely the Japanese system where, if you do not have a good business reason to keep a technical document around, you have a retention policy that states that documents should be reviewed yearly or once every six months, and documents that do not have a good business reason for existing should be discarded.

QUESTION, MR. WOODS: I understand that, in the United States, a number of major corporations have been basically shut down by judges because they were not able to produce documents effectively. The judges had intervened to enforce new electronic document management even before the litigation could start. I wonder if you have any insight on that, as well as any

comments on the situation in Canada with respect to the production of electronic documents.

Next, what is the lawyers' role in redefining how we do products liability, particularly in the class action element? For example, the Quebec government recently awarded \$1000 each to a large number of children who were orphans in the 1940s and 1950s, compensating them for less-than-proper treatment. I realize this is not a class action. These people found money to be insulting. The government's apology was a starting point, but the whole process of giving a few million people or millions of people a few hundred dollars to punish a company for doing something wrong or for doing something improper misses the point.

Is there some new kind of legal theory to which we can look forward that could be a little bit more effective?

ANSWER, MR. WHEELER: Let me comment on the first question. I do not know of any instance in which a company has been "shut down" on the document issue, but certainly there has been a substantial number of instances in which companies have had summary judgments entered against them because the court found that the company had failed to produce the documents that had been requested and they were then ordered by the Court to produce them.

That type of thing, unfortunately, has become really quite common. Generally speaking, the problem is that most judges have never represented a major corporation. They have no clue about the difficulties of searching a company with 10,000 to 100,000 employees for a very wide variety of documents. That is a real problem.

ANSWER, MR. SPENCER: There really is not any way to control that situation. In the Canadian jurisdiction, you basically have to search back and freeze everything that you can and make it available. If you are going to say that it is privileged, it must pass the test of relevance. Even if it is privileged, you have to list it anyway.

On the question of new ways to do things, we do not seem to be able to do that very easily as lawyers. We engraft technology, we entertain the judge, and we entertain the juries, but we really do not have a way to add new technologies. I know exactly the case about which you are talking because I had someone come to me who was a victim of physical and sexual abuse. I think my best answer to that is that the normal court system just does not respond well to those things.

In the Canadian context, if you go ahead and destroy documents, are you going to end up being treated punitively for spoliation? We are beginning to move that way because documents are destroyed that way.

ANSWER, MR. ZAKAIB: There is an Ontario Court of Appeals decision that deals with spoliation. It is the highest decision we have so far where a case was actually dismissed for somebody doing destructive testing, and that was reversed on appeal.

QUESTION, MR. DELAY: That was the rape clinic case?

ANSWER, MR. ZAKAIB: No, no. I am talking about a fire claims products case, a case called *Warner and Grew*.¹ On appeal, that dismissal was overturned by the Court of Appeals. So, our law is nowhere near as developed as it is in the United States, but it is starting to evolve.

QUESTION. MR. ROBERTSON: I am from Industry Canada. It occurs to me that, of course, you inherit product liability even with your existing products. In particular, Y2K brings up a very interesting potential product liability concern that companies inherit. There was no necessary decision point where you agreed to go ahead with this – you have sold your product all along, and consumers have bought it with the reasonable expectation of performance. Then, along comes Y2K. What kind of potential liability is there for companies who may have Y2K problems?

ANSWER, MR. WHEELER: It is truly massive. In fact, the Y2K product liability situation has spawned many continuing legal education seminars already, books have been written, there are already over 200 lawsuits filed, and it has not even hit us yet. We are not even there yet, and the lawsuits are already filed. The exposure is just huge, and we are going to see, I predict, literally thousands of Y2K lawsuits. As you are saying, it seems odd that most companies are relying on some software company or some hardware company that provided them with a system. So, what you are going to have is inter-industry litigation. You are going to have all these computer companies impleaded, the software companies impleaded, and it is going to be just beautiful, from a lawyer's point of view.²

ANSWER, MR. SPENCER: Amen. The real year 2000 issues are going to appear after January 1, 2000. We are seeing some claims in Japan right now, and some people are saying, well, if it is in Japan and it has not been a problem there, then I have nothing to worry about.

QUESTION, MR. GIBBONS: Is there any increase in transnational discoveries? Can a Canadian company store documents in the United States and

¹ *Roe v. Warner* (1996), 1996 Ont. C.A. LEXIS 669.

² On July 20, 1999, President Clinton signed into law the Y2K Act, which limits companies' liability in lawsuits based on computer problems caused by the transition to the year 2000. The law grants a business ninety days after its officers learn of a problem to repair that problem before a lawsuit can be filed. Additionally, the law sets a ceiling on punitive damages for small businesses and narrows the eligibility for class certification in class action suits. *See generally* Y2K Act, Pub. L. No. 106-37, 106 Stat. 185 (1999) (to be codified at 15 U.S.C. §§ 6601-17).

avoid discovery or vice versa, can American companies store documents in Canada?

ANSWER, MR. ZAKAIB: To answer from the Canadian context, we have something called a Related Corporations Rule where, if you are sued as a Canadian company in Canada and you have an American parent or an American affiliate or subsidiary, you have to produce documents from that related company. A related corporation is defined in our rules of practice. So the discovery can be worldwide.

ANSWER, MR. SPENCER: I only have one story to tell you. A client that Malcolm knows very well had a medical device case, and they were very concerned with what was going to happen in Canada because the same document production appears in Australia. They sent seventy-one boxes over one weekend from Los Angeles to Sydney in the middle of the litigation. It was one of those judges Malcolm talked about who had never represented a major corporation and was ordering discovery during the course of the trial. When everything was received, the Australian counsel, who obviously had been part of this Internet network, said, where is the seventy-second box?

COMMENT, PROFESSOR SHANKER: The problem seems to me to be lawyers. Most lawyers do not know anything about science, or very little about it, and do not appreciate it. A lot of lawyers, of course, become judges, and they know less about it; as you say, a lot of judges never understood what it was. A lot of lawyers are going to the legislature, and every time a proposal might be made to alleviate this problem from a legal point of view, people get right together and prevent it.

There have been proposals made to deal with that problem, but they are getting nowhere because, right now, the culture and the law dictate that this is the only way to deal with products liability and the injuries caused thereby. There is no other way to deal with it, and any attempt to change it is not even discussed. If changes are made, they are only in the margin, but there are ways that have not been thought about.

Keep in mind you used to have a lot of workers injured in the workplace. What did we do about that? We used to sue each other. Now you have different systems of compensation. Those things are not even being thought about in product liability, or seriously being written about in other areas.