BEFORE THE CLOUD TURNS DARK AND IT BEGINS TO RAIN

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Summary

AV-rated attorney represents clients involving: Software, Data Breach and Privacy matters, and Web site contracting; Real estate transactions representing commercial landlords and tenants; Financings; Corporate and asset acquisitions; Banking law; General business negotiations; and, Development, exploitation and transfer of intellectual property rights in Entertainment law.

Southern Methodist University Law School, Adjunct Professor of Law

Adjunct Professor of Law and course co-author with S.M.U. Law Professor Jane K. Winn for a special E-commerce program teaching E-commerce legal issues to non-lawyers as part of an executive certification program, co-sponsored by Nortel Networks and S.M.U.'s Engineering, Business, and Law Schools. Included multi-disciplinary case study of Northeastern University, Boston, Massachusetts, and San Bernadino County, California, using on-site interviews and Nortel's proprietary data. Review included: privacy and open records; ownership of educational materials and processes; interdepartmental government communications; streamlining tax evaluation processes; and electronic voting.

Medallion National Bank, *Chair and Organizer*, Dallas, Texas

- Supervised market research leading to site selection and favorable lease.
- Prepared 3-year business plan for the bank, and established federally required "community need" resulting in grant of a national bank charter by U.S. Comptroller of the Currency.
- Raised initial capital.
- Achieved profitability in 9 months (industry average was 22 months) by concentrating on retail banking in a low-overhead environment. Subsequently, negotiated and structured sale bringing shareholders a 95% cash-on-cash return in one year.

Summary of Professional Activities

Co-author (1 of 3) of S.B. 28,"Antibotnet Bill," legislation creating a private right of action for businesses damaged from botnets. SB 28 passed the Texas House and Senate on roll-call votes without a single "nay" vote in 81st Regular Session; Governor Perry signed it on June 19, 2009. This passage culminated efforts covering 3 legislative sessions and almost 6 years to combat spam, malware, and Distributed Denial of Service (DDoS) attacks. Supported legislative efforts by Texas Business Law Foundation during all 3 sessions including soliciting and preparing testimony for Committee hearings.
Vice Chair and Council Member, Computer and Technology Section, State Bar of Texas, 2008-Present.
Member, Data Breach and Privacy Committee, Business Law Section of the State Bar of Texas, 2005-Present.
Member, Legislation Comment Committee, Business Law Section of the State Bar of Texas, 2001-Present.

- Our committee had responsibility for writing legislative analysis of Uniform Computer Information and Transaction Act (UCITA). UCITA originated through the National Conference of Commissioners on Uniform State Laws. UCITA is best compared to the Uniform Commercial Code (UCC)—a standard for transactions involving computer information or

software. Continuing with this comparison, our work would become the official "Commentary" and part of the legislative history of the bill.

- Our committee had responsibility for reviewing and analyzing the impact of the Uniform Electronic Transaction Act (UETA), adopted by Texas in 2001, and consider the choice to modify, limit, or supersede the provisions of the Electronic Signatures in Global and National Commerce Act (15 U.S.C. Section 7001, et., seq.) as authorized by the Federal Act (Section 102). Our Business Law Section committee's comments were passed to legislative committees reviewing the Texas Act.

Board of Director of Japan-America Society of Dallas (now the Japan-America Society of Dallas / Ft. Worth) 1991-1995.

Speaking Engagements (Have spoken over 57 times at Texas Bar CLE courses and as law school guest speaker.)
Speaker, and author of numerous articles, on topics such as:

- E-commerce Legal Issues Course (co-authored and taught) as part of an E-Commerce certification by Southern Methodist University and Nortel Networks;
- Privacy and Data Security;
- Internet use and contracting;
- Entertainment law (character copyright and control);
- Federal preemption of state actions by copyright act;
- Texas sales tax rules and regulations as applied in the advertising industry;
- Deceptive Trade Practices Act as applied to real estate transactions.

Summary of Education
University of Texas at Austin, School of Law, awarded J.D. degree in 1976.
University of Texas at Austin, awarded B.S. in Ed. with High Honors in 1973.
Washington University in St. Louis, Missouri 1969-1971.

Before The Cloud Turns Dark and It Begins to Rain

Description: Examination of legal ethics issues, client liabilities and protection, and investor due diligence requirements, when Landlords and their Creditors, Real Estate or Equipment Financing Entities, and Trustees fight for control over Cloud servers holding data.

By Joseph Jacobson, Attorney

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I. Summary

This paper begins with an identification of the ethical issues that require greater awareness and operating skill for attorneys. This requirement then leads to both real and hypothetical examples of technology's impact on legal ethics and business practices in the legal industry.

An overview of the Cloud computing industry follows with discussion of the range of services available through the Cloud.

This paper then explores statutory protections and failings, contractual provisions, and case law uncertainty in identifying and protecting interests of Cloud providers, landlords to Cloud providers, lenders to every enterprise associated with the location and equipment used in the Cloud, Cloud consumers, Cloud consumer's clients, software vendors, and the role attorneys take in representing these parties. This paper concludes with an examination of ethical issues facing attorneys and other professionals in their representation of clients and their firms' own use of the Cloud.

The "Cloud " is not one thing. The various uses of the Cloud cover fungible and mobile storage of software and data associated with an enterprise. This data may include emails, documents, formulas, and software.

The software could be publicly available or custom created, used in activities as mundane as writing a letter or as complicated as calculating a support structure's required strength in a construction project. Software creates and manipulates data to keep an enterprise operational.

This data may also include images of paper documents as well as documents created particularly for data. Video and audio recordings ranging from items for distribution in public relations efforts to all the messages of a voice mail box, to actual recordings of conversations may be mixed into this data. This data in the Cloud could be anything and everything.

II. Introduction: "Send in The Cloud. Isn't it bliss?" (Paraphrasing Stephen Sondheim).

Your client or you has heard about "The Cloud." Your client or you find IT daunting, an increasing expense, and source of liability. While your client or you may not understand all of the concepts and details of Cloud use, reducing staff, reducing IT expenditures and off-loading direct responsibility for technology support all sound great. How do we get from (A) aggravated with operations and IT administration to (B) "bliss?" Can it be done?

Stephen Sondheim with amazing prescience asked and answered a question for today:

> Isn't it rich?
> Are we a pair?
> Me here at last on the ground,
> You in mid-air.[1]

This paper will help you determine if your client (or your law firm) should be "a pair" with a Cloud provider. Putting these lyrics in context, the lead actress with new self-awareness, and having recognized her part in a failed relationship, ends the song alone and in tears. Will your relationship with your Cloud provider mirror this segment in Sondheim's play, or mirror the play's conclusion where the 2 protagonists are united and happy?

III. The American Bar Association establishes a previously nonexistent or at least unarticulated requirement for attorney technological competence.

A. The American Bar Association Commission on Ethics 20/20 broadens a lawyer's ethical requirements to include an understanding and appreciation of technology.

On February 13, 2013, the American Bar Association's Commission on Ethics 20/20 issued its proposed recommendation. Rule 1.1 of the Model ABA rules is entitled "Competence."[2] It states

> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.
>
> Comment
> Maintaining Competence
> [6] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all

1 Stephen Sondheim and Harold S. Prince, *Send in the Clowns* in "A Little Night Music" by Hugh Wheeler, Stephen Sondheim and Harold S. Prince, "A Little Night Music" 1973. Music Copyright 1973 Revelation Music Publishing Corp./Beautiful Music, Inc. All rights reserved.
This song was made famous by Judy Collins' recording.

2 American Bar Association Commission on Ethics 20/20 Report to the House of Delegates, Resolution 105A Revised February 13, 2013
http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120808_revised_resolution_105a_as_amended.authcheckdam.pdf

continuing legal education requirements to which the lawyer is subject.

This Comment ties not only the use of technology to an attorney's competence, but apparently requires the attorney to have sufficient understanding of technology to communicate the risks and benefits associated with "relevant" technology. The client may make a final choice on security procedures required for its communication with a law firm, but the client would not be in a position to make the choice, unless the attorney communicated this knowledge to the client.

This Comment to Rule 1.1 is significant in another way. The ABA Model Rules are applied to individual attorneys. The responsibility these rules impose may not be passed to a firm's IT Department. Likewise, I assert, at least to some degree, the responsibility may not be delegated to a Cloud provider. At the very least, the attorney should be aware of the basic technology the Cloud provider uses and how the attorney's procedures or the law firm's procedures fit into this pattern.

Practicing attorneys have already had to answer questions about whether files are encrypted while stored at a law firm, while in transit from the firm to the Cloud provider or from the Cloud provider to the firm, and encryption of the files at the Cloud provider. The control of the keys for cyphering the information is not usually discussed with clients.

Encryption is one level of protection meaning the file is gibberish without the key to cypher the file. Password access is different, and much less rigorous in that the file may be read if accessed, but that access is limited to individuals that have the appropriate credentials, i.e., User ID and Password.

Client expectations for email may be different than that of written communications. Consider the circumstances of a client writing a letter on paper to the attorney. The client would reasonably believe the letter could be read by any attorney or assistant working on the case.

Consider a hypothetical similar to this circumstance: How comfortable would the client be, if an attorney announced that everyone in the law firm had the same email account and any email could be read by any other attorney? I would suggest that clients or their authorized agents for contact with attorneys would not be so comfortable. If so, then the following questions arise:

- Would you, as a practicing lawyer agree, that it is common knowledge and a usual and customary business practice in the delivery of legal services that each attorney has a password that allows that attorney access to emails addressed to that attorney? If so, then,
    - Does a client's awareness of these usual and customary business practices in the delivery of legal services create a different expectation than if the client were to write a letter to the attorney?
    - Does Jane, a client contact for Acme, have an opportunity to review emails that Jane wrote Sue, (a recently departed attorney at the law firm Smart & Sharp representing

Acme) before the emails are released to other attorneys in the firm that may represent that client?

- Does Jane, a client contact for Acme, have an opportunity to review emails that Jane wrote to Sue discussing the possibility of Jane's taking a job for one of Acme's competitors.

- Does Sue have an obligation to inform the client or inform Jane that the expectation of email privacy may not be accurate, and that indeed, the IT department or anyone at the firm Smart & Sharp could gain access to these emails?

The State Bar of Texas and the Texas Supreme Court have not approved any modifications to the existing Texas Disciplinary Rules of Professional Conduct.[3] The rules are currently silent regarding specific technological requirements of competency.

The Texas Disciplinary Rules of Professional Conduct Rule 1.03 Communication holds the lawyer's obligation to inform a client to this standard:

> (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.
>
> http://www.legalethicstexas.com/Ethics-Resources/Rules/Texas-Disciplinary-Rules-of-Professional-Conduct/I--CLIENT-LAWYER-RELATIONSHIP/1-03---Communication.aspx

The ABA Model Rule 1.0(e) defines informed consent to occur " . . . after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." ABA Commission on Ethics 20/20 Model Rule 1.0 Terminology http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120808_revised_resolution_105a_as_amended.authcheckdam.pdf .
The standards are different, but the ABA discusses material risks, while the Texas rule is not limited to material matters. Does this create a real difference or is the Texas rule require more disclosure?

How would you identify the risks associated with your firm's use of the Cloud?

- Would you as an attorney have to provide statistics on the loss of mobile phones or mobile computers and passwords or automatic logins for Cloud access to a client's data?
- Would you as an attorney have to provide information as to the number of law firms and other businesses that have been hacked, i.e., had its computer data

3 TEX. DISCIPLINARY R. PROF. CONDUCT. (1989) reprinted in Tex. Govt Code Ann., tit.2., subtit.G, app. (Vernon Supp.1995)(State Bar Rules art X [[section]]9)), also found at Texas Center for Legal Ethics' Web site, beginning http://www.legalethicstexas.com/Ethics-Resources/Rules/Texas-Disciplinary-Rules-of-Professional-Conduct.aspx.

compromised?

- Do you as an attorney have to provide information your Client's data is stored on computers in California, Virginia, India, and Iceland?
- Do you, as an attorney, even know where the data is stored and the level of encryption if any of this stored data?

Without clear standards, or any guidance, attorneys may want to disclose a firm's procedures, but be sure to allow the Client to set higher standards.[4]

B. Texas, arguably, had other encouragement for an attorney's technological competence before the ABA Commission on Ethics 20/20's proposed Model Rule.

Many lawyers forget that a law practice is a business and that standard business statutes and regulations applicable to other businesses would also be apply to them.

The Texas legislature has defined personally identifiable information relative to whether the information is encrypted or not. In other words, if the information is encrypted then it data is ***not*** sensitive personal information; yet, the same information in an unencrypted state is sensitive personal information.[5] This statute was amended in 2009, so every Texas business has had an opportunity to understand the advantages of encryption almost 4 years previous to this paper. Every Texas business includes law firms. Also, businesses may reasonably expect their attorneys to have sufficient knowledge of encryption to explain the meaning of this statute and advise them as to whether the company's procedures are in compliance.

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4 Although not part of this paper, you as an attorney may also consider his or her ability to adequately inform your client with regard to the risks of communication without encrypted email or files.

5 Tex.Bus.& Com. Code §521.002 (*emphasis added)*

(2) "Sensitive personal information" means, subject to Subsection (b):

(A) an individual's first name or first initial and last name in combination with any one or more of the following items, *if the name and the items are not encrypted*:

(i) social security number;

(ii) driver's license number or government-issued identification number; or

(iii) account number or credit or debit card number in combination with any required security code, access code, or password that would permit access to an individual's financial account; or

(B) information that identifies an individual and relates to:

(i) the physical or mental health or condition of the individual;

(ii) the provision of health care to the individual; or

(iii) payment for the provision of health care to the individual.

Even if an attorney did not represent businesses, an attorney would easily possess sensitive personal information such as a person's first name or initial and last name and social security number if the attorney prepared wills for the individual, or represented that person in a divorce, or made a social security disability claim for that person — just to name a few opportunities. So, the attorney would have a good reason to understand the statue for application to his or her own business (practice).

Businesses and law firms may store emails in a backup system (in the Cloud or on their own servers at their offices) separately from their email server system, which may be Web based. For example, Google Applications is a commercially available product providing Web-based email access. The emails are on Google's cloud. The emails, however, may be downloaded to a firm's server and stored by client or matter or in bulk. These stored emails themselves, may be saved on another server system or backup. Whether these emails are encrypted after being downloaded to the firm or subsequently stored in the firm's Cloud backup (independent of Google) is relevant to the extent the emails have legal ethically defined confidential or privileged information, or may contain "sensitive personal information" or other information as regulated by the Texas legislature.

While Texas statutes address the responsibilities for a business, the ethics requirements are personal to the attorney. This tension between

- Business entity compliance with Texas statutory business records; and,
- Ethically mandated personal responsibility for an attorney

may not be easily assuaged.

Law firms and individual attorneys may face issues such as:

- Do Texas legal ethics requirements or Texas employment law protect a newly hired attorney in a "whistle-blower" fact circumstance, where the law firm does not have agreements that properly "explain a matter to the extent reasonably necessary to permit the client to make informed decisions?"[6]
- Is there a way for an attorney to obtain a binding ruling on the disclosures within the professional services agreement without putting his or her employment at risk?

A ruling from whatever authority may appropriately issue such ruling, may be supportive of the law firm. If so, would the ruling be binding in any civil legal action where the client claims the disclosure regarding technology was not adequate? The client claims may arising from the disclosure of data

6 TEX. DISCIPLINARY R. PROF. CONDUCT 1.03(b) http://www.legalethicstexas.com/Ethics-Resources/Rules/Texas-Disciplinary-Rules-of-Professional-Conduct/I--CLIENT-LAWYER-RELATIONSHIP/1-03---Communication.aspx

protected by either statute or the Texas Disciplinary Rules of Professional Conduct; yet, may be based on a breach of contract or tort claim. For example, if a law firm held information about a public offering or an acquisition of a public company, and this information were to be accessed and the pricing change, could a claim reasonably be asserted against the law firm for breach of contract, breach of warranty, or negligence or all three?

Currently, the Texas State Bar has a procedure for an advanced ruling from the Advertising Committee as to whether an advertising is compliant with State Bar of Texas rules. The Advertising Committee's ruling is admissible in any action against the law firm or attorney for violation of the advertising rules.[7]

No procedure within the ethics rules grants an attorney or a law firm a safe-harbor provision for satisfactory disclosure enabling a client's informed consent for the attorney's or law firm's use of technology, including encryption or the Cloud. Ethics Opinions would always be admissible, but admissibility is a far cry from a safe-harbor provision. Ethics Opinions only address Disciplinary Liability and obtaining an Ethics Committee Opinion may require several months after submission. No ethics opinion exists regarding an attorney or law firm's use of the Cloud or Cloud services for storing client data.

In 2009, the Texas legislature created an incentive for every business which keeps electronic records, including law firms, to have protection against lawsuits based on unauthorized release of these records. The safe-harbor only required encryption. No details about the sophistication of encryption were included either in the statute or any regulatory authority or judicial standard. Just encryption.

The ABA Committee on Ethics 20/20 does not even use the word encryption in its rule or commentary on the proposed rule.

Encryption is covered by other presentations, particularly those by the Computer & Technology Section, which enable attorneys to receive CLE and ethics credit. Only encryption details necessary to describe the latest developments and advantages of its use are discussed within this paper.

IV. Hypothetical problems soon become real crises; can you tell one from the other?

Let me give you 2 situations which focus on the issues for companies and attorneys using the Cloud.

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I. Situation 1: A family vacation.

A Texas family, rents a car in Texas and goes vacation driving California's Highway 1 in their rented car, then stopped at a restaurant for lunch. When they came out their car (with all the luggage) was gone. The California police didn't care. No charges were filed, since nothing illegal occurred. How could this be?

The rental car was merely repossessed by the leasing company's lender. The family's vacation was ruined. When the family asked the lender about the luggage left in the car while at the restaurant, the they were told all luggage from all the repossessed cars is available for identification in a warehouse in Fargo, N.D. Insurance covered nothing; nothing was stolen.

II. Situation 2: A law firm.

A law firm has one-third of its lawyers jump to another firm. The landlord would not negotiate a downsizing of the firm's space.

Following these unsuccessful negotiations, the landlord declares the tenant in default, even though rent is fully paid. Landlord accelerates the balance of the rent, a claim amounting to several million dollars, and asserts a landlord's lien on the firm's personal property, including its computers. The landlord files an action to push the firm into ***state*** receivership (suggesting its own receiver). State receivership served only as an intermediate step to having landlord's choice of receiver place the law firm into federal bankruptcy proceedings.

Which of the two situations was the hypothetical? Situation 1? No. The reality of Situation 2 deserves your focus, but the fact situation is not complete for what may happen with Cloud computing. Let us consider some variations of the two alleged hypotheticals and create, yet other hypotheticals.

III. Opportunities to prepare for hypothetical Situations 3 and 4 before they become real to you.

Combine the 2 scenarios above and consider the personal property in jeopardy (the computers) and your client's data residing on the computers of a Cloud provider (luggage in the repossessed car). The computers where the data resides is not in Client's control. The Client is not aware the Cloud provider has placed financing liens on its equipment (the computers) or that the landlord has a lien on the Cloud provider's personal property (the computers storing data). Your client is not aware of your Cloud provider's landlord-tenant dispute. Your client calls and says no one in her company can log on and asks your advice. Your client's business is in jeopardy.

This scenario sounds challenging for these reasons:

- Your client does not know where the computers are located or how to gain physical control of them and the data.

- Your client does not know what actions if any have been filed against the Cloud provider, or in what jurisdictions. (The computers may be in a location different than the Cloud provider's headquarters.)
- Your client cannot access anyone at the Cloud provider company.
- Your client asks you if any of these problems effect the acquisition it has been planning or its patent applications or its soft drink secret formula.

Now, imagine a fourth scenario. You are not worried about these issues because it happened to a client; you are in panic mode because these circumstances happened to ***your*** Cloud provider, and no one in ***your*** law firm can log on.

V. Identification of possible relationships between and among parties involved in creating and using the Cloud, and this paper's terminology.

A. Outsourcing your IT needs with Software as a Service, Infrastructure as a Service, or simply off-site backup.

Cloud providers are third-party entities that minimally store data, and may provide software licenses for an enterprise's data creation and manipulation needs, including Web hosting—Information Technology (IT) services. These services may be complete encompassing all your fully outsourced, or as little as an off-site backup resource.

Terminology in the industry may also reference these same companies as "SaaS," or "Software as a Service" providers. Another term that is frequently used is "IaaS" or "Infrastructure as a Service." The SaaS or IaaS designation highlights the use of the Cloud provider's versatility and capability of providing more than remote data storage. The Cloud provider may take responsibility for the Cloud customer's software licenses since the software is run on the Cloud provider's computers. The "sale" or licensing of software is turned from a single transaction, into a environment where all IT activities are supplied by a third-party vendor, and are maintained off-site.

Realizing the breadth of a Cloud provider's activities, including providing software licenses and sublicenses to companies, this paper will use "loss of data," to mean all the services and data enumerated in the customer contract.

The term SAN, an acronym for "***S***torage ***A***rea ***N***etwork," describes data backup systems. All storage on a network could be backed up, or just servers. SAN may be at the location of the enterprise or it may be offsite.

The use of "you" or "your" within context, means the Cloud customer (the entity contracting for some Cloud services), the IT professional reading this paper, or the professional

advisor to Cloud customers. Many, but not all of the references in this paper focus on "you" the lawyer with a firm representing the Cloud customer, Cloud provider, lenders landlords or tenants, as will be identified within this article .

Issues effecting professional accountants will be covered in another paper.

B. Who finances what and where: from the Cloud provider's facilities to the equipment holding your software and data, every creditor to every borrower in the chain of transactions wants protection.

