



INTRODUCING ELECTRONIC DISCOVERY TO INSURANCE CLAIMS:

HOW THE ELECTRONIC DISCOVERY PROCESS INTERSECTS UNDERWRITING, CLAIMS AND LITIGATION

Incorporating the management of electronic data into its risk analysis protocols is insurance carriers' next big move.

As insurance carriers continue to underwrite large corporate risks and as litigation continues to become more complex and costly, electronic discovery is becoming an integral part of the underwriting, claims handling and resolution process. The earlier in the process electronic discovery questions are asked, the earlier decisions can be made and the more defensible and cost-effective the project can be for the client and the insurance company that is ultimately paying the bills. In order to reduce its own costs, the insurance industry is starting to incorporate the management of electronic data into its risk analysis protocols.

UNDERWRITING

Underwriters have always assessed an insured's risk before writing a policy or upon renewal. The application usually includes questions about the corporation's finances, leadership, market share and prior litigation. More and more, as electronic discovery continues to affect payments on a file and loss runs reflect these payments, underwriters are asking questions about the insured's electronic discovery preparedness plans. For example, an underwriter may ask a corporation whether it has data maps in place or designated individuals responsible for litigation holds in order to learn more about their litigation readiness program prior to an event. Additionally, underwriters have found it important to find out whether there are retention policies in place and compliance measures enforced with those policies to ensure that the data collected will be from the smallest defensible universe.

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Adding questions about the insured’s experience with electronic discovery and the costs incurred in previous litigation will also give the underwriters a better sense of what litigation costs might amount to in a claim. For a company, proactively preparing for an electronic discovery event is not only good corporate policy to reduce risk and cost, but may also make insurance coverage easier—and less expensive—to obtain.

THE CLAIMS PROCESS

Once a policy is in place, and a claim is made, a claims professional at the insurance carrier receives the file and reviews the complaint along with the policy. After an initial discussion with the insured corporation to un-

derstand the allegations better, the claims professional will assign counsel (if the policy provides a duty to defend) or the insured may select its defense team. Either way, it is imperative at this early stage in the claims process to discuss the electronic discovery plan with counsel.

It is important to understand that claims professionals are not always familiar with electronic discovery, so this inquiry is an essential part of the assessment phase. The claims professional should, for example, ask counsel whether the retention of an electronic discovery vendor has been contemplated. Best practices as well as recent court decisions (*Victor Stanley, Inc. v. Creative Pipe, Inc.*, et. al.) support the retention of an independent third party vendor for several reasons: 1) counsel should handle the strategies related to defense and should not be focused on technical aspects; 2) an independent party eliminates any conflicts; and 3) the liability risk may be shifted away from counsel. Some carriers have a designated approved list of electronic discovery vendors and the retention of one of these firms should be considered the same way panel counsel might be considered. Counsel and the insured’s IT department should work with the vendor and be prepared to answer the questions a claims professional asks—or lead the claims professional to ask if necessary.

There are at least five questions to ask at this stage: 1) Does the insured have a data map; does it know where all the data is stored? If not, it is likely that there will be additional costs and time expended to locate the data that needs to be collected. 2) How many custodians are involved? The more custodians targeted in the litigation, the more data to collect. 3) Who is planning to do the document review – associates, contract attorneys or outsourced document reviewers? 4) When is the meet-and-confer conference set? Knowing this deadline is important because it marks the event when both sides will agree to criteria which will help reduce the data population. 5) How much data was collected? How much is e-mail?

The claims professional may feel confident that the insured is being provided with a sound defense, as first responses and early motions are probably being filed, and a coverage determination will be issued. The entire claim may be covered or just the defense costs. However, it is essential for all parties to recognize that defense costs typically include electronic discovery costs

and if these costs are not being billed in a separate invoice, then line items should be reviewed for the electronic discovery charges. Collection, filtering, tiff review, and native review are some of the keywords in any line item that may indicate electronic discovery charges.

LITIGATION

Once a coverage opinion is issued and the initial data collection is completed, an electronic discovery vendor is able to measure the data and offer an initial estimate of the cost of processing the data. In general, processing the data means removing system files, eliminating duplicate documents and filtering the remaining documents through aggressive use of technology, including keywords or concept search. The goal is to reduce the amount of data for counsel to review. Electronic discovery is a process, which can offer cost-predictability. While it may be difficult for counsel to provide a good cost estimate for the case overall, (due to the unpredictability of litigation), an electronic discovery vendor can usually provide a reasonably reliable estimate.

Upon receipt of an electronic discovery estimate, the initial legal reserve may be set. The benefits of setting an early reserve cannot be understated, as sometimes this initial estimate appears to be higher than the value of the case, promoting initiation of settlement discussions. When defense counsel renders its estimate of the defense of the case through trial, this number should be added to the electronic discovery estimate. The combined estimates will constitute the legal reserve. As the electronic discovery and litigation process continues, the estimate may have to be revised if more data is collected or the universe of documents does not decrease as anticipated.

As the case approaches settlement or trial, the core documents will be separated from the rest of the data and reviewed for relevance and privilege. As reviewers make determinations for either privilege or relevance, an audit trail should be preserved so that documents may be retrieved at any time. Finally, the documents are produced to the other side and the case will close once there is payment.

Traditionally, information from the discovery process revealed potential liability or shed light on additional facts. But today, electronic discovery also reveals information about the cost of the case. In large security class action disputes, for example, the cost of litigation, including electronic discovery costs, could erode the primary policy limits. Early assessment of discovery costs is important to ensure the insured is not left responsible for defense costs it could have avoided or at least expected.

Like any other information related to claims, the information gathered about the insured’s electronic discovery processes and readiness is (or should be) shared back with the underwriting policy, completing the circle. The information also enables the underwriting department to explain why defense costs are so high, and to help motivate the insured to be proactive and tighten up its processes. The result is better decisions by all, hopefully, a better rate for the insured.

Electronic discovery is a critical part of the litigation process. Sanctions, preservation, and meet-and-confers present risk, require preparation, and demand preparedness. Insurance carriers covering defense costs in any claim now frequently include electronic discovery in their coverage analysis. The rising costs of electronic discovery not only will increase defense costs but will also affect the handling and resolution of a covered claim, but, as always, planning and proactive steps can reduce cost and risk for all involved.

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