QBE INSURANCE ISSUES BRIEF

QBE European Operations

NOVEMBER 2005

FULLY DOCUMENTED?:

CIVIL PROCEDURE RULES (CPR) ON THE DISCLOSURE OF DOCUMENTS

As of 1st October 2005, significant changes came into force relating to the disclosure of electronic documents. Under the new Civil Procedure Rules (CPR) which govern civil proceedings in England and Wales, there are now explicit guidelines regarding electronic documentation, its storage, accessibility and what constitutes potentially disclosable documentation in electronic format. This Issues Brief has been released to alert you to the enforcement of the new documentation rules.

BACKGROUND

The disclosure of electronic documentation has increased in importance over the past decade as the use of the internet, email systems, and company intranets, has dramatically enlarged. The move towards paperless offices has resulted in significant levels of correspondence being carried out electronically. The disclosure of electronic documentation has previously not been expressly addressed within the CPR. While it was generally assumed they were disclosable, in practice the majority of businesses had not paid a great deal of attention to electronic documentation.

The CPR changes will have a profound effect on the need to store and retain electronic documentation which could be submissible material in any future civil proceedings. Legal experts have said it signals a sea change in the way businesses need to treat their electronic communications. In addition, it may require a root and branch revision of current systems and procedures to ensure compliance.

CIVIL PROCEDURE RULES: DISCLOSURE AND INSPECTION

The new specific disclosure rules extend to all of a company's electronic documents including email and other electronic communications, word-processed documents and databases. In addition, it applies to all documents that are readily accessible from computer systems and other electronic devices and media. This definition covers those documents that are stored on servers and back-up systems, as well as electronic documents that have been 'deleted'. It also extends to additional information stored and associated with electronic documents known as 'metadata'.

Under the terms of the new disclosure rules metadata is defined as any extra information which is stored anywhere on the system or servers, associated with the relevant documentation. The key issue is that it provides additional information such as the author of the document, and the number and dates of any subsequent changes.

NEW RULES, NEW CONCERNS

Electronic disclosure brings with it a number of significant demands and challenges. These can broadly be split into two. Firstly, employers need to be fully aware of the levels and scope of the electronically-held data that could be deemed disclosable within any litigation or civil proceedings. This goes above and beyond the need to disclose any relevant and readily accessible electronic documentation. It demands the disclosure of any relevant, but deleted documents, which remain stored on back up server systems and requires the disclosure of any relevant metadata. Secondly, there is now an obligation to inform the other party in any dispute and the court prior to disclosure about the types of electronic documents stored by you and the systems on which they are stored. This information has to include the system of storage and the company's document retention policy.

It is now a requirement not only to explain, but to show the extent of, your document search. In any dispute over a party's efforts to conduct a search for relevant items, the court will make a decision on its 'reasonability'. This will take into account the numbers of documents needed to be searched, the complexity of the proceedings and the value of the documentation to the court's decision making ability. It will cover the ease and expense of the retrieval of any particular document. Companies have been warned that if deemed reasonable, a court can rule that the organisation search its entire database for relevant documentation.

QBE
European Operations

RETENTION IS THE RIGHT POLICY

Given that the main thrust of the new rules is to bring the usage of electronic documentation to a par with its physical peers, the courts have made it implicit that companies should treat each with equal weight in terms of their use in the legal process. Legal experts have advised that the new rules will penalise those who have not previously established a comprehensive document retention policy to prove to the courts the company has taken the safeguarding of their electronic documents in a transparent manner seriously.

The very nature of the problems the policy is seeking to address requires a system which will meet both the technical and legal requirements under the new CPR rules. Technically, any policy should be based on the ability to search and identify documentation quickly and clearly. Companies should bear in mind that the new rules take in wider definitions of electronic documentation than that held on the systems contained in the office or on a remote site server. For example, if staff use Personal Digital Assistants (PDAs), Blackberries, or take laptops home for work use, these need to be synchronised using the relevant software so that all information stored on them can be accounted for and searched.