Few Cloud providers have financial servers and data centers. A Cloud provider often leases a facility from which to run its servers. The Cloud provider with which you contract may even subcontract its storage and computing needs to third parties, and you are even more removed from your data.

A Cloud customer's use of a Cloud provider located within the United States could be subject to some or all of the following:

- Equipment and software security agreements
- Software licensing agreements
- Liens created and filed by lenders to both landlords and tenants
- State constitutional and statutory liens, filed by either the tenant's or landlord's contractors
- Government tax liens

Priorities and both formal and informal relationships may govern how these entities work to achieve their goal: getting paid. Bankruptcy proceedings may make further adjustments among the parties, and their relative bargaining strengths. Ultimately, your client's data is caught in the middle of these negotiations.

C. Nomenclature for this paper.

Entity barriers exist between your data and you, and all potentially have claims that interfere with access and control of your data: developers, landlords, Cloud provider-tenants, Cloud customers, and lenders and mortgagees at every step.

The facility owner is considered the *landlord* in this paper. The landlord may develop its own facility, in which case it may have a ***construction lender*** until the landlord moves to ***a long-term financing lender***. A landlord may purchase an existing industrial facility with help from an ***acquisition financing lender***.

In this paper, all of these lenders or mortgagees are called landlord-lenders.[8]

The Cloud provider is considered a tenant for the purposes of this paper. When highlighting the Cloud provider's limited control of its environment, we'll remind you with the term provider-tenant. The Cloud provider-tenant has the broadest concerns, since its agreements are subject to the parties involved in development and their respective lenders (described above). Unless otherwise stated, this paper assumes the provider-tenant has lender financing for its equipment and software acquisitions.

The lenders for tenant finish-out of the facility or for equipment acquisition (whether through purchase, a lease or finance lease arrangement), are called tenant-lenders or Cloud provider-lenders.

Cloud customers enter into agreements, physical or online, regarding their use of the Cloud . Some companies provide free use of Cloud services. Whether free use or paid, and whether online or on paper, these agreements are called customer contracts.

In the usual arrangement examined by this paper, a Cloud customer enters into a contract with a Cloud provider-tenant. The Cloud provider-tenant acquired equipment with a loan from a tenant-lender. The Cloud provider-tenant entered into a lease agreement with the landlord. This lease could have been entered into in the construction phase prior to occupancy or after construction was complete. The landlord is assumed to have some type of landlord-lender financing, whether for construction, acquisition or improvements.

D. Utility regulation in states outside your jurisdiction may allow destruction of your data.

State utility regulations commonly include electricity. In addition to those regulations, special legislation may grant or deny powers or rights outside of utility regulators' purview. Regardless of the competing claims on the equipment on which your data and software resides, your data's survival may depend upon utility regulation or legislative approach within the state where your data is maintained.

Cloud customers may not assume the regulatory and statutory provisions for utilities are applicable to the Cloud agreement for many reasons. The easiest to imagine, however, is the storage of data in another state or jurisdiction. Utility regulations or statutory fiat may control your Cloud provider's access to power. What if power is intentionally interrupted—not by a utility, but by a Cloud

8 Other possibilities exist where an owner-operator becomes a tenant. For example, ByteGrid offers data center owners the opportunity to "Monetize your Real Property and Mission-Critical Infrastructure Assets – Enabling you to redeploy capital into your core business operations." Sale/Leaseback, http://www.bytegrid.net/saleleaseback.php (last viewed by author on _____).

provider's creditor or even its subcontractor where the server is physically located—all within the governing state's laws, and all without recourse by your client for its damages?

Utility interruption in accordance with state laws and many commercial leases may be allowed or, if not statutorily allowed, waived, by the entity closest to servers holding your data. Utility interruption may prevent your client's or your access to data and may also jeopardize the data itself. The sudden power outage alone may destroy data or interrupt business operations.

An issue closely aligned with this potential interruption is whether business interruption insurance would cover this type of catastrophe, and if not, could such insurance be obtained?

E. Redundancy of data and software, or "Here, There and Everywhere."[9]

Redundancy, the storage of all data and applications you use from the Cloud provider protects data, but places it out of your control, and maybe in a foreign country.[10] Redundancy may mean storage on multiple devices where all the devices exist at one geographical location. For example, your data resides on a server with serial number 135 and a server serial number 246, both located in the same building 400 Gates Drive, Billingsly, Montana. Server 135 may not be subject to

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9 Copyright words and music John Lennon and Paul McCartney 1966.

10 Cloud provider Syncplicity discloses a minimum of information about its redundancy standard in a Web page few customers may not normally read entitled "Syncplicity Reseller Program" with, "Data is stored in quadruplicate across three geographically dispersed data centers to deliver 99.9999999% durability of data." Many consumers would not think the "Syncplicity Reseller Program" page would have information valuable to him or her as a consumer. http://www.syncplicity.com/partners/resellers (last viewed by author on _____).

There is no disclosure of whether the locations are in the same state or international or some mix of international and national sites. The representation seems to set a minimum standard of "quadruplicate" storage, and would allow more than 4 locations. Having several locations, creates more difficulty for your client or you to have access to and control the data. Having more than one location in a single state or in a single country my invoke jurisdiction and legal requirements that neither your client or you would have reasonably contemplated.

Amazon's Web Services, called Amazon Simple Storage Service (Amazon S3) is among the most transparent of Cloud providers allowing customers options for geographical regions for data storage. The regions are defined as US Standard, US West (Oregon), US West (Northern California), EU (Ireland), Asia Pacific (Singapore), Asia Pacific (Tokyo), South America (Sao Paulo, Brazil) and GovCloud (US) Regions. The US Standard region allows routing to either Northern Virginia or the Pacific Northwest. Amazon S3 states an object "stored in a Region never leaves the Region." This representation is critical because of European Union (EU) financial, employment, and personal privacy policies, which are very different from the United States, yet critical to international companies and international transactions. "Amazon S3 Functionality," Amazon Web Services, *http://aws.amazon.com/s3/*, (last viewed by author on _____).

a security interest under a UCC-1, while server 246 may be subject to a security interest by a provider-lender or landlord. Should you have a concern if others hold security interests in servers holding your data? This level of detail could have implications we will discuss later.

If the Cloud provider offers redundancy in the form of your data stored in multiple locations, then secrecy may both add protection and reduce your control over information. [11] Your information is not in one place but in several—all at once—and some locations may be outside the United States. Your client's or your data could be stored in Billingsly, Montana and India. The redundancy is minimal, but the data in India is less within your control.

Your challenge to identify your data and assert ownership rights in the data becomes not only an interstate, but potentially an international nightmare. Even your access to your Cloud provider's geographical locations is not certain. Secrecy is integral to the Cloud industry for both vendors and consumers of Cloud services. Your client or you may be unaware of the international connection to your data until you face a crisis or until the data is breached.

Our state-by-state public records filing system poses challenges to Cloud industry vendors, lenders, landlords, and consumers. If you do not know the location of your data (Austin, Texas or Billingsly, Montana), you cannot see

- If any prior liens exist on the equipment; or,
- If there are claims to funds from contracts; or,
- If a recorded instrument assigns to another party your Cloud contract; or, certain specified interests in your Cloud contract; or, your contractual payments to your Cloud provider.

If a lien holder owes the debtor a duty to protect an asset from waste, how far does that duty extend? Does it go beyond the asset to data on the asset? If so, then the lien holder would expect to have notice of the asset to be protected.

Assume you represent a financing entity that has just taken possession of the Cloud provider's equipment. What do you do to advise your client of its duty? Do you tell your client to protect data or not to protect data? If the client tries to protect data but is unsuccessful, what consequences follow?

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11 "The owner of a facility doesn't necessarily want to have the address or name of the building out in the world, because what they're doing is very secretive," said Brett Boncher, project manager at Cupertino Electric, which installs data center electrical systems." San Jose Mercury News (CA) Via Acquire Media NewsEdge, *Server farms sprouting in Silicon Valley [San Jose Mercury News, Calif.]*, Next Generation Communications, October 6, 2011, http://next-generation-communications.tmcnet.com/news/2011/10/06/5835494.htm

- How is notice provided when data, not necessarily copyrighted nor displaying appropriate confidentiality notices, is the protected asset?
- What examination may a creditor conduct to protect encrypted data to determine ownership?
- What examination may a creditor allow a Cloud customer in order to access its data? [This question focuses on the situation where a server holds the data of more than one company, a likely incident.]

Assume your client or you place data with a Cloud provider, and the Cloud provider loses control of the data to a creditor of the Cloud provider. [12]

- Would your client or you be responsible for data breach notices to your client's customers or your clients?
- Does a foreign state's breach notification law apply to your client's data merely because the Cloud provider's servers were in jurisdictions in other states, not your client's principal place of business or your firm's principal place of business?

Not all these questions have answers at this time, but the abundance of data centers make these questions likely to occur.

Cloud providers may have automated systems that move your data, for administration purposes, among the hundreds or even hundreds of thousands of servers it owns.

Even if you knew data storage locations and the storage locations were stable, you may not want to disclose that information. Public filings disclosure could lead to attacks on your data. Some Cloud users may not want the Cloud provider with which they do business identified. Data center locations are often undisclosed, providing security by preventing physical terror attacks (bombings, etc.) or cyber attacks (which in the future may include computer-based power-grid interruptions).

High value information, often held by law firms, may become a target. China is alleged as the source of attacks successfully breaching security at law firms in the United States[13] and Canada.[14]

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12 While this paper discusses many ways in which the Cloud provider may lose control of data, consider foreclosure on a Cloud provider's servers used as collateral for a lender or a landlord asserting a lien on personal property for violations of a lease agreement.

13 Ashby Jones , *China and the Law: Did Chinese Hackers Attack LA Law Firm?*, WSJ Law Blog, Wall St. J., Jan. 14, 2010, http://blogs.wsj.com/law/2010/01/14/china-and-the-law-did-chinese-hackers-attack-la-law-firm/
Dennis Romero, *L.A. Law Firm Reports Cyber Attack From China*, LAWeekly, January 14, 2010, http://blogs.laweekly.com/informer/2010/01/law_firm_cyber_attack.php

14 Jeff Gray, *Major law firms fall victim to cyber attacks*, The Globe and Mail (Toronto), April 12, 2011, http://www.theglobeandmail.com/report-on-business/industry-news/the-law-page/major-law-

These security concerns are not for the future because the incidents have occurred. These security concerns are for now. Does the Cloud protect you from these concerns?

Professional firms have a special consequences and liabilities for breaches and potential ethical violations if a firm's client's information is accessed or destroyed. That data may be in jurisdictions different from those where the professional practices exist or are licensed may effect causes of action available to injured parties.

F. Will your data "take a ride on the magic bus."[15]

This paper is being delivered at the State Bar of Texas Annual Meeting across the street from the Infomart, in Dallas, Texas. My personal tale relevant to data and IP address location begins across the street at the Infomart.

I registered a domain with a company called Verio in the late-1990s. I knew the owners and if I had a problem, I could come down the Dallas North Tollway and visit with them. I could have face-to-face meetings. I could see the servers on which my domain and data were stored.

Verio, a Texas corporation with principal place of business in Dallas, Texas was acquired by Nippon Telephone and Telegraph. The owners disappeared to a happier place. Verio wrote that some of its data was going to be transferred to its servers in Florida. It advised of where the server with my IP address could be found. Verio could have transferred the data without notice to me, but at the time, it was a company sensitive to customer relations.

Later Verio, still a subsidiary of NTT acquired other companies including a company in Utah. Verio determined that the laws of Utah were unfavorable for ISPs such as Verio, and removed all the data from Utah. At around this time, all data in the United States was consolidated in either California or Virginia.

Eventually, I learned that Verio purchases its domains through a company named MelbourneIT. MelbourneIT is located in Melbourne, Australia. In order to continue to operate my domain, at one point, I had to open an account at MelbourneIT. There was no way, at that particular time for me to renew my domain name registration without opening an account in Australia. I had no idea that Verio did not acquire its domain names directly.

For me, there was little risk about opening domain account providing for email, even temporarily, in Melbourne, Australia. That may not hold true for other companies, and the liabilities could be very significant.

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firms-fall-victim-to-cyber-attacks/article1972226/

15 "The Magic Bus" words and music, Peter Townshend (1967).

Australia has a provision in its privacy laws that if a subsidiary is obligated to handle data in accordance with Australian law, and the data is transferred to the parent, which is outside Australia, then the parent of that subsidiary is required to handle the data as though the data was still in possession of the subsidiary. Instead of limiting liability by having a subsidiary, liability actually increases by extending to the parent.[16]

The lesson to take from my series of transactions is that your client's data or your data may unexpectedly find itself in another country's jurisdiction, and subject to other laws.

G. What entities are going to save your client or you in case of loss of data?

If the entity's Cloud provider or an entity further down the chain from your provider is responsible for the data loss or business interruption, then coverage issues and replacement costs and loss of business will be important. The threshold question is whether these coverages exist, do these organizations have such coverage, and are the amounts sufficient.

If you are a professional, and client's data is lost or transactions using software inaccessible for the failure, then the focus becomes

- Does your general liability or professional liability insurance provide coverages for loss of client data where the data is held by a third party?
- Does the defaulting Cloud provider or its defaulting subcontractor have insurance that would cover your client's or your law firm's damages?
- For professionals, does your data loss alone violate an ethical cannon? In some states, violations of ethical regulations create causes of action for malpractice or professional negligence (the term used in Texas). If as a professional you advise a Cloud customer suffering a data loss and business interruption, can that advice be the basis for a cause of action?

This paper will examine some of the possible answers to these questions and identify other issues.

VI. "But it's the Internet, don't you understand?"

A. For those still holding on to the "Too Big to Fail" doctrine for protection in the Cloud-provider discussions, consider Nortel Networks and Dropbox.

The bankruptcy judge in March, 2012, described Nortel's fortunes succinctly.

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16 Witzleb, Normann, Halfway or Half-Hearted? An Overview of the Privacy Amendment (Enhancing Privacy Protection) Act 2012 (CTH) (December 15, 2012). (2013) 41 Australian Business Law Review 55. Available at SSRN: http://ssrn.com/abstract=2259019

In 2000, Nortel reported approximately $30 billion of annual revenue, employed nearly 93,000 people, and had a market capitalization of over $250 billion. Nortel's business was essentially two-fold: the supply of physical hardware with embedded or bundled software and the deployment and support of that hardware. . . .

Competition for innovation in the telecommunications industry, high operating expenses, the deterioration of the global economy and a general decrease in demand for some of Nortel's products, in addition to previously described difficulties, caused Nortel to confront a full-blown liquidity crisis and the insolvency proceedings in Canada and here. IN RE NORTEL NETWORKS (Bankr.D.Del. 3-20-2012), In re: Nortel Networks, Inc. et al., Debtors. Chapter 11 Case No. 09-10138(KG) Jointly Administered). United States Bankruptcy Court, D. Delaware March 20, 2012, pp. 3-5.

These economic conditions and market forces may describe the Cloud-provider industry, just as they described the telecommunications and networking industry in 2004. According to the judge's description, how much different is a Cloud provider's activities than Nortel's? A Cloud provider supplies hardware (rented or purchased) with bundled software. Consider this recent description of Dropbox, a Cloud provider:

> Dropbox Inc. followed the Internet start-up playbook to a tee last year.
>
> The online file-sharing company became a hot property in Silicon Valley and snagged a [sic] $250 million in venture capital at a $4 billion valuation. It even secured celebrity investments from U2's Bono and his bandmate, The Edge. . . .
>
> At all that valuation, five-year old Dropbox is worth as much as companies with multi-billions in revenue, such as Cablevision Systems Corp. and Expedia Inc.
>
> Dropbox is now racing to keep up with that growth and prove its business is sustainable. The 100-person company recently moved into an 87,000-square-foot office in San Francisco where it plans to hire hordes of engineers and product managers.[17]

For comparison and to appreciate Nortel Networks' capitalization of $250 billion, at the end of the fourth quarter (Q4) of 2001, here are some comparisons:

Apple at $6.84 Billion;[18] At 2013, Q1 at $477.45 Billion [19]

17Geoffrey A. Fowler, Jessica E. Vascellaro, Hype Hangs Over Dropbox, WALL ST. J., May 19, 2011.

18 "Apple (AAPL), Apple > Market Capitalization > 2001 > Q2" http://www.wikinvest.com/stock/Apple_(AAPL)/Data/Market_Capitalization/2001/Q2, (last viewed by author on _____).

19 "Apple (AAPL), Apple > Market Capitalization > 2013 > Q1" http://www.wikinvest.com/stock/Apple_%28AAPL%29/Data/Market_Capitalization/2013/Q1?ref=chart (last viewed by author on _____).

Microsoft at $336.66 Billion;[20] At 2013, Q1 $227.4 Billion;[21]
Dell at $67.48 Billion;[22] At 2013, Q1, $22.28 Billion[23]
Cisco at $132.76 Billion.[24] At 2013, Q1, $110.82 Billion; [25]
Hewlett-Packard at $37.44 Billion.[26] At 2013, Q1 $32.42 Billion;[27]

All of the companies listed above remain in business, but the valuations are very different now. The Internet is fluid.

B. Electric power supply contracts are complex arrangements of what once was an easily priced commodity.

Electric supply contracts are complex and touch practical and philosophical business goals. Some businesses strive to have a green designation, and the source of electricity may be part of that arrangement. These companies may seek wind, hydro, or solar generation in whole or in part in order to fulfill a larger business ethic. As you've learned, there may be a divergence in corporate goals between

1. Being green, and for example locating to Iceland and using the cold waters there for cooling; and,
2. Being a "good" United States corporate entity and maintaining jobs in the United States.

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20 "Microsoft (MSFT), Microsoft > Market Capitalization > 2001 > Q1" http://www.wikinvest.com/stock/Microsoft_%28MSFT%29/Data/Market_Capitalization/2001/Q1 (last viewed by author on _____).

21 "Microsoft (MSFT), Microsoft > Market Capitalization > 2013 > Q1" http://www.wikinvest.com/stock/Microsoft_%28MSFT%29/Data/Market_Capitalization/2013/Q1 (last viewed by author on _____).

22 "Dell (DELL), Dell > Market Capitalization > 2001 > Q4," http://www.wikinvest.com/stock/Dell_%28DELL%29/Data/Market_Capitalization/2001/Q4 (last viewed by author on _____)

23 "Dell (DELL), Dell > Market Capitalization > 2013 > Q1," http://www.wikinvest.com/stock/Dell_%28DELL%29/Data/Market_Capitalization/2013/Q1 (last viewed by author on _____)

24 "Cisco Systems (CSCO), Cisco Systems > Market Capitalization > 2001 > Q4," http://www.wikinvest.com/stock/Cisco_Systems_%28CSCO%29/Data/Market_Capitalization/2001/Q4, (last viewed by author on _____).

25 "Cisco Systems (CSCO), Cisco Systems > Market Capitalization > 2013 > Q1," http://www.wikinvest.com/stock/Cisco_Systems_%28CSCO%29/Data/Market_Capitalization/2013/Q1?ref=chart (last viewed by author on _____).

26 "Hewlett-Packard (HPQ), Hewlett Packard Company > Market Capitalization > 2001 > Q4," http://www.wikinvest.com/stock/Hewlett-Packard_%28HPQ%29/Data/Market_Capitalization/2001/Q4, (last viewed by author on _____).

27 "Hewlett-Packard (HPQ), Hewlett Packard Company > Market Capitalization > 2013 > Q1," http://www.wikinvest.com/stock/Hewlett-Packard_%28HPQ%29/Data/Market_Capitalization/2001/Q4, (last viewed by author on _____).

Electricity contracts may not be about electricity supply.

To the extent electricity contracts are about the supply of electricity, there are opportunities for purchase through long-term contracts. These long-term contracts provide a target usage and a variance of for example 15% more or less during any billing cycle. This variance is subject to negotiation.

Charges may be dependent upon facilities, and for example certain types of businesses may anticipate closing existing facilities and adding new ones. The contract, separately from the 15% variance to the target use, may allow for other locations or facilities to be added to the contract at the same rate as the original contract.

There is a futures market in electricity supply and while suppliers may use the futures market to arrange for actual delivery of electricity some electricity consuming companies may use the futures market to arrange for hedges to the volatility of electric pricing.

C. "The Do No Harm" mantra of Internet companies is not universal.

Consider this case regarding a data center transaction for those of you who still believe the computer industry is populated with good and honorable people running good and honorable companies.

Calling the plaintiffs/counterclaim defendants collectively, "Sterling," and the defendants/counterclaim plaintiffs, collectively, "Digital," we can discuss the sale of Sterling's 350,000 square foot data center facility (the Property) in Phoenix, Arizona, to Digital, along with SNS, the entity operating the data center.[28] SNS "sold" space and power to third party customers. Digital bought the building and SNS, so there was a real estate component and a securities component to the purchase/sale agreement. At 12 times the Net Operating Income (NOI) of SNS, Digital paid $171,703,038 for the property and SNS, combined.

One of the closing agreements selected Arizona law as applicable, while another selected Delaware. All the parties agreed that there was no significant difference between Arizona and Delaware laws on the subjects, and agreed Delaware law would apply.[29] This $171 million transaction could have been even more complicated if the parties had not agreed Arizona and Delaware law was so similar.

Digital asserts it was not granted full access to the property prior to closing, and the power supplier would not discuss with Digital its current contract without consent from the property owner (Sterling), which consent apparently was not forthcoming. Digital asserts Sterling falsely represented that the capacity of the utility services at the property was adequate. Additionally, Sterling over-

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28 Sterling Net. Ex. v. Digital Phoenix, 07C-08-050WLW (Del.Super. 3-28-2008), C.A. No. 07C-08-050WLW. Superior Court of Delaware, Kent County, decided March 28, 2008, page 6.

