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BUSINESS BRIEF

There is No "Small Company" Excuse to the Duty to Preserve Emails or other Electronically Stored Information (ESI)

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Even for a "small company," the failure to comply with discovery obligations to preserve electronically stored information (ESI) can be dangerous. The case of *Perez v. Vezer Industrial Professionals, Inc.* 2011 WL 5975854 (E.D. Cal. 2011) involved a truck accident, but the lawsuit quickly reached the point where the plaintiff sought a default judgment against the defendant for failure to preserve emails and other ESI. The court in *Perez* found the defendant had breached its discovery obligations, noting the following:

- Two of the defendant's executives, including the owner, admitted they made no effort to retrieve potentially relevant ESI from their computers.
- The court rejected the defendant's argument that it was a "small company," that the case was not document intensive, and that most relevant communications took place by phone or in person. The court said these facts were not valid explanations for the minimal to no effort made by the company to preserve relevant ESI, including documents sent, received, or created by key players.
- According to the court, the fact that one of the key players' computer crashed was "no excuse" given that the witness admitted he did not backup any of his ESI. The court reiterated the following warning to lawyers: "Defense counsel's apparent failure, in this electronic age, to verify with appropriate representatives of their client whether there was an e-mail backup system, cannot be countenanced."
- The court found the company had "proceeded with business as usual, without making any special effort to retain ESI relevant to this litigation."

Although the court concluded the death penalty (a default judgment) was inappropriate in the case, the court did award monetary sanctions. This case is just another example that even small companies must pay attention to their ESI preservation obligations once those obligations are triggered.

Louisiana's Business Judgment Rule Protects Corporate Officers From Being Second Guessed, Unlike California's Corporate Law

Louisiana protects corporate directors and officers from liability to shareholders or others when they make decisions in good faith and reasonably believe that their decisions are in the best interest of the organization. This principal, called the "business judgment rule," gives officers and directors the freedom to take risks and to make decisions without wondering if shareholders or others will attempt to sue them, personally, if a particular decision ultimately results in a loss to the company. The business judgment rule itself is not news; it has been discussed in American case law since at least the 1940s, and is now codified in the statutory law of some states, including Louisiana. The blog-worthy news about the business judgment rule is a December 13, 2011 court decision from a federal court in California in *FDIC v. Perry* noting that the statutory version of the rule enacted by California's legislature protects only corporate directors, not officers.

Unlike California's law, the Louisiana statute that codifies the business judgment rule, La. R.S. 12:91, provides business-judgment-rule protections to directors <u>and officers</u> of corporations, partnerships, and limited liability companies formed in Louisiana. Louisiana provides strong protection to directors and officers who act in good faith and exercise reasonable diligence in making decisions. Louisiana is already attracting digital-media and other high-tech and entertainment-related business from California with the possibility of attractive tax credits, free workforce training, and other incentives. The fact that Louisiana's corporate law is more management-friendly than California's is one more factor for businesses to consider when thinking about expanding or relocating to Louisiana.

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