Local networks within the office need to be backed up centrally. A filter device can and should be used to isolate email containing what could be deemed important information. Keywords should be used to store them in order to aid data retrieval. Organisations have been advised to periodically test their procedures to ensure that at the first sign of litigation, the system will provide the search and retrieval processes demanded by the courts. Legally, a company's policy for retention of documents must be seen to be neutral. The system will be required to store positive, as well as negative, documentation.

The courts have proven they will not take kindly to any party which fails to provide the relevant documentation. In the US, the tobacco giant Philip Morris was fined $2.75m after being found by the court to have flouted its evidence preservation order and destroyed relevant emails in contravention of the company's document retention policy.

There is, however, no standard matrix for a document retention policy. Companies have been told they would be ill advised to seek to simply adopt the document retention policy of another organisation. The court will demand that the policy reflects the particular nature of the business. The policy should be consistent with the general document policy operated by the company. The rules open up the debate over the personal use by staff of the company's electronic communications system. Legal advice indicates that there should be no documents created on a work system that are not applicable to the company or the business it conducts. Therefore, personal use of the system should be banned.

QBE European Operations

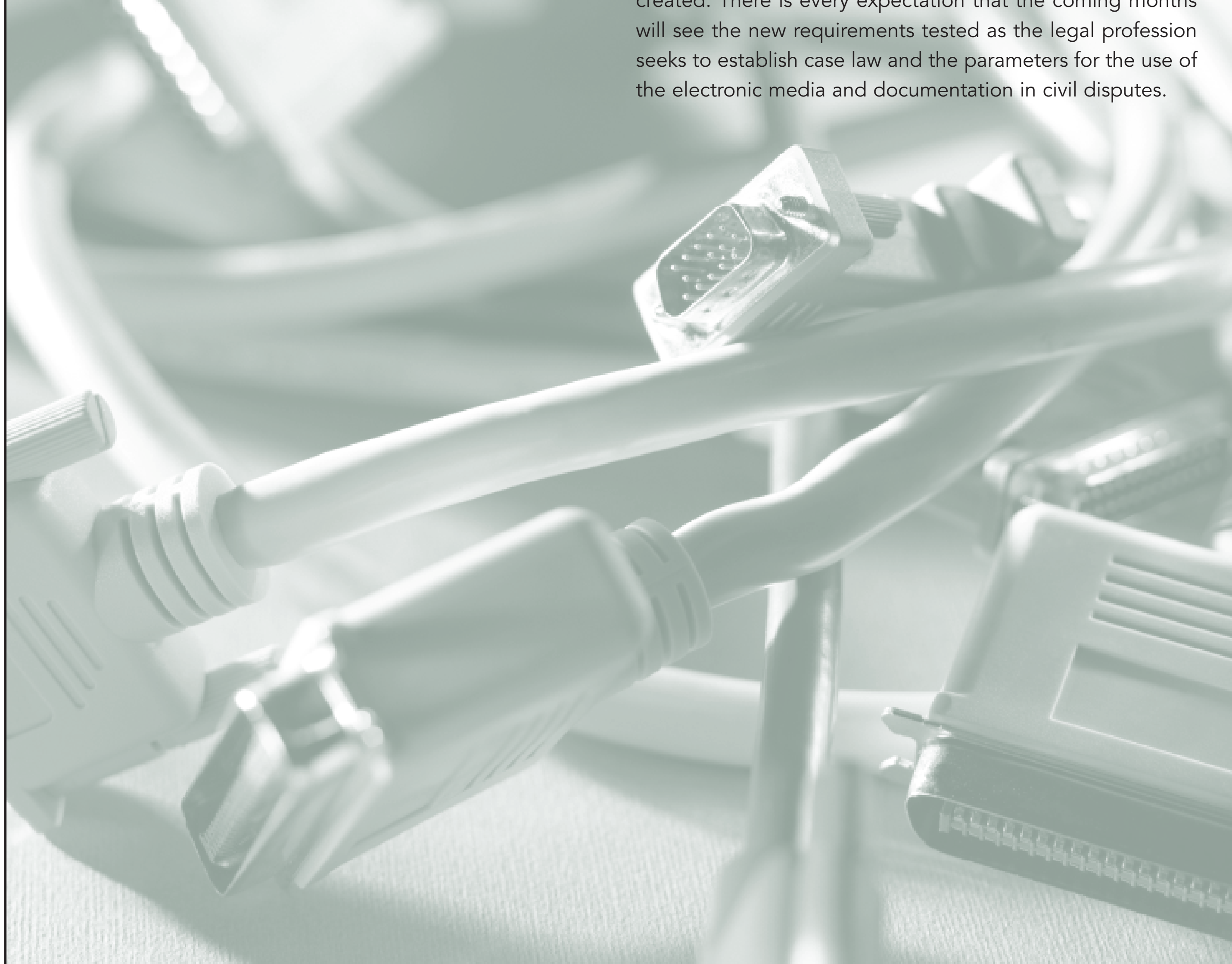
QBE EXPERIENCE

The increased levels of electronic communication and documentation, and the legal issues surrounding their use, have been highlighted in a range of recent legal cases. These stress that the way that the storage, disclosure and destruction of such information has been carried out must not be deemed prejudicial to either side. The courts have not been at the forefront of the reform of existing laws to encompass digital and electronic information. The new rules are the first step in the England and Wales' legal system building electronic documentation clauses into civil legislation. The US has for some time had rules which are broadly similar to the changes made to the CPR and the US Congress is considering actions to further the specification on electronic disclosure.

IMPACT

The new ruling will have far-reaching effects for the business community and its insurance providers. The potential in terms of the volume of electronic documentation is immense. The task of analysing, and, if applicable, retrieving data including those items that have been previously deleted, will be a difficult one for those companies which do not have the correct processes and protocols in place.