29 Id. 7.

committed the available power capacity at the property by signing 120 new contracts for which customers were promised more power than could be delivered to the building.

Digital alleges the last 120 new customer agreements entered into before the sale were designed to increase the purchase price at 12 times NOI. Digital's problem was not only did they pay 12 times the added value of these contracts to the NOI, but Digital asserts these last 120 new customer agreements promised more power than could be given.[30] Sterling argues the contract and closing documents required only that it deliver power to the existing "tenants and customers."[31] The court quotes Digital's assertion:

> ". . . Property is, in general, an improperly engineered building, not enough generator capacity, not enough UPS [Uninterruptable Power Supply] systems, and not enough cooling infrastructure."[32]

Digital alleged $20 million in damages to meet these new customer commitments.

The *what-ifs* are worth noting:

- What if Digital could not "cover," in contract remedy terms? What if Digital could not have afforded to honor SNS's agreements for the last 120 customers by paying the allegedly $20 million in extra costs for power and infrastructure, and potentially temporary relocation of client data to other facilities? In other circumstances the excess infrastructure and power charges could have forced the entity acquiring SNS to go into bankruptcy. Without the rent stream, the property owner (a separate entity) may have defaulted on its mortgage. This effect cascades through other parties in interest and their mortgagees. Maybe, the assets, including the servers on which your client's data may reside would be sold at auction

- What if you. as a lawyer, represented Digital in the acquisition? Do your firm's examinations in a real estate transaction include detail representations and warranties by utilities and other parties to the transaction regarding capacity to a property?

- What if Digital is accurate in asserting the power capacity to the property was inadequate because of the last 120 new customers, ***and*** SNS could not meet its obligation to the new customers, ***and your law firm or you represented one of***

30 Id. 8.

31 Id. 10. There is no discussion of the difference between "tenants" and "customers" and how priority of their claims on power would be managed, in the event Digital could not have afforded the extra power costs.

32 Id. 8.

these 120 customers who asked you to "just glance at this IT agreement to be sure it's okay?"[33] Does this case help establish a new duty lawyers owe clients in a Cloud transaction?

VII. "Your money or your data, or both;" or, "Skip the money—just give me your data."

A. Comparing financial safeguards with data protection and control.

Which would cause the greatest disruption to your personal and professional life: access to your bank account or access to your all your data? The answers vary upon scheduling. Is today payroll? Are trust funds missing? Must a brief or tax return or 10Q report be completed and filed today?

Let's examine and compare sudden failure in both instances and see the recovery options available for both.

Acquired banks have a a smooth transition from the failed entity to the new bank, complete with instant temporary vinyl signs. Your checks and ATM cards work just as they did on Friday before the acquiring bank's opening in your old bank's location.

The Federal Deposit of Insurance (FDIC) closed 92 banks in 2011[34], 2 of which do not have acquiring bank arrangements. For 2012, as of March 9, the FDIC closed 13 banks of which 2 had no acquirer. You may compare a "no acquirer bank failure" to a bankruptcy liquidation. Where there is no acquiring bank, the insured deposit limits are $250,000, thanks to government regulation and depositors apply to receive their insured funds[35]. Even in cases where there are acquiring banks, things change dramatically.[36] For uninsured funds, there is no timetable for access.

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33 Clients often begin requests for document examination with this phrase when the client does not have much time for examination, the client has only a small amount of money allocated to the examination, or both. Also, the client often works on the documents thinking she, he, or the entity, already knows enough about the subject matter to operate successfully without advice from attorneys,. In this instance, if the IT department already approved and negotiated the contract, the client's confidence may be high. Client's are rarely interested in fine points such as access to electrical power.

34 FDIC Bank Failures in Brief, http://www.fdic.gov/bank/historical/bank/2011/index.html

35 You may loose your banking relationship with lending officers and other bank contacts.

36 FDIC Failed Bank List, Last Updated 03/09/2012, http://www.fdic.gov/bank/individual/failed/banklist.html

Of the 7,437 reporting institutions, of which about 3,500 are banks or bank holding companies, there were 813 "Problem List" banks, or about 1% of total reporting institutions or about 4% of banks.[37] Some of these problem list banks will fail.

In these instances of bank failures, if there are interim findings, and a public disclosure of agency regulated operating agreements, customers receive warnings. The FDIC has put the bank on notice and works diligently to find an acquiring institution. The FDIC encourages a resolution prior to receivership. Is there a government agency that monitors and regulates Cloud providers?

Does the federal government devote any resources to encouraging resolution of Cloud provider bankruptcies prior to the closing of the company in order to protect the Cloud provider's customers? No.

Is there any industry organization that emphasizes the importance of having secure data in our commerce and has the resources and authority to take steps to protect Cloud customers? No.

Your client and you are on your own. It is a not only an free market, but it is a market in a territory that's not a state.

You may think these business arrangements are different than banks because they occur through the Internet. Last year 2 Internet banks failed.[38] The Internet does not make transactions safer.

If banks can fail, do you really believe Cloud providers cannot and will not fail?

You may think you're protected with a Cloud provider, that you'll receive notice or understand if things are not going well, and you'll be able to move your account. You may be wrong as is discussed later.

If you have a problem with your bank's, closing, the FDIC gives you a toll-free number: 877-ASKFDIC and TDD access at 800-925-4618. Do you have an emergency toll-free number independent of your Cloud provider company for when your Cloud provider does not answer its phones?

In your business, if you make arrangements with a Cloud provider you may face unlikely events in crisis, ***or you may recognize risks and guard against them with careful planning***.

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37 FDIC Complete Quarterly Banking Profile, Fourth Quarter 2011, accessible as qbp.pdf at http://www2.fdic.gov/qbp/qbpSelect.asp?menuItem=QBP

38 Ken Turin, *Review of the 2011 Bank Failures and Their Effects on Depositors*, DepositAccounts.com, Jan. 2, 2012, 11:15 AM., http://www.depositaccounts.com/blog/2012/01/review-of-the-2011-bank-failures-and-their-effects-on-depositors.html

B. A Cloud providers' size may be relevant, but is not controlling for this decision, since size creates other risks.

Just as big banks have economies of scale that pressure smaller competitors, large Cloud providers and data centers have a similar advantage. Large high-tech firms have traditional advantages in purchasing (or designing and making their own) servers, storage, and cooling and power equipment.

The largest data center companies have another and distinct advantage in operations. Apple is building 20 megawatt solar farm on 100 acres and a 5 megawatt fuel cell plant across from its data center in North Carolina. In assessing this competitive advantage, one commentator noted, "Adding a lower cost of electricity to the mix just makes it much harder for small and medium-sized data center companies."[39] The other option to lowering power costs is to build facilities in climates that are advantageous to cooler temperatures and, therefore, lower energy costs for cooling. Only very large companies are capable of managing logistics of building and operating facilities in, for example, Iceland[40]; so, again, size plays a large part in the data center economics.

There have been bank failures in a highly regulated industry; and, and for the most part, customers have been protected. Protection of our money is supervised by our government. Large banks, however, have been in trouble.

In our service economy, in "The Information Age," access and manipulation of data is money. There is no governmental safety net. Cloud users are all on their own. Cloud provider and data center failures may be as likely as bank failures in a regulated and highly supervised industry.

This paper examines Cloud transactions, protections, and liabilities and risk shifting negotiated in the market or established under current law.

VIII. Key industry factors effecting your negotiations and you liability today: the Cloud computing industry basics and trends.

There are about 2,300 data centers in the United States. Many are not owned by the Cloud provider. There are lenders and debtors at every level in providing Cloud facilities. A facility owner-provider would not have these same levels of claims *at that facility*, that may be most common to the data center industry. The emphasis on "at that facility" is to highlight that with redundancy, data could be stored in a facility owned by a Cloud provider and in a separate facility the Cloud provider leases

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39 Mike Fox, *Apple's Green Energy Program Could Kill The Data Center Industry*, DATACENTERFIX.COM, March 12, 2012, 14:39, http://www.datacenterfix.com/news/apples-green-energy-program-could-kill-data-center-industry ,(last viewed by author on _____).

40 See discussion in V, B.

from a landlord. So, the same data at the same time, may be on different machines in different states with different laws regulating control of the equipment on which your data resides. You often would not know your data's location.

A. Economies of scale and facilities planning win the day.

Servers and data storage facilities are filled with racks of computers. These computer facilities are centralized for maintenance, management, and security control. A server center needs a low-cost power source, as well as, backup power storage, and if necessary, electrical generation capabilities. Efficiency in keeping the hardware cool and at operationally optimal temperatures is critical. Once a location has been deemed satisfactory, the investment is long-term and substantial.

I. "If you build it, they will come."[41]

The Cloud center industry finds a 20,000 square foot facility notable enough for press coverage.[42] But that size is small in comparison to international corporations and their delivery of Cloud services. Apple constructed a 500,000 square foot, $1 billion data center in North Carolina.[43] IBM plans a 6,200,000 square foot facility in China.[44] Facebook recently announced the opening of its own facility in Prineville, Oregon, and construction of another in North Carolina.[45][46] Facebook acquired 120 acres for The Prineville Facility. Within 15 months construction completed on the first 150,000 square feet and the first building opened. Construction on another 150,000 square feet in the second portion of the first building has begun.[47]

Major companies, such as Apple, not only have their own facility, but lease data center facilities.[48]

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41 Paraphrase of "If you build it they will come," from Field of Dreams,

42 Kelli Davis, *TekLinks Announces Opening of Third Data Center*, Press Release, April, 8, 2011,

43 Darrell Etherington, *Apple's New North Carolina Data Center Ready to Roll*, GIGAOM.COM, October 25, 2010, http://gigaom.com/apple/apples-new-north-carolina-data-center-ready-to-roll-2/ (last viewed by author on _____).

44 Rich Miller, *IBM's China Cloud Project: Exactly How Big*, DATA CENTER KNOWLEDGE, January 25th, 2011, http://www.datacenterknowledge.com/archives/2011/01/25/ibms-china-Cloud-project-exactly-how-big/ (last viewed by author on _____).

45 Digital video: Facebook's new energy efficient data center, Produced by Facebook, Facebook announcement: http://www.youtube.com/watch?v=JZUX3n2yAzY&feature=related, http://tinyurl.com/4x67au9 (last viewed by author on _____).

46 Open Compute Project Web site: http://opencompute.org/ (Uploaded to youtube.com, April 28, 2011) (last viewed by author on _____).

47 *Press Release: Facebook Opens First Data Center in Prineville, Oregon*, by Prineville Data Center on Friday, April 15, 2011 at 2:46pm, http://www.facebook.com/note.php?note_id=10150150581753133 (last viewed by author on _____).

48 Nicole Henderson, *Apple Leases Space in DuPont Fabros Santa Clara Data Center*, WEB HOST INDUSTRY REVIEW, May 19, 2011, http://www.thewhir.com/web-hosting-news/apple-leases-space-in-dupont-fabros-santa-clara-data-center (last viewed by author on _____).

II. Power availability and cost, even more than contiguous space, dictates the location of Cloud providers and data centers.

Power is critical to a data center facility location, and its cost may be the most significant single factor in choosing a location.[49]

The largest single-building data facility currently in the United States is the 1.1 million square foot location in Chicago.[50] This facility houses 79 entities affiliated with the Chicago futures markets. For Con Edison, the 350 E. Cermak building's electricity use is second only to Chicago's O'Hare Airport.

To help understand power's importance you'll want to note the description of Apple's leasing data center space in a May 18, 2011, description in Theflyonthewall.com

> DuPont Fabros signs Apple as a tenant, Data Center Knowledge reports. In April, Apple (AAPL) signed a seven-year lease for 2.28 megawatts of critical power load in a new data center being built in Santa Clara, Calif. by DuPont Fabros Technology (DFT), a leading developer of wholesale data center space, according to Data Center Knowledge.
>
> News Breaks, "Your Daily Buzz from the Street," THE FLY ON THE WALL, May 18, 2011, http://www.theflyonthewall.com/permalinks/entry.php/DFT;AAPLid1431721/DFT;AAPL-DuPont-Fabros-signs-Apple-as-a-tenant-Data-Center-Knowledge-reports

The press release did not highlight the square footage that Apple leased, but the megawatt of critical power load. DuPont Fabros, a REIT (Real Estate Investment Trust), composed the press release used by the media, since other sources had the same description.[51] DuPont Fabros and Apple, decided the most important element of the lease was the data center's available power in watts. Square footage was literally irrelevant, and not even mentioned.

The square footage of a lease agreement may be misleading as an indicator of the size of a facility. As processors become smaller and designs more sophisticated, more computing power (more wattage use, more heat generation), will be stacked in smaller spaces. The amount of space servers

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49 Scott Canon, *'Data farms' draw big tax breaks, incentives from states*, The Kansas City Star, Posted February 24, 2012, 10:15 PM, http://www.kansascity.com/2012/02/24/3450585/data-farms-draw-big-tax-breaks.html (last viewed by author on _____).

50 Rich Miller, *World's Largest Data Center: 350 E. Cermak*, Data Center Knowledge, April 10, 2011, http://www.datacenterknowledge.com/special-report-the-worlds-largest-data-centers/worlds-largest-data-center-350-e-cermak/ (last viewed by author on _____).

51 John Paczkowski, *Apple's Data Center Buildup Goes Bicoastal*, JOHN PACZKOWSKI'S ALL THINGS DIGITAL, ALL THINGS DIGITAL, ALLTHINGSD.COM, WALL ST. J., MAY 19, 2011, http://www.wotino.ru/default119.htm (last viewed by author on _____)

occupy may decrease, while the data storage capacity increases. More data in less space drives the industry.

Real estate, power, and personnel may cost less overseas. Remote server management allows for international location of servers reducing costs and increasing flexibility.[52] Decentralized and redundant solutions achieve catastrophe planning goals and are consistent with the Internet's operation where any computer can find any other computer, and there is no singular way to get from computer Alpha to computer Omega.

B. Analysis of international aspects of U.S. companies placing data in foreign countries is beyond the scope of this paper.

Many Cloud providers use data storage facilities in foreign countries. Your client or you may not be able to control where data is held, nor should your client or you presume U.S. law is applicable to data storage or transfer.

Facebook, as its customers approach 800 million, recognizes it has more users outside the United States than within. Facebook is building a server facility in Sweden.[53] While this data center will provide a node for better communications for European users, there is recognition the data traffic is subject to surveillance by Sweden's National Defense Radio Establishment, known by Swedish initials as FRA. The constructions costs are estimated at $760 million and the total size of the 3 buildings is about 904,00 square feet.

Google turned a paper mill in Haminam, Finland, into a data center using Baltic Sea water for its cooling systems.[54]

Every country seeks to exploit its advantage of workforce, Internet connectivity, and clean power. For example, Iceland has renewable energy in a temperate climate. [55] Olafur Olafsson, CEO of Green Earth Data expects 5% to 10% of the world's data to flow through Iceland. The reliability

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52 Digital video: Google Data Security, Producer, GoogleApps, http://www.youtube.com/watch?v=1SCZzgfdTBo (Uploaded April 13, 2011) (last viewed by author on _____).

53 Associated Press, *Facebook to build arctic server farm in Sweden, Cold climate attractive for keeping servers cool*, CBC, October 27, 2011. http://www.cbc.ca/news/technology/story/2011/10/27/technology-facebook-server-farm.html (last viewed by author on _____).

54 Rob Waugh, *That's really cool: Facebook puts your photos into the deep freeze as it unveils massive new five acre data center near Arctic circle*, MailOnline, October 28, 2011. http://www.dailymail.co.uk/sciencetech/article-2054168/Facebook-unveils-massive-data-center-Lulea-Sweden.html (last viewed by author on _____).

55 Ellen M. Gilmer and ClimateWire, *Can Iceland's Renewables Power the Web? Iceland hopes electricity from renewable resources can power the servers that make the Web work*, Scientific American. October 17, 2011. http://www.scientificamerican.com/article.cfm?id=icelands-renewables-geothermal-hydro-power-web (last viewed by author on _____).

and cost of power is low at less than one-half the price of electricity in the United States. This pricing makes foreign location attractive.

This paper will review the types of claims that could occur in Texas, and provide some examples from other jurisdictions. This paper will not discuss international financing arrangements or data regulation, even though your data may be located in a facility in a foreign country, and that country's law could be applicable. This topic will be addressed in a separate paper.

IX. The Cloud starts on the ground: construction and financing claims.

A. Landlord's lender for construction or acquisition of the facility housing a Cloud provider would normally require approval of lease forms and assignments of rents and leases.

A new or remodeled facility will likely have an interim construction loan. This loan is not intended to be permanent, but provides the developer-landlord with construction financing. The landlord's lender during construction wants the option to exercise control over the project, since the project, for whatever reason may not be completed by the landlord. The construction financing lender wants to be able to finish construction, and if necessary, take over the project. Obtaining control of the project may lead to the landlord's lender completing construction of the facility either for operation or sale.

Construction activity increases the landlord's credibility for pre-lease activity (leasing a space before it is built). The project may be built in phases so that some tenants occupy some portion of the facility while other sections are being constructed.

The lenders during construction often influence or control the leases entered into by a Cloud provider-tenant either before or during construction. The Cloud provider's lease and the Cloud provider customer's use are subject to the landlord's construction or acquisition finance liens. This hierarchy of claims may be disclosed in the Cloud provider's lease with the landlord since as a requirement for the construction or acquisition financing, the landlord often must have its leases approved by its lender.

Disclosure of the exact nature of claims asserted by the landlord's financing institutions most likely will not be clearly identified in the agreements between the Cloud provider and the Cloud customer.

Even if there were a disclosure, many Cloud customers entering into the agreement would not imagine their data on a server would come to be controlled by a construction lender or a landlord, neither of which were part of the Cloud agreement.

I. Landlord's lender receives all rents from tenants (such as your Cloud-provider-tenant).

Landlord-lender's deed of trust or mortgage may provide for the assignment of rents and profits separately from the assignment of a lease.[56] In the section quoted below, the landlord's lender claims the rent, and grants a license to the landlord to collect the rents and apply rent proceeds to the mortgage.

The assignment of rents from the landlord to landlord's lender has less potential for assertion landlord's lender assumed obligations limiting the alternatives in collection proceedings. This assignment of rents from the landlord to landlord's lender, may take precedence over a tenant's prepaying a deposit and last month's rents (common in many commercial leases). Landlord's lender may claim a priority stake in those funds if segregated. In Texas, while segregation does not often occur in apartment or multi-tenant form leases, the fund's segregation may be negotiated, or local law in some states, but not Texas' law, may provide for segregation of a tenant's deposit from its rent.

If interest rates were high and the deposit (often defined as "rent" within the lease) and the last months' rent was sufficient, arrangements have been negotiated where a CD was in the name of the landlord, but the interest payable quarterly to the tenant. This and other variations depend upon the landlord's desperation and the tenant's strength in lease negotiations.

If the Cloud provider loses access to the deposit and pre-paid rents, then the Cloud provider may have, as its sole remedy a claim against a bankrupt landlord with no assets. The lender's control over these funds could hamper the Cloud provider-tenant's possibility for relocating, if that were an option or even desirable. Relocation becomes an option, since depending upon a particular state's law and the facts, the Cloud provider-tenant's lease may be terminable with as little as 30-days' notice.

Looking solely at these documents, it is clear no one is concerned for the interests of the Cloud provider-tenant's customers.

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56. This is one example for an assignment of rents from a form found at the Real Estate Probate and Trust Law Section of the State Bar of Texas:

> Assignment of Rents, Profits, Etc. All of the Rents (as hereinafter defined) derived from the Mortgaged Property or arising from the use or enjoyment of any portion thereof or from any lease or agreement pertaining thereto, are hereby absolutely and unconditionally assigned to Beneficiary, to be applied by Beneficiary in payment of the Indebtedness. . . .
> . . . the assignment in this Section is an absolute assignment and not merely a security interest; however, Beneficiary's rights as to the assignment shall be exercised only upon the occurrence of an Event of Default (as hereinafter defined).
> BETH TIGGELAAR, REAL ESTATE PROBATE AND TRUST LAW SECTION, STATE BAR OF TEXAS, FORM DEED OF TRUST (WITH SECURITY AGREEMENT, ASSIGNMENT OF RENTS AND LEASES AND FINANCING STATEMENT), 5-6 (1999).
> http://www.reptl.org/Private/Content/Documents/5/TIGGELAA.E.pdf

II. Landlord assigns leases to the landlord's lender, the "Beneficiary."

In the same form as discussed in VI, A, 1, the Mortgagor ("landlord") separately assigns the leases to the Beneficiary (landlord's lender).

> 4.2 Assignment of Leases. Grantor hereby assigns to Beneficiary all of Grantor's rights, ***but none of its obligations***, under all Leases (as hereinafter defined). "Lease" and "Leases" means each and all existing or future leases, subleases (to the extent of Grantor's rights thereunder) or other agreements under the terms of which any person has or acquires any right to occupy or use any part of or interest in the Mortgaged Property, and each and all existing or future guaranties of payment or performance thereunder, and all extensions, renewals, modifications, supplements and replacements of each such lease, sublease, agreement or guaranty upon any part of the Mortgaged Property. Grantor hereby further assigns to Beneficiary all guaranties of tenants' performance under the Leases. Prior to an Event of Default, Grantor shall have the right, without joinder of Beneficiary, to enforce the Leases, unless Beneficiary directs otherwise. (emphasis added)[57] BETH TIGGELAAR, REAL ESTATE PROBATE AND TRUST LAW SECTION, STATE BAR OF TEXAS, FORM
> THE ULTIMATE DEED OF TRUST (BEYOND THE FORMS MANUAL), ADVANCED REAL ESTATE DRAFTING COURSE, 6 (1999).
> http://www.reptl.org/Private/Content/Documents/5/TIGGELAA.E.pdf

The Beneficiary (the mortgagee) spends 10 lines defining "lease," while only 5 words declining any responsibility for landlord's obligations under the leases.

Sophisticated financing may include the fee owner of the property entering into a long-term ground lease. The fee owner may still seek financing of its acquisition of the property. The owner then becomes the lessor, while the holder of the ground lease becomes the lessee-developer, while at the same time in adding improvements to the property the lessee-developer becomes the landlord to the Cloud provider-tenant. The language below provides protection to a leasehold mortgagee against the fee owner of the property.

No Liability. No leasehold mortgagee or its designee hereunder will become liable to Lessor as an assignee of this Lease or otherwise, unless such mortgagee or designee expressly assumes by written instrument such liability, and no assumption will be inferred from or result from foreclosure or other appropriate proceedings in the nature thereof or as the result of any other action or remedy provided for by such mortgagee or deed of trust or other instrument or from a conveyance from Lessee pursuant to which the purchaser at foreclosure or grantee acquires the rights and interests of Lessee under the terms of this Lease. AARON JOHNSTON, JR. REVISED AND PRESENTED BY BRIAN C. RIDER, GROUND

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57 David W. Tomek, acknowledged Beth Tiggelaar for use of of her "ultimate deed of trust" the source of the language quoted above. DAVID W. TOMEK, *Selected Issues in Customary Commercial Real Estate Loan Documents*, STATE BAR OF TEXAS 18TH ANNUAL ADVANCED REAL ESTATE DRAFTING COURSE, HOUSTON, CHAPTER 12 (2007).

LEASES – A REVIEW OF CONSIDERATIONS FOR LEASEHOLD FINANCE, ADVANCED REAL ESTATE LAW COURSE, CHAPTER 17, 17 (2002).

The most critical element is that none of the landlord's obligations are assumed by landlord's lender (the Beneficiary in the Mortgage above), nor by any purchaser at foreclosure.

The Cloud provider-tenant's lease may have been assigned or will be assigned without the Cloud provider-tenant being aware of the entity to which the lease and rents were assigned, or that the lease was assigned (depending upon lease terms). The Cloud provider-tenant does not have an entity against which the lease may be enforced. With securitization of commercial mortgages, ownership and control of a mortgage may be more difficult to ascertain. Securitization means the Cloud provider-tenant is further handicapped in its search for parties with which to negotiate or communicate in worst case scenarios.

A developer may pre-lease a project while it is under construction. Even under construction loan mortgages, an assignment of rents and leases clause exists. The Cloud provider-tenant may not be aware of the construction mortgagee when the lease is executed.

If as a lawyer, you were negotiating on behalf of a Cloud provider-tenant, the good practice tip in lease negotiation would be to have the various mortgagees identified and have some provisions for copies of notices of default or foreclosure actions.

You must determine if your client's or your firm's circumstance as a customer of a Cloud-provider is so tenuous that you would want to have some notice provisions placed in the Cloud provider agreement. Your clients as Cloud customers may determine this level of disclosure and negotiation may not be warranted or cost-effective in arrangements with Cloud providers.

In the instance of co-location, where your client or your firm as the Cloud customer would designate specific servers to a data center to hold only that customer's data and software, the direct contact with lenders may be more understandable. Cloud customers would want to insure their equipment was in some way identified and segregated from equipment claimed under any mortgage or other financing arrangement, or as collateral for unpaid rent.

III. Tenant approves lease subservience to landlord's financing.

The tenant's lease obligation usually discloses the lease is subservient to the landlord-lender's mortgage and other financing documents, but little else. Often the disclosure does not even identify landlord's lender.

The Texas Association of Realtors® form commercial lease provides:

> 26. SUBORDINATION
> A. This lease and Tenant's leasehold interest are and will be subject, subordinate, and inferior to:

> (1) any lien, encumbrance, or ground lease now or hereafter placed on the leased premises or the Property that Landlord authorizes;
> (2) all advances made under any such lien, encumbrance, or ground lease;
> (3) the interest payable on any such lien or encumbrance;
> (4) any and all renewals and extensions of any such lien, encumbrance or ground lease;
> (5) any restrictive covenant affecting the leased premises or the Property; and,
> (6) the rights of any owners' association affecting the leased premises or Property
> TEXAS ASSOCIATION OF REALTORS®, COMMERCIAL LEASE, 11 (2010).

The approval of this provision by the Texas Association of Realtors®, means its members' use of this form is so standard that it may be used by real estate brokers and agents without concern for practicing law in Texas. While a tenant would likely expect the lease to be subservient to any of landlord's obligations, in my practice in real estate as both a broker and an attorney, I've found these provisions are rarely explained by either the landlord's or tenant's representative. According to a developer who has been both a landlord, and tenant, parties enter into many leases without the benefit of an attorney or without full understanding of these provisions. [58]

58Check with Roger Gault for quote on this item as confirmation.

B. Texas and other states' laws do not have any non-negotiated subordination protections for Cloud provider-tenants.

There are no standard protections for tenants regarding subordination.

X. When landlords act: foreclosure, bankruptcy, and subservient rights in Texas.

A. Cloud provider-tenants release landlords.

A landlord's lease generally includes the language releasing the landlord from any obligation to fulfill the Cloud provider-tenant's obligations.

B. Cloud provider-tenants release landlord-lenders.

Landlord-lenders typically include provisions in the lending agreement or deed of trust requiring the landlord's form lease to be reviewed and approved by the landlord's lender. Any lease, varying in any way from the previously approved "form" lease, would trigger a provision requiring submission of that variant lease to the landlord's lender. Landlord's breach of this additional approval procedure would be considered a default under the lending agreements.

Landlord's use of these loan provisions in the lending agreement or deed of trust, insures landlord's protection from tenant claims.

If landlord breached this provision, determination of whether this default is material breach of the agreements and whether this breach is curable may depend upon the lender's agreement with the landlord. From the landlord's or landlord-lender's perspective, cure of an executed lease effective on its face between a tenant and landlord would be difficult. From my experience, and the experience of others, renegotiating the lease would be difficult among the landlord. tenant, and landlord's lender.[59]

XI. Cloud provider-tenant's equipment is subject to multiple claims of different priorities by both landlord and tenant lenders.

Each state's property law (constitutional, statutory, and common) governs relationships between landlords and tenants. This paper's focus is on Texas law. A Cloud provider tenant lease would be subject special provisions applicable to commercial leases.

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59 Obtain Roger Gault quote or quote from other counsel.

Texas' statutory commercial landlord liens[60] create mechanisms for enforcing a preferential recovery on the tenant's personal property for debt arising from the commercial lease. In addition, commercial liens recognize a wide range of contractual liens.

A. Texas' Property Code provides for a landlord's preference lien on a tenant's personal property.

Texas' Property Code, Section 54.01 establishes the landlord's "preference" lien on a tenant's personal property for commercial leases. Without any filing, the landlord obtains a lien for the rent due or to become due for the 12 months beginning with the inception of the lease. This lien may be renewed at the anniversary of the lease. This statutory "preference" lien is unenforceable for rent more than 6 months past due, ***unless***, a lien affidavit is filed with the county clerk.

The "preference" lien's reach may be extended by the landlord's verified filing with the county clerk. The landlord, the landlord's agent, or the landlord's attorney may make this filing.[61] This verified filing is public notice of the landlord's rights in the Cloud provider-tenant's personal property in the leased premises securing payment of the tenant or even subtenant's debt to the landlord. This personal property will include the equipment holding your data.

Tenant's lenders often request that landlords execute a "lien waiver." This waiver reduces priority of the landlord's statutory "preference" lien, while elevating the lender's lien to a first priority over personal property acquired by Cloud provider-tenant. As with any UCC security interest, the drafting could include more than the initially acquired personal property. The waiver may include "after-acquired" property, or other types of property.

The landlord may have a form waiver prepared by its lender. The tenant's lender may also have a form approved by its lender. The landlord is usually irrelevant in the negotiations for the waiver, and the actual language may become a negotiation between the Cloud provider-tenant's lender and the landlord's lender.

The waiver is an important document, however, since the landlord's lien waiver may only reduce the priority of the landlord's lien, but not eliminate the landlord's lien. The drafting becomes critical because the personal property, along with its contents, at sale may exceed the Cloud provider-lender's claims. If at private sale or public auction, the sale of the collateral were to exceed all sums due provider-tenant's lender, then the remaining sums would be returned to the next claimant. If no other claimant, then the remainder sums would be returned to Cloud provider as debtor.

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60 Texas Property Code § 54.01

61 The lien statement must contain

- An account of rent due itemized by month; and,
- Name and address of the tenant or subtenant; and,
- A description of the leased premises; and,
- The beginning and termination dates of the lease.

These priorities and issues matter in practice. This author in executing on a landlord's lien, had a sheriff take control of a 5-foot safe from the tenant—a wholesale jeweler. The combination was unknown and the safe unopened. The safe drew interest for the sheriff's sale, and had the defaulting tenant not cured prior to the auction, the bids for the safe most likely would have exceeded sums due from the lease default.

B. Cloud-provider tenant grants landlord a personal property lien and security interest.

Commercial leases customarily include a provision where tenant grants landlord both a lien and a security interest in personal property in the leased premises. The Texas Association of Realtors Commercial Lease Form includes the following provision:

> 23. LANDLORD'S LIEN AND SECURITY INTEREST: To secure Tenant's performance under the lease, Tenant grants to Landlord a lien and security interest against all of Tenant's nonexempt personal property that is in the leased premises or on the Property. This lease is a security agreement for the purposes of the Uniform Commercial Code. Landlord may file a financing statement to perfect Landlord's security interest under the Uniform Commercial Code.[62]

This paper discusses the differences in remedies available to the landlord and protection options for a tenant.

I. Statutorily created in the Texas Real Property Code, a landlord's lien requires a judicial procedure.

There is a difference between a lien and a security interest, although they are often joined together in one granting clause.

This statutory lien is recorded in the Deed Records of the County in which the property lies. A title search will find this lien. To enforce the lien, the landlord must bring suit in either county or district court in the county in which the property lies.[63]

A properly perfected security interest is filed in the U.C.C. records in the county where the property lies and in the Secretary of State's office in Texas.

II. Landlords use self-help to enforce UCC liens.

Landlords may now use a UCC-1 Financing Statement to identify a security interest in the Cloud provider-tenant's personal property (i.e., the computers and hard drives that hold ***your*** data).[64]

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62 TEXAS ASSOCIATION OF REALTORS®, COMMERCIAL LEASE, 11 (2010).
63 Footnote for venue provisions
64 UCC-9 explanation.

Any personal property that is affixed becomes part of the fixtures of the property and ownership goes the landlord, even though the personal property may have purchase money liens. HVAC equipment, wiring, and plumbing are all examples of tenant-added items that become part of the leasehold and are not removable at lease termination.

As with so many issues in personal property, once the property has become a fixture, there is no titling mechanism available to identify the property in advance. The tenant-lender could release the lien on the property that became a fixture, but there is little incentive to take this action.

The tenant-lender and landlord are left to either agree or litigate whether an item has become a fixture, and the superiority of one lien over another.

C. Landlord grants priority to Cloud provider-tenant's lenders.

A Cloud provider-tenant's lender may obtain a landlord's lien waiver in which case the landlord makes its liens subservient to the debtor-tenant's lender's lien (to finance equipment, i.e., servers and storage devices).

The debtor-tenant's lender may have to seek additional safeguards to ensure the landlord's lien waiver would be effective against the landlord's lender. The landlord is not an agent of its mortgagee to release any claims the mortgagee would have against the personal property the tenant acquired.

XII. Cloud provider-tenants grant control of your data to third-parties—and you said it was okay.

A. Subordination, Non-Disturbance and Attornment Agreements protect Cloud provider-tenants and their lenders.

The Subordination, Non-Disturbance and Attornment Agreement (SNDA) governs a relationship between the Cloud provider-tenant, tenant's lender, and landlord's lender. While having an interest in the agreement's success, the landlord may not be directly involved in negotiations. or may not be a party.

B. The SNDA changes the authority of landlord-lender over Cloud provider- tenant.

The landlord-lender enters into a relationship with the Cloud provider-tenant which governs the landlord lender's obligations in the event of foreclosure on the property and the priority of lien claims.[65]

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65 Brian C. Rider, "The Subordination, Non-Disturbance, and Attornment Agreement: The Loan

A SNDA reduces the Cloud provider-tenant's risks in the event of foreclosure. As noted above, the Texas Association of Realtors'® lease form enumerates the obligations and liabilities to which the lease is otherwise subordinate.

This enumeration means that in the event of a nonjudicial foreclosure sale the lease is automatically terminated[66] or may be terminated[67] by the mortgagee purchasing the property. These 2 resolutions are examined. Landlord-lenders want every issue to their advantage, particularly in the event of a nonjudicial foreclosure. The foreclosure alone signals conflict between the mortgagee and the landlord. From the mortgagee's perspective tenant interference impedes resolution. Facts in cases exemplify the types of disputes arising from the recipient of a trustee's deed from a nonjudicial foreclosure[68] and a tenant or subtenant. These cases are examined below.

All discussions that follow assume the deed of trust or mortgage is filed of record prior to the tenant executing the lease. In this way, the lessee Cloud provider-tenant and anyone (your client or you) who enters into contracts with the Cloud provider-tenant has notice of a prior mortgagee's interest in and rights to the property.[69]

DOCUMENT YOU LOVE TO HATE," UT MORTGAGE LENDING INSTITUTE, 4 (2003).

66 A mortgagee (who received a trustee's deed of trust from a foreclosure action) was not required to provide notice of foreclosure or make a make a tenant a party to an eviction action after foreclosure. "For [tenant] to have had any interest in the property, other than any disclosed on the original deed of trust, it would have had to have taken the interest *subject* to the bank's interest." (emphasis in original), citing *Millingar v. Foster,* 293 S.W.249 (Tex.Civ.App.---San Antonio, 1927). *Judson Bldg. v. First Nat. Bank of Longview*, 587 F. Supp. 852, 855 (1984), Civ. A. No. M-83-114-CA, E.D. Texas, Marshall Division). The court goes on to state, " . . . after the foreclosure Judco occupied the property only as a tenant at will. The law of Texas is clear that a tenancy at will can be terminated at any time." Id. 855.

67 Following a nonjudicial foreclosure, a tenant claimed its rights were violated when mortgagee did not provide notice. The court held the lender (beneficiary) under the deed of trust, when purchasing the property at the nonjudicial foreclosure took possession under the trustee's deed and the previous owner became a tenant at will. There was no notice of a tenant or any other entity, other than the mortgagor having an interest in the property. Accordingly, any tenant of the mortgagor did not have to receive notice, since its interest was subordinated to the beneficiary under the deed of trust. ??????????????

68 Usually, but not always, the mortgagee purchases the property at a trustee's sale in a nonjudicial foreclosure. This transaction clears the property of many claims by subsequent lien holders. Often, after the mortgagee purchases the property, a third-party will buy the property from the mortgagee. The owner (former mortgagee) provides a title policy and any liens on the real estate are identified and resolved before the third-party purchaser obtains title.

69 If the lease was executed prior to the deed of trust agreement, some older Texas cases discuss the requirement that the tenant be brought into the foreclosure proceeding in order to have the lease terminated. These cases are distinguishable from the most prevalent circumstances and primary

a. Option 1: Nonjudicial foreclosure makes a subordinate lease terminable.

This rule may be the most accepted approach: a nonjudicial foreclosure *automatically* terminates a lease. The tenant becomes a tenant at will.

Although the lease may be terminable, payment of the rent due under the lease for at least 3 months affirms Cloud provider-tenant's intent to be governed by the lease.[70] Foreclosure alone does not govern the relationship.

If the landlord-lender is disadvantaged by a below market-priced lease with the tenant, then the landlord has the advantage in foreclosure actions.[71] The landlord-lender, having purchased the property at a foreclosure sale would terminate the lease. The Cloud provider-tenant would have to either voluntarily leave (or suffer eviction) or renegotiate with terms more favorable to landlord's lender than the current lease with the former landlord.

The original landlord, unable to prevent foreclosure, loses in this scenario since it does not have the option of just canceling the tenant's lease on the first Tuesday of some month.[72] The Cloud provider-tenant confers this exceptional power upon landlord's lender.

Once the landlord is in default of some provision of the deed of trust and the required cure of default is not a possibility, a termination upon foreclosure would be imminent.[73]

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discussion since in those instances the tenant did not subrogate the lease to the deed of trust. *B. F. Avery & Sons Plow Co. v. Kennerly,* 12 S.W.2d 140 (Tex. Comm'n App. 1929, judgmt adopted) . Also, in these instances, there was judicial foreclosure instead of nonjudicial foreclosure actions. Judicial foreclosure actions would most likely not arise under a deed of trust or mortgage.

70 The mortgagee who acquired a trustee's deed at a nonjudicial foreclosure was denied the opportunity in a declaratory judgment action to argue the lease was not applicable to the tenant. *United General Insurance Agency of Midland, Inc. v. American National Insurance Company,* 740 S. W. 2d 885 (Tex. App.-El Paso 1987, no writ).

71 This same advantage may not be available if the landlord and landlord's lender were to agree to a deed in lieu of nonjudicial foreclosure or some other negotiated settlement. The nonjudicial foreclosure action may also remove mechanics' liens attached to the property after the deed of trust's recordation. Foreclosure creates the cleanest title for landlord's lender.

72 Property Code § 52.001(a) provides as follows:

> A sale of real property under a power of sale conferred by a deed of trust or other contract lien must be a public sale at auction held between 10 a.m. and 4 p.m. of the first Tuesday of a month. Except as provided by Subsection (h), the same must take place at the county courthouse in the county in which the land is located, or if the property is located in more than one county, the same by be made at the courthouse in any county in which the property is located.

73 An interesting scenario would be if the mortgage was purchased for fair market value by an entity related to the landlord. If leasing market prices rise, becoming more favorable to landlords, the landlord could fail to make payments to its related entity. The related entity forecloses, and a

When tenants fail to require an SNDA, the Cloud provider-tenants relinquish to landlord-lender (the mortgagee) the opportunity to remain in the leased premises undisturbed by landlord's failure to comply with the mortgage. Cloud provider-tenants place their business and your data at extraordinary risk.

b. Option 2: Nonjudicial foreclosure automatically terminates a subordinate lease, turning the tenancy into a tenancy at will.

A lender received a trustee's deed after a nonjudicial foreclosure sale. A subtenant brought a wrongful eviction action. The deed of trust provided that upon foreclosure the bank could take possession of the property. The court stated, "[The subtenant] occupied the property only as a tenant at will. The law of Texas is clear that a tenancy at will can be terminated at any time." *Judson Bldg. v. First Nat. Bank of Longview*, 487 F.Supp 852, 855 (E.D. Marshall Div. Texas 1984).

The tenant's failing to require an SNDA, means tenants relinquish power to landlord-lender (the mortgagee).

In *Judson*, the subtenant and landlord-debtor were related companies and one person was an officer in both companies. In this instance, the court found mortgagee provided adequate notice to the subtenant. The court went further in stating that even if the notice was not adequate, the adequacy was irrelevant since the subtenant could not have an interest in the property greater than that of the mortgagor.[74] Moreover, the bank as owner had acted reasonably in giving notice of eviction. From this case, the conclusion is that when a tenancy at will exists, the only requirement for termination is that the landlord act reasonably.

c. Option 3: Nonjudicial foreclosure automatically terminates a subordinate lease, turning the tenancy into a tenancy at sufferance.

Three months after a foreclosure sale, a purchaser of the foreclosed property seeks to terminate a former tenant's lease agreement. Even though the lease provided that it was "binding on subtenant of a debtor-landlord."

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trustee's deed is issued to the mortgagee at a foreclosure sale. The landlord's related entity becomes the ***new*** landlord. If the sale did not terminate the lease (see, *infra*), then the new landlord would terminate tenant's lease and negotiate with the current tenant or other potential tenants on terms more favorable to the new landlord.

Similarly, in falling markets, with wrap mortgage financing (no longer popular, but illustrative of the possible relationship between mortgagee and landlord), the author has knowledge of a mortga***gor*** at the 17th level purchasing a mortgage at the 10th level. The mortgagor at the 17th level intentionally failed to make its payments to the its mortgagee. The defaults and foreclosures cascade down to the 10th mortga***gee*** (which is also the 17th mortga***gor***). The 10th mortgagee forecloses eliminating all subsequent obligations, and continues payments to the 10th -level mortgagee, at a much reduced rate, more reflective of the declining real estate market. Clever.

74 *Id.*

C. Contracts limiting Cloud provider liability may prevent customers from asserting third-party beneficiary rights against new owner of property, even if the proceedings were monitored in bankruptcy court.

I. The Cloud customer is at best a third-party beneficiary to the lease agreement between the Cloud provider-tenant and the landlord.

The rights your client or you claim in data on a defaulting tenant's servers are not strengthened just because the Cloud-provider tenant goes into bankruptcy and a trustee is appointed. The trustee may owe no special duty to the Cloud customer.

Consider how third-party beneficiaries are treated in this California case for damages, arising out of a real estate bankruptcy case.[75] CHEG Inc., owned solely by an individual C is a general partner of Rivendell, a limited partnership. Bank, secured by a deed of trust, loaned money to Rivendell. Rivendell leased property to IMP, with CHEG acting as a broker between IMP and Rivendell. The lease, very friendly to CHEG's controlled limited partnership Rivendell, called for a brokerage commission to be paid to CHEG if the property is sold to tenant IMP.