Most legal experts agree that the new CPR requirements have been intentionally left relatively broad. It is expected the courts take an approach that enables the rules to be adapted and fine tuned as and when new scenarios are encountered and new storage and delivery systems are created. There is every expectation that the coming months will see the new requirements tested as the legal profession seeks to establish case law and the parameters for the use of the electronic media and documentation in civil disputes.



SUMMARY

The US has established a more complex system for the use of electronic documentation. While there are lessons to be learned, many have come as a result of high profile court decisions in which major US brands have been held to account for the mismanagement of their electronic documentation and data. Lawyers have been quick to warn clients of the problems they now face and many have urged their clients to adapt existing, or adopt new systems, to ensure their electronic policies are compliant with the needs of the new requirements.

Organisations have been told to consider the new need to ensure that all disposable electronic data is safe from any opportunity for tampering or destruction. The US courts have told domiciled companies that once there is a reasonable expectation that litigation is possible they must identify every potential source or document that could be of use in the case and ensure that the information is not destroyed. As financial giant UBS Warburg discovered in a recent case brought by a member of their staff in the US, failure to do so can lead to heavy court penalties.

Companies have to ensure that from the very outset of any potential claims, there is a clear understanding of the need to protect documentation and begin the task of searching and identifying those documents that will be required for the particular case. The English legal system has demanded disclosure of documentation at the earliest stage with penalties if this is not achieved.

Lawyers have warned that the very nature of the new disclosure rules leaves a generous amount of room for the courts to manoeuvre; given the decision to ensure that the CPR is not too restrictive, therefore lessening its impact. The early decisions are sure to be keenly argued and companies have been advised to utilise proper planning, good transparent processes and a commonsense approach to their electronic documentation strategies to ensure they do not become some of the early casualties of the country's legal system's first steps into the electronic age.

FURTHER INFORMATION

Additional information can be found on the Department for Constitutional Affairs (DCA) website: **www.dca.gov.uk**, and the published regulations can be found on The DCA's CPR web page at: **www.dca.gov.uk/civil/procrules_fin/**

Please speak to your Liability Risk Manager, Claims Inspector or regular QBE contact should you require further information.

QBE Insurance (Europe)
Plantation Place, 30 Fenchurch Street, London EC3M 3BD
t + 44 (0)20 7105 4000 f + 44 (0)20 7105 4019
enquiries@qbe-europe.com

www.QBE.com