CHEG sued the bank for the brokerage commission allegedly due, in accordance with the lease, on the sale of the property from landlord to tenant IMP.

When Bank's loan matured, Rivendell was unable to pay, and entered voluntary Chapter 11 proceedings. Through an auction held in bankruptcy court, Bank purchased the property. The court ordered sale was free and clear of all liens, interests or encumbrances. Rivendell transferred the property by deed to Bank, accompanying an agreement for mutual releases between Rivendell and Bank.

The sale order was subject to a real property tax lien encumbering the property. The lease was not identified as under a list of liens which were extinguished by the sale. The court of appeals noted the bankruptcy court's treatment was consistent with Local Rule 6004-1 providing a different treatment of "liens" and "interests." The description of liens must be more specific than the description of an interest. Therefore, the absence of the lease on the list of terminated liens is not dispositive of the lease's continuing in force.

The California court of appeals notes the difference between 11 U.S.C. § 363(f) authorizing the sale "free and clear" of any entity's interest and 11 U.S.C. § 365 (h) which sets forth a tenant's rights should a lease be rejected. The court sites an Indiana case which distinguishes cancellation of covenants requiring debtor's future performance from a complete termination of lessee's estate in the property. These future performance items, include the debtor's providing utilities, repair and

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75 C.H.E.G., Inc. v. Millenium Bank, 99 Cal.App.4th 505 (2002), 121 Cal.Rptr.2d 443, Court of Appeal

maintenance, are extinguishable rights that may be reduced to a money judgment, citing 11. U.S.C. 363(f)(5).

CHEG then asserts the bank's accepting rent means it ratified the lease and accepted the landlord's responsibilities, including the obligation to pay CHEG the commission upon sale to the tenant.

Even if that were the case that all the obligations of the previous landlord were assumed under the lease, these would be obligations owed IMP. CHEG claims a commission as a third-party beneficiary, and there was no contractual obligation for the bank to pay a commission to CHEG upon the sale to IMP.

CHEG is denied its claim against the bank on all counts.

This case may not be good news to Cloud customers. A Cloud customer does not have an interest in the real estate when it "leases" space on servers. The Cloud customers seek maintenance of the servers, protection of its data, and use of software (as in a SaaS arrangement); yet, the customers are third-party beneficiaries. The Cloud customers have agreements that may be terminable, without any recourse to the trustee, debtor-in-possession or entity acquiring the real property or the personal property at a sale.

The ability to reduce a third-party beneficiaries claim to money damages allows bankruptcy trustees and other parties greater flexibility in the sale of real or personal property.

Cloud customers may allege their claims survive a sale as ordered in the bankruptcy proceedings described above. This argument could be based on a Cloud customer's asserting its claims could ***not*** be reduced to money damages.

Cloud customers may assert the Cloud provider has a responsibility to keep secure the data, and make it and software programs accessible. The data cannot be secure unless the new owner performs, at least temporarily, all the obligations of the Cloud provider. The Cloud customers need time to transfer their Cloud operations to another provider.

The Cloud customer's assertion as described above, may fail because the customer's claim may have been reduced to money damages. While an analysis of protection and liabilities is discussed in more detail later, examining the reduction of Cloud services to money damages is warranted here .

II. Cloud contracts reducing a Cloud provider's liability to money damages may prevent a Cloud customer's successful third-party beneficiary claim.

In the *CHEG* case, the California court found that if a third-party beneficiary claim can be reduced to money damages, then an entity purchasing property from a bankruptcy proceeding would take it free of lease obligations.

Many Cloud service agreements limit a Cloud customer's claims to money damages. There will be a greater analysis of this issue later, it is worth examining now some examples of the liability limitation clauses.

Verio, Inc. hosts email and offers other services. Verio's "Microsoft Exchange 2007/2010 Service Level Agreement,"[76] for email describes its obligations in the event of "catastrophic failure of the SAN [Storage Area Network] or datacenter . . ." as limited in the contract to credits against your monthly bill.[77] If the Cloud customer is due a Service Availability credit, then it can be no greater than 50% of the customer's monthly bill. Data Protection Credits can be no greater than 100% of the monthly bill. These credits are issued for the month of the failure. Verio continues with

> The total credits that You may be issued with respect to any calendar month, including the aggregate of Service Availability Credits and Data Availability Credits, shall not exceed 150% of the monthly fees charged to the account during the month for which all such credits are issued. "Microsoft Exchange 2007/1010 Service Level Agreement," XIII, c.

This provision appears to state, if the Cloud customer receives no services and its data is lost, then the Cloud customer does not owe any money for that month. This amount is ascertainable, and with the California case as a guide for third-party claims, the new owner of the property sold from bankruptcy would take the property without any obligation created under the lease.

Carbonite's "Terms of Service,"[78] has a similar provision. Carbonite limits its liability "for all damages of every kind or type" to the subscription fees paid by the customer to Carbonite in the 12 calendar months immediately prior to the damages arising.

These Cloud provider damages are calculable. Since specific performance appears never to have been contemplated under either of these agreements, then the trustee or a new owner taking possession of a property sold from a bankruptcy would have no obligation to honor the Cloud service contracts. Cloud consumers have to seek the costs of data recovery and transfer to another Cloud provider from other sources.

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76 http://www.verio.com/about/sla/exchange/ , (last viewed by author on _____).
77 Id XIII.
78 "Terms of Service," Carbonite, April 11, 2012, http://www.carbonite.com/en/terms-of-use/terms

XIII. A secured party's duties when in possession of collateral are limited.

XIV. Government claims against landlord may place Cloud provider in jeopardy.

A. Federal tax liens may be imposed on Landlord's real property.

I. How and where federal tax liens are filed on real property.

Federal tax liens arise out of a debtor having a tax liability, and arise at the time of assessment.[79] Assessment is not necessarily the date the tax lien is filed of record.

A lien against real property in Texas must be filed in the Official Public Records of Real Property of the county in Texas where the real property is located.

II. How and where federal tax liens are filed on personal property.

A lien against personal property, such as a Cloud provider's servers, would be at the "residence of the taxpayer at the time the notice of lien is filed."[80] The residence of a corporation or partnership is deemed to be the place the principal executive office of the business is located.[81] If the taxpayer's "residence" is located outside the United States, then the residence shall be deemed to be in the District of Columbia.

These statutory requirements create difficult situations for the client or law firm contracting with a Cloud provider. A Cloud provider may be virtual and locate your data and software on computers in a data center operated by a third party data center. As a matter of course, you may request monthly searches against the Cloud provider to discover tax or any other type of liens. Yet, if the Cloud provider contracts with an unrelated data center, not identified to you, then federal tax liens may arise against this unrelated data center's equipment. Searches using your Cloud provider's name

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79 26 U.S.C. § 6321

80 26 U.S.C. § 6323(f)(2)(B)

81 26 U.S.C. § 6323(f)(2). Compare this provision with TEX. BUS. & COM. CODE § 9.307(b) regarding security interests. This section provides that a debtor's place of business, if an individual, is the individual's principal residence; and, if an organization with only one place of business, then at its place of business; and if an organization with more than one place of business, then at its chief executive office. Subsection (b) applies if the place of business is located in a jurisdiction where information for nonpossessory security interests is available in a filing, recording, or registration system to establish priorities of the lien creditor. If subsection (b) does not apply, if, for example, the debtor is located in another country, then the debtor is presumed to be in the District of Columbia. As a creditor, searches in the District of Columbia become important.

would not discover tax liens against the unrelated data center, where your data really resides because of the subcontracting arrangement.[82]

Even if you were aware of 3P Data Center, the location where your data resides could be in another state or country. So, not finding any liens against 3P Data Center at its principal place of business would not be dispositive of whether these federal tax liens exist, and whether your data and use of software is in jeopardy. You may have to search Washington, D.C. records.

III. Priority of federal tax liens.

The priority of federal tax liens, depends in part on the jurisdiction's law. To the extent a jurisdiction gives priority to a purchase money line for either real or personal property, then a previously recorded tax lien does not have superiority. In Texas, that priority exists.

Creditors usually require a title policy, and prior to the loan closing and purchase of the real property, a title commitment would be obtained and it should disclose any prior under the debtor's name, including a federal tax lien.

B. Texas' state ad valorem tax liens have a super lien priority.

I. How and where ad valorem tax liens are filed.

II. Priority of ad valorem tax liens.

XV. Landlord and Cloud provider-tenant lenders may share collateral.

XVI. Identifying and protecting your data: from federal copyright to the Uniform Commercial Code.

Copyright arises at the time of creation.

The Texas Business & Commerce Code is not a substitute for a titling procedure allowing a Cloud customer to provide notice of an interest in the data on the servers.

You cannot easily and visibly claim ownership in data. Labels on CDs are commonly used to identify copyright ownership of music, while USB drives, hard drives, and servers are not

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82 Cognoscape, LLP is a Cloud provider specializing in service to lawyers, but does not have its own servers and instead contracts out to parties it deems reliable. Michael St. Martin, *Legal Technology: Mobile Computing for Lawyers*, Dallas Bar Association CLE program, February 10, 2012.

commonly marked with copyright notices. Some documents or data bases may be copyrighted and the copyright notice would be available through "reading" the data, once access was gained.

Federal registration of copyright enables authors to collect statutory damages, if notice is correctly placed. Statutory damages are tied to each violation and may be monumental sums.

The UCC gives notice of security interests in accordance with Article 9 of the UCC, not ownership interests.

If data is encrypted, particularly if you encrypt the data before placing it in the Cloud, then even less information is available to an outsider trying to identify information on a hard drive or some other storage media. You would hope the Cloud provider would also encrypt the data as part of its security procedures. If there was an entity taking over the Cloud provider's operations, deciphering instructions may be provided at least as to this first level of encryption, i.e., the Cloud provider's encryption. Encryption and further identification of your data or even additional lawyers of encryption would not be available except through your company's IT department.

These additional layers of encryption may apply to special procedures for encryption of particular documents or even special procedures for encryption of all of a client's email communications. Engineers often require extra encryption procedures when corresponding by email with patent attorneys.

XVII. Cloud customers lose, along with landlords, lenders, and debtor-tenants if the parties do not cooperate.

Professionals may relate to a dispute involving a law firm's break up when approximately one-third of the partners left.

What's unusual in the following example, is the law firm Weinstock & Scavo announced cessation of continuing ongoing representation of clients.

The landlord declared them in default of the lease. A large section of the firm left, and remaining members and associates of Weinstock & Scavo sought other positions. The property management firm declared Weinstock & Scavo in default under the lease provisions, accelerated the lease payments approximately $9 million, and sued to have the firm placed in state receivership.

Weinstock & Scavo asked for a renegotiated rent for the floor vacated when Scavo and 11 other lawyers left the firm to join another. With a relatively new landlord and management company, twenty-four years in the building did not hold much sway when Weinstock & Scavo sought modification of the lease and lease terms. Its space needs were less (with about one-half of a floor fewer attorneys), and the market value of rents had fallen substantially from when the firm entered into

its last lease. Unsatisfactory lease negotiations led the landlord to sue the law firm Weinstock & Scavo in a fight to control the law firms' accounts receivables and other assets.

The landlord asserts liens for unpaid rent in the amount of $7 million, while challenging liens the firm granted remaining attorneys up to the amounts of their salaries in an effort to hold the firm together. Subsequently, the lawyers with those security interests withdrew the liens granted in their favor. In a situation which resembles a default in a Cloud computing case, the landlord is left trying to collect on its lease agreement using the receivables of the now disbanded law firm. As founding attorney Michael Weinstock, questioned,' "How many of the accounts receivables could be collected by a landlord who sues and gets a judgment from an abandoned corporation?" '[83] The remaining lawyers in the firm took their practices to other firms.

As of May 31,2011, the firm removed its personal property from the leased premises. According to the law firm's counsel, Jim Cifelli and Greg Ellis, of Lamberth, Cifelli, Ellis Stokes & Nason, P.A. landlord lien covered the personal property (i.e., computers and storage devices) and there was no financing lien that covered personal property, although the law firm did have financing through SunTrust.[84] SunTrust's financing was covered by a lien, but the lien did not extend to the firm's personal property.

The landlord's attorney brought an action in state court, which among other relief, sought to have the law firm placed in receivership. The landlord's attorneys specifically requested that the state court-appointed receiver have authority to place the company in federal bankruptcy. The judge denied the motion. The firm may be solvent on a current cash flow basis, but its contingent liabilities, including the $7 million accelerated under the lease agreement, made the situation precarious.

SunTrust, a lender, filed liens as security, including ones that appeared to reach accounts receivables. Michael Weinstock, a shareholder of Weinstock & Scavo and personal guarantor on the SunTrust note purchased the debt and the security from SunTrust. He therefore assumed SunTrust's priority, ahead of the landlord. The landlord claimed the conveyances and transfers from SunTrust were fraudulent, but these claims were rejected by the court.

The adverse positions and claims among the landlord, lender, and debtor-tenant mirror positions that may be taken in a Cloud computing case. The failed Cloud computing entity's clients are no more likely to pay outstanding invoices than a law firm's clients. Here there was a dispute over control of the computers, the software, and data which are contained on the law firm's computers, just as if the debtor-tenant would be a Cloud computing entity. The landlord did not succeed in having a

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83 Meredith Hobbes, "Weinstock & Scavo to Disband," Fulton County Daily Report, May 27, 2011, http://www.law.com/jsp/article.jsp?id=1202495399443&Weinstock__Scavo_to_Disband&slreturn=1&hbxlogin=1 (last visited July 25, 2011)

84 Telephone interview with Jim Cifelli and Greg Ellis, partners of Lamberth, Cifelli, Ellis, Stokes & Nason, P.A. , counsel for Weinstock & Scavo (July 5, 2011).

receiver appointed for the law firm; which left the lender (now Michael Weinstock), the landlord, and the defunct firm to have individual actions challenging priorities when a coordinated solution may have been more beneficial.

Counsel for Weinstock & Scavo distinguished the business aspects of a Cloud provider's failure from the law firm's handling of its data. The files held by the law firm (and the data on the computers) belong to the firm's clients. The law firm has a legal obligation to protect and return the files (both electronic and nonelectronic) to the clients. The clients can direct transfer of their files to other law firms.

A lawyer formerly with Weinstock & Scavo created a special purpose company to manage the winding down of the firm including collecting receivables, payment of on-going liabilities, return of files to clients, and any other outstanding matters. As with a Cloud computing debtor-tenant entity, each client may have maintained copies of its data.

A. Saving equipment and data requires coordination between lenders.

A Cloud vendor's facilities may be equipped with special systems for power generation as well as heating and cooling. Facebook has placed an emphasis on generating its own electricity through solar paneling, and has 120 acres for expansion of its facility. The costs of these special features are not separated but even conventional HVAC[85] equipment cost is substantial.

Many Cloud providers are not in a position to build their own facilities. In commercial leases, HVAC equipment will most likely become part of the fixtures of the building and would remain with the building if the tenant were to vacate the premises. Fixtures, by lease, often become the property of the landlord.

If there were special HVAC needs, then the tenant may want to finance this special construction. If the tenant were to seek outside financing, then a bank may ask a landlord to waive its landlord's lien (which would cover any of tenant's equipment and inventory, remaining once tenant leaves or is removed from the premises,). Through an executed and publicly filed waiver the landlord would acknowledge its lien would be subservient to the tenant's financing institution's lien on the identified items. This subservience does not mean an absolute release, but an acknowledgement that the financing institution may take control of and dispose of those items according to state law in order to pay the debtor (tenant's) obligations, however, the landlord makes claim to any remaining proceeds in excess of the lien to pay the tenant's obligations to landlord. If there are funds after all of the financing entity's and landlord's claims, then any balance would go to the tenant.

Numerous technologies require special equipment and installation to achieve traditional goals (heating, cooling), but which are separate from "fixtures." Instead of traditional HVAC units,

85 "HVAC" is an acronym for "Heating, Ventilation, and Air Conditioning."

cooling equipment becomes more integrated into the "trade fixtures" of servers. One such example is to have servers floating in tubs of circulating coolant similar in composition to mineral oil.[86]

In the example of cooling vats, the landlord may reasonably consider the cooling vats and piping fixtures to the building, while other creditors may oppose this interpretation. Another creditor could argue the coolings vats are integral to the servers (they would overheat and become inoperative without the cooling vats), and are therefore, removable from the building.

In special use situations, all creditors with a stake in the cooling vats and servers may determine cooperation serves them best, and the advantage is to find another data center tenant that could use the building, the access to power, the servers, and the cooling vats. This type of facility is not the space where conversion to a large retail chain is economically feasible. or a care repair shop makes financial sense.

A new entity may be able to take over the Cloud customer's lease or acquire the defaulting Cloud provider-tenant's interest in the agreements. Since the Cloud customer lease may be terminable , the new entity may negotiate new terms and pricing with Cloud customers of the defaulting Cloud tenant.

B. A landlord's control over utility service jeopardizes lenders and debtor-tenant's business.

I. Utility control coerces debtor-tenant at lender's risk.

Uptime is a crucial element of Cloud services. Customers expect access to their data. Uninterrupted electrical service is critical to the Cloud provider meeting customer expectations. Power interruptions prohibit customer access, but also may damage equipment purchased with borrowed funds. While the Cloud provider's lender may have a secured interest in the debtor-tenant's personal property (servers and hard drives), the landlord's control over utilities impacts personal property rights of both lender and debtor-tenant, and may also impact the Cloud customer's data stored on the Cloud provider debtor-tenant's servers.

In a commercial transaction, the landlord is statutorily prohibited from interrupting utilities when the tenant contracts with a third party for the service.[87] Regardless of whether the landlord is a utility provider or not, this statutory framework provides for the lease to validly supersede the limitations on prohibitions against a landlord's interruption of utilities.[88]

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86 Green Revolution's Immersion Cooling in Action *April 12th, 2011: Rich Miller* http://www.datacenterknowledge.com/archives/2011/04/12/green-revolutions-immersion-cooling-in-action/

87 TEX. BUS. & COM. CODE §93.002

88 "A lease supersedes this section to the extent of any conflict." TEX. BUS. & COM. CODE §93.002(h)

Therefore, even if the debtor-tenant is current on obligations to the the third-party utility provider, if the lease allows, the landlord may interrupt utilities. Utilities could include traditional phone service and Internet access, electricity, water, and gas. In a business predicated on 24/7 access, customers perceive almost *any* interruption in the Cloud access as a fundamental failure.

II. Landlord's utility interruption jeopardizes tenant-lender's business plan.

Servers and hard drives are sensitive to heat. Any disruption in cooling, or heating, could damage the equipment, even if the equipment was not operating. Cisco, a major supplier of computer switching hardware, recommends ambient room temperatures of between 41ºF and 95ºF.[89] The highest of these temperatures may easily be exceeded in Southwestern states, where no power exists for cooling. The best building designs would not provide for windows because of security reasons. Likewise,, severe winters in northern climates could find powerless buildings colder than 41ºF.

With electricity interruption, the servers and communication devices would no longer work. Even if the data center had no power from a landlord's interruption, the heat in a closed building in certain climates may be sufficient to damage the servers and storage devices. The heat could corrupt the information on the devices. The debtor-tenant's lender with a first-lien security interest would naturally want to prevent damage to the data storage devices and servers. Damage to the hardware reduces the value of the recovery. Damage to the data would impair a reorganization of the debtor. So, the Cloud provider's lender for purchase of equipment would want to work with the landlord and maybe the utility provider (an independent entity) to insure power is maintained.

There could be no disruption of electricity, but interruption of Internet access;[90] so, data and programs would be inaccessible to the Cloud provider's customers.

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89 Cisco's "Video Surveillance Storage System Hardware Installation Guide," offers the following cautions:

> If the temperature at the installation site is not actively regulated, ensure that daily and seasonal temperature changes will not result in the ambient temperature exceeding the limits prescribed below.
>
> . . . A unit's ambient temperature requirements remain the same when multiple units are present. Always ensure that the ambient operating temperature in the unit's immediate area does not exceed the limits prescribed below. . . .
>
> . . .. Ensure the ambient temperature of the installation site is between 5°C (41°F) and 35°C (95°F). If the unit is rack-mounted (recommended), ensure that the unit's intake air temperature is no higher than 35°C (95°F).
>
> http://www.cisco.com/en/US/docs/security/physical_security/storage/installation_guide/csshig_unpack.html

90 Internet access could be defined as a utility.

Any equity beyond the first lien holder's claims would be available to the landlord. Of course, the landlord would not have been likely to interfere with utilities if it thought there were other opportunities for recovery of past due rent. The loss of data from the interruption of utilities would contribute to customers leaving the Cloud provider debtor-tenant if it were to move to bankruptcy proceedings. The loss of data could also create claims by customers against the entity whether in bankruptcy or not. Customer dissatisfaction arising from the inability to access data and software would likely be sufficient to create problems for continuation or reorganization of the Cloud provider's business. Complete failure, and consequent customer claims, may doom any reorganization using the debtor-tenant's personal property at the leased premises.

XVIII. Does a Cloud provider offer a service or a lease or something else?

A. Cloud computing appears as both a service and a variable storage equipment lease.

Cloud contracts vary with some sounding more like a service, while others tend to sound more like storage space rental. Your IT needs for space measured in Gigabytes for storage of programs and data usually govern the charges. In fact many Cloud providers that are storage-oriented offer some free storage and then after you exceed the free limit, offer you options for adding to your storage for pay. These Cloud providers believe trial leads to addiction.

When a Cloud provider allows your use of software, then the Cloud provider also becomes a sublicensor of the software you use on its machines.

The Cloud provider is responsible for maintaining the licenses, and your fees should include charges for the software.

Even the more storage-oriented Cloud providers offer some services. The most basic of these services would be synchronization of your data and programs among registered computers. For my example, I'll call the service "Wicker"). You create the online account with Wicker, then you download a program onto your computer. You place files into the Wicker folder. You may remove and add files at will. Files are not only stored in the Cloud but available for your access from any registered computer under your account. As the users of the other registered computers log onto the Internet, each registered computer's client program residing on the registered computer synchronizes the Wicker file to match the latest version.

Variations to these arrangements include the Cloud provider's keeping a history of the Wicker folder for 30 days or more. You then have the option to see files from a particular day within this history window. The service obviously requires potentially 30 times the storage you would normally have over any one day; so, this extra storage may cost more. Storage space is inexpensive,

particularly when purchased in bulk, so the costs are nominal. What's not nominal is the value this storage offers. If you think you accidentally deleted a valuable file or you need to reconstruct a corrupted data file, you can go back to the last day it was uncorrupted. You'll find these services important and convenient.

Your contract with the Cloud provider may be a hybrid, but it appears that most reviewed Cloud provider contracts include warranty disclaimer knowledge consistent with a lease. You are leasing storage space, it just may ***not*** be made of cinder block and have a roll-up door for access.

As we examine the Cloud contract as a lease, the Cloud provider will be the "lessor" and the Cloud customer will be the "lessee."

B. Lease arrangements allow application or disclaimer of warranties, just as in a purchase.

The warranties associated with a sale apply to leases. The advantage is that these warranties may be disclaimed. The chief disadvantage is failure to properly disclaim warranties may result in very large damages, particularly if the Texas Deceptive Trade Practices Act (DTPA) is applicable, where actual damages are multiplied.

We'll review the provisions applicable to leases and the major cases regarding those provisions.

I. A Cloud provider does not enter into a finance lease with a Cloud customer.

Cloud provider leases are not "finance leases" as defined in Tex. Bus. & Com. Code § 2A.103(7). Finance leases must meet 3 principal criteria.

The lessor does not "select, manufacture, or supply the goods." The Cloud provider has already selected the components used in creating the Cloud, without regard to lessee's preferences. The lease proves for the lessee to select the goods and and there are no options to purchase the "Cloud space" for a nominal fee at the end of the term.[91]

The lessor acquires the goods or the right to possession and use of the goods in connection with the lease. Again, the lessee does not purchase the components in creating the Cloud. The Cloud is already packaged the Cloud customer selects among the offerings.[92]

The final condition required to create a finance lease is that one of the following 4 criteria occurs.

1. The lessee receives a copy of the contract by which the lessor acquired the goods, and again, the Cloud provider does not offer this information.
2. The lessee would have approval rights to lessor's contract for acquisition of the goods.

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91 TEX. BUS. & COM. CODE § 2A.103(a)(7)(C)(i)
92 TEX. BUS. & COM. CODE § 2A.103(a)(7)(C)(ii)

3. The lessee, *before* the signing of the lease contract, receives an accurate and complete statement of warranties and disclaimer of warranties and other terms regarding the lessor's acquired goods.[93]
4. If the lease is not a consumer lease, then the lessor before the lessee signs the contract, informs the lessee provides lessor details about the vendor, from which to acquire the goods; the lessee is entitled to the promises and warranties, including those of any third party, and the lessee may communicate with the vendor to the lessor.[94]

The Cloud provider agreement would not normally disclose the detail about the equipment acquired, if any, for storing the Cloud customer's data or operating the customer's software. Since the Cloud provider may subcontract the server operations to yet another party, that third party in charge of the server maintenance and operation of software may make changes without prior approval of the Cloud provider. The control of the data and the equipment where it resides becomes even more remote.

II. A representation that a leased product would satisfy particular requirements is created in §2A.210.

In statutory construction, the first warranty is an express warranty.[95] The statute begins with the lessor creating an express warranty by affirmation of fact or promise to the lessee that becomes part of the basis of the bargain. A description of the goods that form the part of the basis of the bargain creates a warranty the goods will conform to the description. If the seller uses a sample or model that becomes part of the bargain, then the whole of the goods will have to conform to the sample or model. Finally, use of the words "warrant" or "guarantee" are not required to create an express warranty, nor is intention required. Still, the lessor's affirmative opinion about the value of the goods or commendation of the goods does not create a warranty.

The statute's perspective is from the lessor creating an express warranty by doing any item from the list above. In many situations, the lessee, will have some specifications. If there is a Request For Bid (RFB) or Request For Proposal (RFP), then a reply by lessor seems to acknowledge and accept the specifications creating an express warranty. As with sales contracts, a response with an offer and price does nothing more than start the battle of the forms.

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93 The lessee must receive "a complete statement designating the promises and warranties and any disclaimers of warranties, limitations or modifications of remedies, or liquidated damages, including those of a third party, such as the manufacturer of the goods, provided to the lessor by the person supplying the goods in connection with or as part of the contract by which the lessor acquired the goods or the right to possession and use of the goods." TEX. BUS. & COM. CODE § 2A.103(a)(7)(C)(iii).

94 TEX. BUS. & COM. CODE § 2A.103(a)(7)(C)(iv)

95 TEX. BUS. & COM. CODE § 2A.210

Texas has only one case[96] at any level, state or federal, that references the creation of an express warranty in a lease agreement. No satisfying conclusion may be drawn from this infrequent use of the statue. One possibility, however, relates to recodification of the Texas Business & Commerce Code; yet, the code has been recodified since XXXX, YY years as of the time of this writing.

This case involved the representation associated with a leased photocopier. The lessee provider lessor a list of 9 specifications the machine had to fulfill. It failed to fulfill them; yet, the lessor provided the equipment. While there was a lease agreement signed by the lessee, the agreement was not signed by the lessor, and the court found the disclaimers of express or implied warranties ineffective. Since the defendant was a merchant, the court found the implied warranty of merchantability arose.

III. The lessor warrants it has good title to the leased property, granting lessee a warranty against interference and a warranty against infringement.

This section brings us to the first hypothetical of the family vacation ruined when a rented car was repossessed by the car rental company's lender.

In an adversary proceeding[97] a federal bankruptcy court addressed the warranty of title in leased personal property[98] and the implied warranty against interference.[99] J&S Hyperbaric Solutions, L.L.C. made demand on HBO Associates, L.L.C. ("HBO") which leased a generator to Pan American General Hospital ("Hospital"). J&S also made demand on the Hospital. HBO's lease contained a general disclaimer of warranties, the court found the "implied warranty against interference may be excluded only if the lease contains specific and conspicuous written language."[100] The Hospital and HBO were found jointly and severally liable for conversion; HBO was found to breach the implied warranty against interference and therefore was liable to the Hospital for (1) any sums it pays on the J&S's judgment for conversion against the Hospital and (2) the Hospital's attorney's fees and costs incurred defending J&S's conversion claim.

If a Cloud customer is considered to lease space to store data on a Cloud server's storage device, then the presumption in Texas would be the Cloud provider owned the hard drive. If the Cloud provider did not own the hard drive within a server, for example, the Cloud provider financed

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96 Innovative Office System v. Johnson, 906 S.W.2d 940 (Tex.App.–Tyler 1995)

97 In re Pan American General Hospital, Debtor, J&S Hyperbaric Solutions, L.L.C., Plaintiff, v. HBO Associates L.L.C. and Pan American General Hospital Defendants, (In re Pan American General Hospital), No. 03-32693-LEK, Adversary No. 03-3048, (Bankr. W.D. El Paso Division, Texas, 2003) (_____,J). http://www.txwb.uscourts.gov/opinions/opdf/03-03048-lek_J&S%20Hyperbaric%20Solutions,%20LLC%20v.%20Pan%20American%20General%20Hospital,%20LLC%20et%20al.pdf

Example: Jensen v. Landolphi (In re Landolphi), 377 B.R. 409 (Bankr. M.D. Fla. 2008) (Paskay, J.)

98 TEX. BUS. & COM. CODE § 2A.211

99 TEX. BUS. & COM. CODE § 2A.214

100 *J&S*, at 4.

the server, then the Cloud provider may exclude the warranties against interference or against infringement by language that is in writing, specific, and conspicuous. Course of performance, course of dealing or usage of trade may give the lessee reason to know the goods are being leased subject to a claim or interest of another person.

One Cloud provider has the following language:

> [Cloud PROVIDER] EXPLICITLY DISCLAIMS ANY WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE OR NON-INFRINGEMENT AND ANY WARRANTIES ARISING OUT OF COURSE OF DEALING OR USAGE OF TRADE."

The very language that disclaims warranties of merchantability, fitness for a particular purpose, and warranty of "non-infringement,"[101] also provide no warranties would arise out of course of dealing or usage of trade.

There is no disclaimer of the warranty "against interference." The statute was precise or redundant to separate the two warranties emphasizing their difference with the use of "against" twice, in "against interference or against infringement."[102] The differences between "interference" or "infringement" are not clear from the statute or the official commentary.

The Texas Legislature's Business & Commerce Committee, has no record of discussion of these provisions in its hearings. The Texas Business & Commerce Code does not provide a definition for either interference or infringement.[103] *J&S Hyperbaric* is the only case in Texas citing this provision.

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101 The author could not identify any cases on whether a "warranty of non-infringement" is the same as a warranty "against infringement."

102 TEX. BUS. & COM. CODE § 2A.214

103 The official commentary adopted as part of the legislative history provides the following:

> This section also provides that to exclude or modify the implied warranty of merchantability, fitness or against interference or infringement the language must be in writing and conspicuous. There are, however, exceptions to the rule. *E.g.*, course of dealing, course of performance, or usage of trade may exclude or modify an implied warranty. Section 2A-214(3)(c).
> Section 2A-211(1) reinstates the warranty of quiet possession with respect to leases. Inherent in the nature of the limited interest transferred by the lease - the right to possession and use of the goods - is the need of the lessee for protection greater than that afforded to the buyer. Since the scope of the protection is limited to claims or interests that arose from acts or omissions of the lessor, the lessor will be in position to evaluate the potential cost, certainly a far better position than that enjoyed by the lessee. Further, to the extent the market will allow, the lessor can attempt to pass on the anticipated additional cost to the lessee in the guise of higher rent.

The Cloud provider's use of "THE WARRANTIES . . . OF NON-INFRINGEMENT" fulfills a strategy of obfuscation. This use *only* of "non-infringement" as opposed to excluding a warranty "against infringement" without referencing "interference," makes searching in the U.C.C. sections more difficult. The use of "infringement" in this context may lead many attorneys, particularly those not concentrating on these provisions of the U.C.C. to have an expectation the computer data storage and processing agreement references intellectual property law. Therefore, an attorney may assume the "non-infringement" reference would be "non-infringement" of a patent. A claim for infringement of a patent, would not likely target a Cloud customer, and a Cloud customer may recognize the Cloud vendor would have no ability to determine if any of the vendor's equipment would be subject to a claim by a patent holder against the manufacturer of the equipment. So, within this context, a disclaimer of warranty of "non-infringement," would appear to reference patent law.

The statute's drafting and use of an arcane word oddly suggests a vagueness if not deception in the statutory language. While this author has not seen any studies on the subject, it would not be surprising that lawyers would think "non-infringement" relates to patent law, rather than a term establishing the rights of a lessee in a lease of personal property. Lessees, whether consumers or even sophisticated businesses, may be even more likely than lawyers to focus on "non-infringement" as a term used in intellectual property. The newspapers are filled with stories about patent infringement suits. Again, this author has no information on any such study.

This strategy of failing to exclude or modify a "warranty against interference" creates a risk. There are no cases in Texas state or federal court on whether a "warranty of non-infringement" is the same as a warranty "against infringement." Nor are there any cases on whether a warranty "against interference," ***not*** mentioned in the sample Cloud provider agreement, is the same as a warranty against infringement.

The discussion of interference in the official commentary is unclear. Accurately, the commentary states the lessee is entitled to the possession and use of the goods. The lessee would expect to be able to use the equipment for the lease term.[104] If there was some risk it would be disclosed and part of the negotiation.

The agreement provides that "course of dealing" or "usage of trade" evidence not be allowed to show a warranty "arising." Section 2A.214 contemplates "course of dealing" and "usage of trade" as a basis for failing to have conspicuous, written, and specific language disclaiming these warranties.

The sample Cloud provider agreement would allow "usage of trade" or "course of dealing" to prove the rationale for failing to include conspicuous, written, and specific disclaimers, while excluding evidence on the same subject showing a warranty's creation in favor of the lessee.

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104 This article previously determined a Cloud provider lease would not be a financing lease, and therefore, there is an expectation of payments through a term and no sale of equipment after the lease ends.

In § 2A.214, there is an emphasis on the disclaimer being in writing, in addition to conspicuous and specific. There is no commentary or other reference on how this warranty is met in online contracting.

C. If a Cloud consumer is not a lessee, then would a Cloud consumer be a licensee?

A Cloud consumer may really be considered a licensee for several reasons. The Cloud consumer may use the Cloud provider for more than just backup storage, but for providing software for its use. This situation could arise in 2 ways. The Cloud consumer could acquire the license for the software directly with the stipulation that software would be run on the Cloud provider's computers. Alternatively, the Cloud provider could have a licensee that allows sublicensing of software.

The Cloud providers, however, seem to adopt agreements that appear to be leases within the U.C.C.

Texas courts may analogize relationships created in a Cloud computing agreement to other areas of the law. In an examination of the applicability of insurance provisions in a premises liability case, Judge Sanders noted that hotel guests were not tenants since they had no estate in the property.[105]

If the Cloud consumer is a licensee, following the analogy of real estate cases, the Cloud consumer will fail in asserting any right governed by an estate in the property. A licensee has no right in property, and as in *Patel v. Northfield Ins. Co.*, the plaintiffs could not assert claims for wrongful eviction. Cloud consumers if determined to be licensees only have "a personal contract and acquire no interest in the realty." In re Corpus Christi Hotel Partn., LTD., (Bankr. S.D. Tex 1991), 133 B.R. 850, 854 Bankruptcy No. 89-01757-C-11. Without an interest in property, then arguably, no duty would be owed the licensee by anyone in control of the property.

XIX. "You better watch out, you better not cry,"[106] Texas law will not apply.

A. Choice of law provisions are not favorable to Texas business Cloud customers seeking Texas jurisdiction in claims against non-Texas based entities.

Most out-of-state Cloud providers have contracts choosing another jurisdiction in the event of legal action growing out of the contract.

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105 Patel v. Northfield Ins. Co., 940 F. Supp. 995, 1002 (N.D. Tex. 1996).
106 Santa Claus is Comin' to Town, words Haven Gillespie, melody J. Fred Coots (1934).

Many Cloud provider contracts do not specify have a choice of law provision. Consider, Syncplicity's Terms-of-Service provisions which are silent on the subject of choice of law.[107]

Actions for breaches of contract, breaches of warranty, or DTPA actions arising out of a claim against a Cloud provider Texas businesses as Cloud consumers will be at a disadvantage to maintain a suit in Texas.

XX. Lessons from the Government

A. Landlord, tenant-lender, and Cloud provider have advantages in cooperating to maintain continuity and satisfied Cloud customers.

Some of the most feared words to people in private industry are "I'm from the government and I'm here to help you."[108] While this may be true in many instances, the government with the aid of private industry may have a model for dealing with difficult situations where potential customers seek security. These models relate directly to Cloud provider marketing, and may even reinforce landlord marketing to Cloud providers.

The various controls and interests landlord and lender share over the debtor-tenant's personal property suggest the two secured parties[109] would consider coordinating their efforts to achieve a mutually beneficial result. Customers of the debtor tenant-Cloud provider may discern a benefit if the Cloud provider were to make some representation about the steps the lender and the landlord would take to maintain the Cloud service in the event of financial problems or some other disaster. The Cloud service would not have to be maintained very long, just sufficiently to allow a Cloud customer to transition to another Cloud provider or bring services in house. Advertising a "warranty" in the event of a business' failure is dramatic, but not unprecedented.

If a business' potential failure is already a topic of concern among potential customers, a company may support its brand image and create current sales by reassuring continuity to its target consumers.[110] President Obama on behalf of our federal government assured potential consumers of

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107 Reproduced in this paper's Appendix Syncplicity's Terms of Service from http://syncplicity.com/legal/terms-of-service

108Prof. Jane Kaufman Winn first suggested this phrase and analysis when we co-authored a course for Southern Methodist University's Hart eCenter.

109 Although priority and the existence of equity in personal property may be unknown, landlord and lender could each be considered a "secured party" as to their respective interests. One claim may be so great so as to leave no balance for the other secured party, but that determination could not be made before the liquidation. Any excess after a sale, even if nonjudicial, would go to the property's owner, but a another secured lender could claim those funds. If prices for the equipment rose, there may be excess after all expenses, which would truly go to the owner. The market would determine these possibilities.

110 To insure continued automobile sales and encourage negotiations among the various parties

the safety of GM and Chrysler warranties before the companies had entered bankruptcy. You may consider this example of federal intervention extreme. If the reference is not to GM's warranty continuity, but continuity of our financial institutions—large and small—then we accept the FDIC's regulatory safety net . Our bank accounts are insured up to $250,000. Our security accounts are insured by the Securities Investor Protection Corporation,[111] and employees' pensions are insured by the Pension Guaranty Benefit Corporation, a federal government agency,[112]

As advisors to clients or for our own firms do we treat our data as seriously as our money? Do we demand from vendors in this area, the types of assurances we take for granted in financial transactions?

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involved in the reorganization of GM and Chrysler, the federal government guaranteed each company's automobile warranties ***before*** either GM or Chrysler were under bankruptcy court proceedings. President Obama stated:

> But just in case there's still nagging doubts, let me say it as plainly as I can: If you buy a car from Chrysler or General Motors, you will be able to get your car serviced and repaired, just like always. Your warranty will be safe. In fact, it will be safer than it's ever been, because starting today, the United States government will stand behind your warranty.
> President Barrack Obama, "Stabilizing the Auto Industry," Grand Foyer, The White House, (March 30, 2009) http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-on-the-American-Automotive-Industry-3/30/09/.

The automobile industry commentators perceived consumers would respond positively to GM and Chrysler car purchases as a result of the federal government warranty.

> American car buyers were given one less reason to worry this week as President Obama revealed his government's commitment to stand behind the warranties being offered on current General Motors and Chrysler vehicles. This eases a substantial amount of anxiety surrounding new car sales in the United States, since many potential shoppers had been putting off purchasing a vehicle from a company which might not be able to survive past the next few months."
>
> Benjamin Hunting, *Federal Government to Guaranty GM, Chrysler Warranty,* AUTOTROPOLIS.COM, March 31, 2009, http://www.autotropolis.com/auto-news/federal-government-to-guarantee-gm-chrysler-warranty.html.

In these references, the potential consumer already had doubts about either company's continuing to operate and ability to service previously sold cars.

Are any but the largest Cloud providers deserving of consumer support so great the possibility of failure is not even considered? Banks are charged by the FDIC for its insurance.

111 Securities Investor Protection Corporation, is a private, non-profit organization mandated by the

Generally, the lender and landlord want no responsibility to debtor-tenant's customers, nor commitments that would reduce either the lender or landlord's options in case of debtor-tenant's default.[113] Lender and landlord do not perceive a benefit for either to commit to a joint strategy and tactic for debt collection, where their natural alignment would be adversaries fighting over priority, control, and equity.

The initial issue that would motivate the landlord, lender, and Cloud provider to act in concert openly and in advance of a financial or other catastrophic crisis, is whether Cloud customers perceive a significant risk in a Cloud provider's failure. If Cloud consumers do not appreciate risks, then the coordination for data loss prevention would seem unnecessary.

If, however, the problem was great, then Cloud customers may find discussion of an emergency plan a distinguishing consumer benefit.[114] Of course, landlords change, lenders may change, and the control over a Cloud provider may change; so, the reassurances would have to be updated or there would have to be some commitment to continuity.

B. Private industry goes beyond government regulated minimums in order to meet consumer demand.

Continuity is not credible—unless it were to be regulated or in some other way mandated by government. This circumstance seems unlikely, but is not unprecedented. On a federal level, to encourage use of credit cards, the Federal Reserve instituted customer liability limits ($50.00)[115], but many card issuers guaranty $0 liability as a marketing tool. So, government regulation helped create an initially "level playing field" by setting a maximum liability for the consumer, while each credit card issuer's liability for its card was variable. Credit card issuers found consumer perception and market forces sensitive enough to respond by covering the consumer's $50 and thereby creating "$0 liability" features for some cards.

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federal government. http://sipc.org/

112Pension Benefit Guaranty Corporation's Home Page, http://www.pbgc.gov/

113Creditors tend to avoid focusing on the business and instead focus on the assets. A bankruptcy filing with the debtor in possession and a Chapter 11 reorganization of a business would offer direction that would be more consumer oriented.

114 Most Cloud providers discuss an emergency plan only in terms of limitation of liability. None of the major agreements this author has read, disclose resources beyond the company in cases of disaster.

115 The Federal Reserve System promulgated regulations under Truth in Lending (Regulation Z) which includes the following:

> (ii)*Limitation on amount.* The liability of a cardholder for unauthorized use of a credit card shall not exceed the lesser of $50 or the amount of money, property, labor, or services obtained by the unauthorized use before notification to the card issuer under paragraph(b)(3)of this section.
> Federal Reserve System, 12 C.F.R. § 226.12 (2010)

Similarly, Cloud providers may offer performance guaranties, particularly as this paper discusses in events of some financial disruption. Just as the credit card fees and interest rates are set to fund a card issuer's loss above the $50 limit, the charges associated with the Cloud provider's service would fund the Cloud provider's recovery or loss prevention procedures. As in the financial area, some Cloud providers may be more efficient than others or willing to increase market share at the risk of lower profits and subsidize this loss limitation.

XXI. May a statutory warranty breach be unconscionable for purposes of Deceptive Trade Practices action?

A. The Official Commentary adopted as part of the legislative history details the re-institution of the concept of quiet possession in leased property.

The Official Commentary notes the re-instated "warranty of quiet possession" is inherent in leased property. This reasoning seems simple enough.[116]

The example that follows depends upon your belief that a shutdown in operations can occur without notice. For those of you who doubt this possibility, consider that airlines previously ceased operations, and without notice[117]

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116 The Official Commentary adopted by Texas and many other states explains:

> Section 2A-211(1) reinstates the warranty of quiet possession with respect to leases. Inherent in the nature of the limited interest transferred by the lease - the right to possession and use of the goods - is the need of the lessee for protection greater than that afforded to the buyer.

117Adam Yeomans "Braniff Abruptly Halts Flights Bankruptcy Filing Expected, September 28, 1989, Orlando Sentinel, http://articles.orlandosentinel.com/1989-09-28/news/8909283183_1_braniff-airline-flights

'Braniff Inc. unexpectedly suspended service Wednesday amid a severe cash crunch while its board of directors and high-level executives worked through the night to hammer out the future of the airline based at Orlando.

Industry sources said the airline is expected to announce today that it will file for federal bankruptcy protection and reorganize as a smaller carrier for the second time this decade, leading to layoffs of many of its 4,700 workers and a severe reduction in flights. The airline canceled many of its 256 flights and forced hundreds of passengers to find seats on other carriers.By early today, Braniff officials had refused to comment about the decision to suspend service although the airline said it planned to explain its actions. The company released a short statement Wednesday evening that had few details."Braniff Inc. began canceling selected flights at 2:45 p.m. (EDT) today. Some additional flights will be canceled later tonight," the statement said. "The company will issue a statement regarding the reasons for these cancellations and future plans later today."As of 12:30 a.m. the carrier

Let's consider this reasoning as applied to the earlier repossession of your leased car during your vacation drive along Highway 1 in California.

For example, you want to lease a car for 14 days from Karless Enterprises.

- Would you waste time negotiating or reviewing whether the rental allowed you 100 miles per day or 150 miles per day, when Karless failed to disclaim that Bank of Carmerica may repossess the car on the 7th day for Karless' failure to pay its loan?
- If you were traveling Highway 1 on the California coast, would you really risk being stopped half-way to your destination by a repossession?
- Couldn't Carmerica Bank find your car at a motel and, while exercising self-help repossession, drive off?
- Would your family accept an explanation that the warranty of non-infringement was disclaimed in all upper case letters and you thought it had something to do with patents and you're not an IP lawyer?
- What if Carmerica Bank exercised self-help repossession and took the car with all your luggage in it?[118] How do you get your luggage back, when you don't know who took the car, why, or where it is, and Karless is not answering its phones?
- Does Carmerica Bank have an obligation to look for your rental contract with your name on it?
    - Why? Carmerica Bank knows it has a security interest in the car (there's a decal that says "Karless" and your lease agreement, whatever its terms is subject to Carmerica Bank's security agreement.
    - Even if Carmerica Bank had a duty to notify you of the repossession, how would it find you?
- What obligations would Carmerica have to protect your luggage? Look for luggage tags with your name and your address?
- What if your luggage is unlabeled?
- What is Carmerica Bank's obligations?
    - Take the luggage out of the car and stack it carefully on the side of the road?
    - If there's a label, write you and tell you where you can pick it up?
    - Tell you to pick up your luggage at a storage facility in New Jersey or New Delhi?

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had not provided further details. To some longtime Braniff workers, the airline's suspension of service seemed like a replay of 1982 when then Braniff Airways stopped flying and filed for Chapter 11 bankruptcy, which provides a company with protection from creditors while it reorganizes its finances. It was the first casualty of the U.S. airline industry, which was in the throes of deregulation.'

118 The handling of your luggage in the repossession is a focus of a later discussion.

Resolution of these relatively simple questions in the context of a a car lease are mostly hypothetical. Resolution in the context of a client's or your relationship with a Cloud provider, after an unexpected closure, could create a disaster for your client.

B. Does lessor's failure to properly notify lessee the warranty of quiet possession may not be met taint subsequent lease negotiations?

If the minimum elements for a lease agreement as suggested by the Official Commentary cannot be met, then is "everything" that follows tainted? As a practical matter, other negotiations are slanted to the lessor's position, because this most crucial element is undisclosed, and this element may draw the most intense bargaining. Does inadequate disclosure or failure to disclose taint other disclaimers or is each provision to be examined on its own?

The Cloud provider knows the property holding the data (the servers) have valid claims from many entities. The Cloud provider has basic, critical knowledge denied the Cloud customer. The Cloud provider has the advantage in knowing whether the leased equipment is security for a loan. The Cloud customer has no way to evaluate the risk taken, ***unless the disclaimer was appropriately made***.

If we return to the original hypothetical situation involving a leased vehicle repossed by a lien holder, the lessee may have accepted the risk of having the inconvenience of the car being repossessed. As compensation for this risk, however, the lessee may have negotiated for a greater maximum mileage to reduce charges, or for a lower price for the lease.[119] There is no way to know how the negotiations would have developed, if changed at all, if there would have been a comprehensible and full disclosure.

The lessor apparently receives a benefit from deceiving the lessee on an issue the Official Committee declared was "[i]nherent in the nature [of the contract] . . . for protection greater than that afforded to the buyer." Failing to appropriately disclaim allows the lessor to take a risk of whether or not its payments to the financing entity which has a security interest in the rented car will be timely. If the risk does not fall through then the lessor's risk wins. If lessor's failure does occur with a subsequent repossession, then the lessee-customer faces all the difficulties without any opportunity to have bargained for a benefit in exchange for accepting a possibly remote, but otherwise catastrophic risk placing the whole vacation in jeopardy.

The lessee-customer's risk becomes extant when the financing entity exercises its right in the security interest. At that time, the lessee's chances of recovery against the lessor are at the lowest: the lessor already has failed to honor its financial obligations, otherwise, the security interest holder would not be repossessing the collateral. As a practical matter, in a suit for damages over the breach of § 2A.214, if successful, the lessee's recovery of any damage award is unlikely. The lessor had no cash to pay its debt, and the lessor's equipment (assets) have been repossessed. The failure may

119 A greater, included daily mileage allows the trip to be completed sooner, thereby reducing risk. An 800 mile trip at 100 miles per day can be completed in 8 days, while if the allotment was 150 miles per day, the trip could take as little as 5 days. The risk is significantly reduced.

prevent the business plan's resurrection with a debtor-in-possession or appointment of a state receiver or federal bankruptcy trustee.

The only Texas case citing this section of the U.C.C. occurred in 2005 as an adversary proceeding in bankruptcy court.[120] The security interest owner J & S was plaintiff. Both lessor and lessee were the defendants. Defendant-lessor HBO (unrelated to the cable channel) leased a generator to defendant-lessee hospital Pan-American.

In this case, plaintiff-owner J&S gave notice to defendant-lessee Pan-American General and successfully prosecuted its conversion claim (for the value of the generator at the time of receipt of notice of J&S's demand for return) and interest from the date of the demand until the date of entry of court's judgment in the adversary proceeding.

The defendant Pan American General did not return the leased generator when it received notice directly from plaintiff J & S. J & S also provided notice to defendant-lessor HBO. No person representing defendant-lessor HBO appeared at the trial, nor did HBO have counsel present at trial. While the court ordered defendant lessee Pan-American judgment against co-defendant HBO, it seems unlikely collection efforts would succeed.

There was no indemnification provision in the contract between Pan-American and HBO. The defendant-lessee and cross-plaintiff Pan-American was unable to prevail on any indemnification theory in its claim against defendant-lessor. The defendant-lessee Pan-American General prevailed on its liability claim through defendant-lessor HBO's breach of § 2A.214. It is unknown if lessee Pan-American General would have attempted to negotiate an indemnification agreement if it were aware that lessor HBO did not have title to the leased equipment.

The lessee is at a disadvantage in these instances, since indemnification agreements must be negotiated clauses in contracts, and the comparative liability statues take precedence over claims among joint-tortfeasors. Lessees often do not have a full understanding of the risks. In this case, the breach of § 2A.214, was the basis for award to lessee Pan-American General against HBO. From the record, there is no discussion regarding claims lessor HBO had against lessee Pan American.

XXII. Data characterization invokes both optional and mandatory security protections for data in the Cloud and data destruction procedures.

A. Any business may have proprietary or confidential information, or other categories of information optionally requiring protection.

When a Cloud provider holds data, any business has several categories of concern regarding security. Some of these security levels are optional based upon the businesses' internal

120 In Re Pan American General Hospital,

policies and operational procedures, while others may be created as a result of state or federal law. The following table includes some, but not all examples of types of categories of information, examples within categories, and whether the security level is mandated or optional:

Category of Information	Examples of Protected Information	Origin or Statutory References
Proprietary	• Customer lists • Pricing • Vendor lists • Nonpublic information	Created by a business
Trade Secrets	Identified and accompanied by special notice and protection a trade secret (includes): • Customer lists • Pricing • Vendor lists • Nonpublic information • Formula for Coca-Cola[121]	Created and protected by a business through the use of special procedures.

121 Historically, the formula for Coca-Cola has been called a “trade secret,” but recent technology and analysis indicates the formula has been reversed-engineered, and since the information is no longer secret, the formula is no longer a “trade secret.” This anecdote served to show the advantages of treating the formula as a trade secret.

Category of Information	Examples of Protected Information	Origin or Statutory References
HIPAA (Health Information Portability and Accountability Act[122])	Personal health information controlled by "covered entities"[123]: • Health plans • Health care providers • Health care clearinghouses[124]	Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191 1996.
"Personal Identifying Information" according to § 521.002. There is another definition of "Personal Identifying Information," but with a different criteria in another section of the TEX. BUS. & COM. CODE.	(A) name, social security number, date of birth, or government-issued identification number; (B) mother's maiden name; (C) unique biometric data, including the individual's fingerprint, voice print, or retina or iris image; (D) unique electronic identification number, address, or routing code; and, telecommunication access device as defined by Section 32.51, Penal Code.	Texas Bus. & Com. Code § 521.002

122 Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191 1996.

123 Covered entities are defined within the statute at

124 U.S. Department of Health and Human Services, Health Information Privacy, For Consumers, "Your Health Information Is Protected by Federal Law," Who Must Follow These Laws, http://www.hhs.gov/ocr/privacy/hipaa/understanding/consumers/index.html

Category of Information	Examples of Protected Information	Origin or Statutory References
"Personal Identifying Information" but defined differently than above referencing Tex. Bus. & Com. Code § 72.001 instead of Code § 521.002; Section 72.001 adds debit and credit card information, as well as, a "financial institution account number or any other financial information."[125]	An individual's first name or initial and last name in combination with one or more of the following: (A) Date of birth; (B) Social security number or other govern-issued identification number; (C) Mother's maiden name; (D) Unique barometric data, including the individual's fingerprint, voice data, or retina or iris image; (E) Unique electronic identification number, address, or routing code; (F) Telecommunication access device as defined by Section 32.51, Penal Code, including debit or credit card information; or (G) Financial institution account number or any other financial information.	Texas Bus. & Com. Code § 72.001

125 The use of "financial institution account number or any other financial information" is vague. An account number could be a loan or mortgage number, which seems reasonable. Any other financial information is so broad as to include the names of retail stores with which you have charge accounts, the limits of the various credit accounts you have, and even your credit score which is expressed as a single number.

Category of Information	Examples of Protected Information	Origin or Statutory References
"Sensitive Personal Information" a state statutorily created category of protected information.	(A) An individual's first name or first initial and last name in combination with any one or more of the following items, if the name and the items are not encrypted: (i) Social security number; (ii) Driver's license number or government-issued identification number; or (iii) Account number or credit or debit card number in combination with any required security code, access code, or password that would permit access to an individual's financial account; or (B) information that identifies an individual and relates to: (i) The physical or mental health or condition of the individual; (ii) The provision of health care to the individual; or (iii) Payment for the provision of health care to the individual. Sensitive Personal Information for this chapter does not include publicly available information. that is lawfully made available to the public from the federal government or a state or local government.[126]	Texas Bus. & Com. Code § 521.002(a)(2) and (b)

126 Texas Bus. & Com. Code § 521.002(a)(2) and (b)

Once you determine at one time possessed statutorily protected information, you must then determine the applicability of the statutes and whether you may take advantage of safe harbors for the precautions the information requires.

The use of the term "possess" is relevant because some statutes provide precise instructions for destruction of document or digital data.[127] You may have possessed information, but according to the Cloud contracting arrangements, you may not be able to state you ***control*** the data.

- If you do not possess the record, how can you be assured it is modified in accordance with statutory requirements?
- If, as an attorney, your Cloud provider does not offer a warranty regarding the destruction of data you "delete" from your files in the Cloud, then how can you represent the data has been deleted in accordance with either statutory or ethical provisions?
- If a nonprofessional company utilizes a Cloud for data storage, then how can it be sure Personal Identifying Information or Sensitive Personal Information has been destroyed in accordance with applicable state law.

There is no definition of a business record. A business record could be one file containing statutorily protected information on several customers of a business or one customer's record. There is no legislative history regarding the interpretation of "business record."

B. Professional firm liabilities: Business regulations combined with ethical responsibilities create the perfect target—whether lawyer or accountant.

Beyond these information categories any business is obligated to investigate, attorneys also have an ethical responsibility regarding confidential and privileged information. These ethical standards are established by each licensing state's laws and regulations. The special responsibilities and liabilities for compliance for attorneys and other professionals will be discussed in the following sections.

Some Cloud provider contracts with business Cloud customers include representations the cloud customer is acting as an agent for other companies and the Cloud customer has authority for entering into the agreement. This provision may create a liability for the professional that places a client's data in the Cloud.

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127 TEX. BUS.& COM. CODE § 72.004 requires that disposition of a business "record" [where record is not defined] requires the personal identifying information of a customer of the business to be modified by shredding, erasing, or other means so the personal identifying information is unreadable or undecipherable.

If there is a breach of a client's data, stored at a law firm or an accounting firm, what liabilities may exist? In Texas, claims of breach of fiduciary duty require something more than the usual attorney-client privilege.

In contrast, other states such as West Virginia, a breach of a state's ethics provisions enables a cause of action for damages, independent of any claim for professional negligence (Texas terminology) or profssional malpractice (terminology in most other states).

In Re Markham involved 2 West Virginia law firms. This case is discussed extensively in this author's paper "Sex, Lies, and the Internet."[128] In summation, one law firm's associate breached his wife's law firm's email accounts. The wife's firm sued the husband for damages from the disclosure of the breach. These damages included the cost of the wife's former firm's marketing program. The damages were denied in this instance, but otherwise would have been recoverable.

If there had been a breach of a client's data while stored at a law firm's Cloud provider, the firm's damages could include data breach notification of the effected parties. If the notification included financial records, then the costs of credit card cancellations and the cost to issue new credit cards may be additional elements of the damages claim against the professional.

XXIII. Conclusion.

Your client's or your decision to outsource some or any IT obligations is a critical choice with immense consequences for ordinary or professional business liability. The greater your client's or your firm's enterprise, then the more complex the decision.

In no event should technology decisions be left to only to IT professionals. This derogation of technology to technicians disregards an enterprise's business and professional interests, and government interests in the relationships between an enter

An IT department would not necessarily appreciate the nuances of the legal ramifications associated with an outsourcing choice. These issues include, but are not limited to the following:

- Data breach notification laws, different in each of the 46 states with such laws;
- Data preservation and destruction requirements of each state;
- Client privilege and confidentiality requirements depending upon whether your firm has offices in multiple states or jurisdictions;
- General liability, professional liability, and directors' and officers' liability coverages;
- Federal or state enforcement of civil liabilities for matters ranging from violation of securities laws to violations of state privacy laws and the

128 Joseph Jacobson, "Sex, Lies, and the Internet," State Bar of Texas Annual Meeting, June 2009.

handling of “personal identifying information” or “sensitive personal information,” or biometric data;
- An appreciation of the consequences of failure to access data;
- The potential for data to come under the control of a third party without the obligations of those originally in contract privity with either your client or your firm;
- The liability limitations insulating those third parties, ***unless*** the third parties are brought into the negotiations at the beginning of the process and agree to some protections for your client’s or your data;

Appendix: Texas Supreme Court Professionalism Committee Opinion 572


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LEGAL ETHICS
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Opinion 572
June 2006
QUESTION PRESENTED
Under the Texas Disciplinary Rules of Professional Conduct, may a lawyer, without the express consent of a client, deliver material containing privileged information of the client to an independent contractor, such as a copy service, hired by the lawyer to perform services in connection with the lawyer's representation of the client?
STATEMENT OF FACTS
In connection with a lawyer's representation of a client, the lawyer hires an independently owned and operated copy service to copy documents, some of which contain information of the client protected by the lawyer-client privilege.
DISCUSSION
Rule 1.05 of the Texas Disciplinary Rules of Professional Conduct governs the disclosure of confidential information of a client. The following portions of Rule 1.05 apply to the situation here considered:
"(a) 'Confidential information' includes both 'privileged information' and 'unprivileged client information.' 'Privileged information' refers to the information of a client protected by the lawyer- client privilege of Rule 5.03 of the Texas Rules of Evidence or of Rule 5.03 of the Texas Rules of Criminal Evidence or by the principles of attorney-client privilege governed by Rule 5.01 of the Federal Rules of Evidence for United States Courts and Magistrates. 'Unprivileged client information' means all information relating to a client or furnished by the client, other than privileged information, acquired by the lawyer during the course of or by reason of the representation of the client.
(b) Except as permitted by paragraphs (c) and (d), or as required by paragraphs (e), and (f), a lawyer shall not knowingly:
(1) Reveal confidential information of a client or a former client to:
(i) a person that the client has instructed is not to receive the information; or
(ii) anyone else, other than the client, the client's representatives, or the members, associates, or employees of the lawyer's law firm.
(c) A lawyer may reveal confidential information:
(1) When the lawyer has been expressly authorized to do so in order to carry out the representation. ...."
Rule 1.05(d) also allows a lawyer to disclose unprivileged information when impliedly authorized by the client or when the lawyer has reason to believe that disclosure of such information is necessary to carry out the representation effectively.
The Committee is of the opinion that a lawyer's delivery of materials containing privileged information to an independent contractor providing a service, such as copying, to facilitate the lawyer's representation of a client (and not for the purpose of disclosing information to others) does not constitute "revealing" such privileged information within the meaning of Rule 1.05, provided that the lawyer reasonably expects that the independent contractor will not disclose or use such items or their contents except as directed by the lawyer and will otherwise respect the confidential character of the information. In these circumstances, the independent contractor owes a duty of confidentiality both to the lawyer and to the lawyer's client. See generally Restatement (Second) of Agency sections 5, 395, 428 (American Law Institute 1958).
The Committee's view is based in part on the general law of privilege, which recognizes that more than physical delivery of items containing privileged information is required before such information is deemed to have been "revealed" or "disclosed" and the privilege is deemed to have been waived. See Compulit v. Bantec, Inc., 177 F.R.D. 410 (W.D. Mich. 1997) (lawyer-client privilege is not lost if a law firm hires an independent contractor to provide a necessary service that the law firm believes it needs in order to effectively represent its clients).
The Committee's view is also consistent with Comment f to Section 60 of the Restatement (Third) of the Law Governing Lawyers (American Law Institute 2000), which provides that a lawyer has authority to disclose confidential client information to "independent contractors who assist in the representation, such as investigators, lawyers in other firms, prospective expert witnesses, and public courier companies and photocopy shops, to the extent reasonably appropriate in the client's behalf ...."
The Committee therefore concludes that, unless the client has instructed otherwise, a lawyer may deliver materials containing information subject to the lawyer-client privilege to an independent contractor hired by the lawyer to provide a service to the lawyer in furtherance of the lawyer's representation of the client without the express consent of the client if the lawyer reasonably expects that the independent contractor will not disclose or use materials or their contents except as directed by the lawyer. Although the lawyer's expectations as to the independent contractor's confidential treatment of the materials could be based on the reputation of, or the lawyer's prior experiences in dealing with, the independent contractor, a good basis for such expectations would normally be a written agreement between the lawyer and the independent contractor as to the confidential treatment required for materials provided by the lawyer to the independent contractor.
CONCLUSION
Under the Texas Disciplinary Rules of Professional Conduct, unless the client has instructed otherwise, a lawyer may deliver materials containing privileged information to an independent contractor, such as a copy service, hired by the lawyer in the furtherance of the lawyer's representation of the client if the lawyer reasonably expects that the confidential character of the information will be respected by the independent contractor.
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Your Email Address
SIGN UP
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Site Map
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Appendix: Syncplicity Terms of Service
PRODUCTS
BUSINESS EDITION

http://syncplicity.com/legal/terms-of-service
Syncplicity by EMC
Terms of Service
PRODUCTS
BUSINESS EDITION

Please read the following terms and conditions carefully. Syncplicity LLC, a wholly owned subsidiary of EMC Corporation, ("Syncplicity") provides the Syncplicity website located at www.syncplicity.com (the "Site") and the related services through which users can use and access Sync Files (defined below), offline and online, through multiple devices and websites ("Services"). These Syncplicity Terms of Service ("Terms of Service") and all policies referenced in this document or elsewhere on the Site which are incorporated herein by reference are a legal agreement between you and Syncplicity and apply to you whether you are a visitor to the Site or a business or individual user who has registered with us and created a Syncplicity account ("Syncplicity User" or “User”).
YOU UNDERSTAND THAT BY CLICKING THE “SIGN UP” BUTTON, BY USING THE SITE, SERVICES OR YOUR SYNCPLICITY ACCOUNT OR BY ACCESSING ANY SYNC FILES OR USER FILES YOU OR THE BUSINESS YOU REPRESENT ARE UNCONDITIONALLY AGREEING TO BE BOUND BY THESE TERMS OF SERVICE. IF YOU DO NOT ACCEPT THESE TERMS OF SERVICE IN THEIR ENTIRETY, YOU MAY NOT ACCESS OR USE SITE OR THE SERVICES. IF YOU AGREE TO THESE TERMS OF SERVICE ON BEHALF OF A BUSINESS, YOU REPRESENT AND WARRANT THAT YOU HAVE THE AUTHORITY TO BIND THAT BUSINESS AND ALL OF ITS USERS TO THESE TERMS OF SERVICE AND YOUR AGREEMENT TO THESE TERMS WILL BE TREATED AS THE AGREEMENT OF THE BUSINESS. IN THAT EVENT, “YOU” AND “YOUR” REFER HEREIN TO THAT BUSINESS.

I. ACCESSING YOUR COMPUTER, SYNCPLICITY FOLDERS AND THIRD PARTY ACCOUNTS

YOU ACKNOWLEDGE AND AGREE THAT BY UTILIZING THE SITE, SERVICES AND/OR SYNC FILES, TO PROVIDE YOU WITH THE SERVICES YOU CONSENT TO SYNCPLICITY ACCESSING AND/OR SCANNING (I) YOUR COMPUTER AND/OR ANY FILES, DATA OR INFORMATION THEREIN AND (II) ANY FILES OR CONTENT LINKED TO AS A RESULT OF YOUR ADDITION OF THIRD PARTY ACCOUNTS OR APPLICATIONS TO YOUR ACCOUNT PROFILE (“THIRD PARTY APPLICATION”). IN THE EVENT THAT YOU CHOOSE CERTAIN SETTINGS (INCLUDING THE SELECTION OF “SYNCPLICITY FOLDERS”) IN YOUR ACCOUNT PREFERENCES YOU CONSENT TO PROVIDING OTHER SYNCPLICITY USERS ACCESS TO THE SYNC FILES YOU INDICATE.

II. REGISTRATION.

In order to access certain features of the Site and Services, you must create a Syncplicity account and become a registered Syncplicity User. To become a registered Syncplicity User you must be at least 18 years of age. When you register you will be asked to choose a username and a password. You are responsible for safeguarding your password and you agree not to disclose your password to any third party. You agree that you will be solely responsible for any activities or actions taken under your

password, whether or not you have authorized such activities or actions. You will immediately notify Syncplicity of any unauthorized use of your password. You agree that the information that you provide to us upon registration, and at all other times will be true, accurate, current and complete. Our Privacy Policy (http://www.syncplicity.com/Legal/privacy-policy.html) contains information about our policies and procedures regarding the collection and use of personal information we receive from Users of the Services. If you are a business User, your business may not (i) register for more than one Services account (e.g., all additional Users above the initial Base Package (as described on the Site) must be treated as add-on Users to the original account as opposed to additional Base Package Users under new or separate accounts), or (ii) register for more than one trial period with respect to the Services.
As a Syncplicity User you consent to the use of: (a) electronic means to complete these Terms of Service and to provide you with any notices given pursuant to these Terms of Service; and (b) electronic records to store information related to these Terms of Service, your use of the Site and Services or your submission of Sync Files.

III. MODIFICATION OF THE SITE OR TERMS OF SERVICE

Syncplicity reserves the right in its sole discretion, at any time, to modify, discontinue or terminate the Site or Services or to modify or terminate these Terms of Service in accordance with the terms herein. Modifications to these Terms of Service or any policies will be posted on the Site or made in compliance with any notice requirements set forth in these Terms of Service. If any modification is not acceptable to you, your only recourse is to cease using the Site and Services. By continuing to use the Site or Services after Syncplicity has posted any modifications to the Terms of Service on the Site or provided any required notices, you accept and agree to be bound by the modifications.

IV. CERTAIN DEFINITIONS

- “Sync Files” or “User Files” means the information contained in the files that you or other users sync, back up, upload, download, access or otherwise organize or manage (including that related to other online services or applications) through the Site and Services.
- Syncplicity Content” means, collectively, the text, data, graphics, images, Syncplicity trademarks and logos and other content made available through the Site and Services, excluding Sync Files.

V. SYNC FILES; THIRD PARTY APPLICATIONS

While you retain all rights in any Sync Files, by using Site or Services, you hereby grant to Syncplicity a non-exclusive, worldwide, royalty-free, sublicensable, perpetual and irrevocable right and license to use such Sync Files as necessary to provide you with the Services. In addition, you hereby grant all other Syncplicity Users who you invite to access the Sync Files you indicate a non-exclusive, worldwide, royalty-free, sublicensable, perpetual and irrevocable right and license to use such Sync Files. You represent and warrant that you own or have the necessary licenses, rights, consents and permissions to grant the foregoing licenses to Syncplicity. You acknowledge and agree that your use of the Site and Services will comply with our Copyright and IP Policy as set forth in the section below titled “Copyrighted Materials: No Infringing Use”
You acknowledge and agree that Syncplicity may, at its option, establish limits concerning Sync Files, including, without limitation, the maximum number of days that Sync Files will remain available via

the Services or on the Site, the maximum size of any files that may be stored on or uploaded to the Site or Services and the maximum disk space that may be allotted to you for the storage of Sync Files on Syncplicity's servers. You agree to fully comply with all such limits established by Syncplicity from time to time. Further, in no event may your monthly bandwidth utilization exceed two times your allotted storage under your currently applicable Service plan. Syncplicity will have no responsibility or liability for maintaining copies of Sync Files on our servers, and you are solely responsible for creating back-ups of your Sync Files outside of your use of the Site and Services for such purposes.
To the extent you or Users under your account choose to link Third Party Applications to the Service account, you acknowledge and agree that Syncplicity has no control over (and you assume all risk arising from) the acts, omissions or policies or such Third Party Applications and that Syncplicity shall have no obligation or liability with respect thereto in any respect.

a. Disclaimer

You acknowledge that Syncplicity does not have any obligation to monitor the Site, Syncplicity Content, User Files or User Posts (defined below) for any purpose, but has the right to do so for the purpose of operating the Site and the Services, to ensure users' compliance with these Terms of Service, or to comply with applicable law or the order or requirement of a court, administrative agency or other governmental body.
Notwithstanding the foregoing, Syncplicity is not responsible for the accuracy, completeness, appropriateness, legality or applicability of User Files or anything said, depicted or written by users in their User Posts, including without limitation, any information obtained by using the Site or Services. Syncplicity does not endorse anything contained in User Files or User Posts or any opinion, recommendation or advice expressed therein and you agree to waive, and hereby do waive, any legal or equitable rights or remedies you have or may have against Syncplicity with respect thereto.
You acknowledge and agree that you should not rely on the Site, Syncplicity Content, Services and Sync Files for any reason. You further acknowledge and agree that you are solely responsible for maintaining and protecting all data and information that is stored, retrieved or otherwise processed by the Site, Syncplicity Content, or Services. Without limiting the foregoing, you will be responsible for all costs and expenses required to backup and restore any data and information that is lost or corrupted as a result of your use of the Site, Syncplicity Content, Services and/or Sync Files.
Syncplicity will have the right to investigate and prosecute violations of these Terms of Service, including intellectual property rights infringement and Site security issues, to the fullest extent of the law. Syncplicity may involve and cooperate with law enforcement authorities in prosecuting users who violate these Terms of Service.

VI. SYNCPLICITY CONTENT AND FEEDBACK

Syncplicity and its licensors own all right, title and interest, including all worldwide intellectual property rights in the Site, Services, Syncplicity Content and any other content made available through the Site or Services contained therein, other than your Sync Files. You will not remove, alter or conceal any copyright, trademark, service mark or other proprietary rights notices incorporated in or accompanying the Site, Services, Syncplicity Content, any other content made available through the Site or Services or related products and services, and except as explicitly described herein, you will not reproduce, modify, adapt, prepare derivative works based on, perform, display, publish, distribute,

transmit, broadcast, sell, license or otherwise exploit the Site, Services, Syncplicity Content or any other content made available through the Site or Services (other than your Sync Files).
All feedback, comments, and suggestions for improvements (the "Feedback") that you provide to Syncplicity, in any form, and any contributions you make to the Site by posting Syncplicity Content and communicating with other Syncplicity Users via posts to forums on the site ("User Posts") will be the sole and exclusive property of Syncplicity. You hereby irrevocably transfer and assign to Syncplicity and agree to irrevocably assign and transfer to Syncplicity all of your right, title, and interest in and to all of your Feedback and User Posts, including all worldwide patent rights (including patent applications and disclosures), copyright rights, trade secret rights, and other intellectual property rights therein. At Syncplicity's request and expense, you will execute documents and take such further acts as Syncplicity may reasonably request to assist Syncplicity in acquiring, perfecting and maintaining its intellectual property rights and other legal protections for your Feedback and User Posts. If any such rights in Feedback or User Posts are not assignable to Syncplicity for any reason, you hereby grant to Syncplicity and its successors a non-exclusive, worldwide, royalty-free, fully paid, sublicensable, perpetual and irrevocable right and license to fully exercise all intellectual property rights related to such Feedback and User Posts in connection with its business. You will not earn or acquire any rights or licenses in the Site, Syncplicity Content, and Services or in any Syncplicity intellectual property rights on account of these Terms of Service or your performance under these Terms of Service.

VII. USER CONDUCT

The Site and Services may be used and accessed for lawful purposes only. You agree to abide by all applicable local, state, national and foreign laws and regulations in connection with your use of the Site and Services. In addition, without limitation, you agree that you will not do any of the following while using or accessing the Site, Services, Syncplicity Content or Sync Files:

1. Post, publish or transmit any text, graphics, or material that: (i) is false or misleading; (ii) is defamatory; (iii) invades another's privacy; (iv) is obscene, pornographic, or offensive; (v) promotes bigotry, racism, hatred or harm against any individual or group; (vi) infringes, violates or misappropriates another's rights, including any intellectual property rights; or (vii) violates, or encourages any conduct that would violate, any applicable law or regulation or would give rise to civil liability;
2. Access, tamper with, or use non-public areas of the Site (including but not limited to user folders not designated as 'public'), Syncplicity's computer systems, or the technical delivery systems of Syncplicity's providers;
3. Attempt to probe, scan, or test the vulnerability of any system or network or breach any security or authentication measures;
4. Attempt to access or search the Site, Syncplicity Content, Services or User Files with any engine, software, tool, agent, device or mechanism other than the software and/or search agents provided by Syncplicity or other generally available third-party web browsers (such as Microsoft Internet Explorer or Mozilla Firefox), including but not limited to browser automation tools.
5. Send unsolicited email, junk mail, "spam," or chain letters, or promotions or advertisements for products or services;

6. Forge any TCP/IP packet header or any part of the header information in any email or newsgroup posting, or in any way use the Site, Syncplicity Content, Services or User Files to send altered, deceptive or false source-identifying information;
7. Attempt to decipher, decompile, disassemble or reverse engineer any of the software used to provide the Site, Syncplicity Content, Services or User Files;
8. Interfere with, or attempt to interfere with, the access of any user, host or network, including, without limitation, sending a virus, overloading, flooding, spamming, or mail-bombing the Site; or plant malware on Syncplicity's computer system, those systems of Syncplicity's providers, or otherwise use the Site, Syncplicity Content, Services or User Files to attempt to distribute malware;
9. Impersonate or misrepresent your affiliation with any person or entity;
10. Encourage or authorize any third party to engage in any of the forgoing prohibited activities.

VIII. COPYRIGHTED MATERIALS: NO INFRINGING USE

You will not use the Site or Services to offer, display, distribute, transmit, route, provide connections to or store any material that infringes copyrighted works or otherwise violates or promotes the violation of the intellectual property rights of any third party. Syncplicity has adopted and implemented a policy that provides for the termination in appropriate circumstances of the accounts of users who repeatedly infringe or are believed to be or are charged with repeatedly infringing the rights of copyright holders. Please see the Syncplicity Copyright and IP Policy (http://www.syncplicity.com/legal/) for further information.

IX. SYNCPLICITY PROMOTIONS.

Syncplicity may operate sweepstakes, contests and similar promotions (collectively, "Promotions") through the Site. You should carefully review the rules (e.g., the "Official Rules") of each Promotion in which you participate through the Site, as they may contain additional important information about Syncplicity's rights to and ownership of the submissions you make as part of the Promotions and as a result of your participation in such Promotion. To the extent that the terms and conditions of such Official Rules conflict with these Terms of Service, the terms and conditions of such Official Rules will control.

X. LINKS TO THIRD PARTY SITES

The Site may contain links to third-party websites or resources. You acknowledge and agree that Syncplicity is not responsible or liable for: (i) the availability or accuracy of such websites or resources; or (ii) the Syncplicity Content, products, or services on or available from such websites or resources. Links to such websites or resources do not imply any endorsement by Syncplicity of such websites or resources or the Syncplicity Content, products, or services available from such websites or resources. You acknowledge sole responsibility for and assume all risk arising from your use of any such websites or resources.

XI. USE OF THE SITE AT YOUR OWN RISK

Your access to and use of the Site, Syncplicity Content, Services, Sync Files and User Files is at your own risk. Syncplicity will have no responsibility for any harm to your computer system, loss of data,

or other harm that results from your access to or use of the Site, Syncplicity Content, Services, Sync Files or User Files

XII. SYNCPLICITY IS AVAILABLE "AS-IS"

THE SITE, SYNCPLICITY CONTENT, SERVICES, SYNC FILES OR USER FILES ARE PROVIDED "AS IS", WITHOUT WARRANTY OR CONDITION OF ANY KIND, EITHER EXPRESS OR IMPLIED. WITHOUT LIMITING THE FOREGOING, SYNCPLICITY EXPLICITLY DISCLAIMS ANY WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE OR NON-INFRINGEMENT AND ANY WARRANTIES ARISING OUT OF COURSE OF DEALING OR USAGE OF TRADE.

SYNCPLICITY MAKES NO WARRANTY THAT THE SITE, SYNCPLICITY CONTENT, SERVICES, SYNC FILES OR USER FILES WILL MEET YOUR REQUIREMENTS OR BE AVAILABLE ON AN UNINTERRUPTED, SECURE, OR ERROR-FREE BASIS. SYNCPLICITY MAKES NO WARRANTY REGARDING THE QUALITY OF ANY PRODUCTS, SERVICES, OR INFORMATION PURCHASED OR OBTAINED THROUGH THE SITE, SYNCPLICITY CONTENT, OR SERVICES, OR THE ACCURACY, TIMELINESS, TRUTHFULNESS, COMPLETENESS OR RELIABILITY OF ANY INFORMATION OBTAINED THROUGH THE SITE, SYNCPLICITY CONTENT, SERVICES, SYNC FILES OR USER FILES.

NO ADVICE OR INFORMATION, WHETHER ORAL OR WRITTEN, OBTAINED FROM SYNCPLICITY OR THROUGH THE SITE, SYNCPLICITY CONTENT, SERVICES, SYNC FILES OR USER FILES, WILL CREATE ANY WARRANTY NOT EXPRESSLY MADE HEREIN. SOME STATES DO NOT ALLOW LIMITATIONS ON HOW LONG AN IMPLIED WARRANTY LASTS, SO THE ABOVE LIMITATIONS MAY NOT APPLY TO YOU.

XIII. INDEMNITY

You agree to defend, indemnify, and hold Syncplicity, its officers, directors, employees and agents, harmless from and against any claims, liabilities, damages, losses and expenses, including, without limitation, reasonable attorneys' fees and costs, arising out of or in any way connected with: (i) your access to or use of the Site, Services, Syncplicity Content, Sync Files and/or User Files; (ii) your violation of these Terms of Service; (iii) your violation of any third party right, including without limitation any intellectual property right, including but not limited to right of attribution, publicity, confidentiality, property or privacy right; or (iv) any claim that Sync Files caused damage to a third party, including without limitation claims that Sync Files are infringing.

XIV. LIMITATION OF LIABILITY

IN NO EVENT WILL SYNCPLICITY BE LIABLE TO YOU OR TO ANY THIRD PARTY FOR ANY SPECIAL, INCIDENTAL, PUNITIVE OR CONSEQUENTIAL DAMAGES OF ANY TYPE OR NATURE (INCLUDING LOSS OF USE, DATA, BUSINESS OR PROFITS) ARISING OUT OF OR IN CONNECTION WITH THESE TERMS OF SERVICE, OR FROM YOUR ACCESS TO OR USE OF, OR INABILITY TO ACCESS OR USE, THE SITE, SYNCPLICITY CONTENT, SERVICES, SYNC FILES OR USER FILES, OR FOR ANY ERROR OR DEFECT IN THE SITE, SYNCPLICITY CONTENT, SERVICES, SYNC FILES OR USER FILES, WHETHER SUCH LIABILITY ARISES FROM ANY CLAIM BASED UPON CONTRACT, WARRANTY, TORT

(INCLUDING NEGLIGENCE), STRICT LIABILITY OR OTHERWISE, OR ANY OTHER LEGAL OR EQUITABLE THEORY, WHETHER OR NOT SYNCPLICITY HAS BEEN INFORMED OF THE POSSIBILITY OF SUCH DAMAGE, EVEN IF A REMEDY SET FORTH HEREIN IS FOUND TO HAVE FAILED OF ITS ESSENTIAL PURPOSE. YOU SPECIFICALLY ACKNOWLEDGE THAT SYNCPLICITY IS NOT LIABLE FOR THE DEFAMATORY, OFFENSIVE OR ILLEGAL CONDUCT OF OTHER SYNCPLICITY USERS OR THIRD PARTIES AND THAT THE RISK OF INJURY FROM THE FOREGOING RESTS ENTIRELY WITH YOU. FURTHER, SYNCPLICITY WILL HAVE NO LIABILITY TO YOU OR TO ANY THIRD PARTY FOR ANY THIRD PARTY SYNCPLICITY CONTENT UPLOADED ONTO OR DOWNLOADED FROM THE SITE OR THROUGH THE SERVICES SYNC FILES AND/OR USER FILES, OR IF YOUR DATA IS LOST, CORRUPTED OR EXPOSED TO UNINTENDED THIRD PARTIES. IN ANY CASE, SYNCPLICITY'S AGGREGATE LIABILITY TO YOU ARISING WITH RESPECT TO THIS AGREEMENT WILL NOT EXCEED THE AMOUNT PAID BY YOU TO SYNCPLICITY IN THE SIX MONTHS PRIOR TO THE DATE THE CLAIM AROSE, OR, IF GREATER, $50. Some jurisdictions do not allow the limitation or exclusion of liability for incidental or consequential damages, so the above limitation or exclusion may not apply to you.

XV. GENERAL

a. No Assignment

You will not assign these Terms of Service or assign any rights or delegate any obligations hereunder, in whole or in part, whether voluntarily or by operation of law, without the prior written consent of Syncplicity. Any purported assignment or delegation by you without the appropriate prior written consent of Syncplicity will be null and void. Syncplicity may assign these Terms of Service or any rights hereunder without your consent.

b. Force Majeure

Syncplicity will not be liable hereunder by reason of any failure or delay in the performance of its obligations hereunder on account of events beyond its reasonable control, which may include, without limitation, denial-of-service attacks, strikes, shortages, riots, insurrection, fires, flood, storm, explosions, acts of God, war, terrorism, governmental action, labor conditions, earthquakes, material shortages, extraordinary Internet congestion or extraordinary connectivity issues experienced by major telecommunications providers, (each a "Force Majeure Event"). Upon the occurrence of a Force Majeure Event, Syncplicity will be excused from any further performance of its obligations effected by the Force Majeure Event for so long as the event continues.

c. Relationship of the Parties

For purposes of these Terms of Service, including if you create a Syncplicity account, you are not an employee or agent of Syncplicity and you will not represent that you are any of the foregoing. Each party will be independent and act independently and not as a contractor, partner, joint venturer, agent, employee or employer of the other and will not bind or attempt to bind the other to any contract. Each party will be solely responsible for their own costs and expenses incurred in the performance of their obligations under these Terms of Service, including without limitation any expenses associated with the implementation of these Terms of Service. Syncplicity shall have the right to identify your business as a user of the Services in its marketing materials.

d. Severability and Waiver

In the event that any provision in these Terms of Service is held to be invalid or unenforceable, the remaining provisions will remain in full force and effect. The failure of Syncplicity to enforce any right or provision of these Terms of Service will not be deemed a waiver of such right or provision.

e. Controlling Law and Jurisdiction

These Terms of Service and any action related thereto will be governed by the laws of the State of California without regard to its conflict of law provisions. Unless waived by Syncplicity in a particular instance, the exclusive jurisdiction and venue of any action with respect to the subject matter of these Terms of Service will be the state and federal courts located in San Francisco County, California, and each of the parties hereto waives any objection to jurisdiction and venue in such courts.

f. Notice

Any notice or other communication to be given hereunder will be in writing and given: (a) by Syncplicity via email (in each case to the address that you provide); (b) a posting on the Site; or (c) by you via email to legal@syncplicity.com or to such other addresses as Syncplicity may specify in writing. The date of receipt will be deemed the date on which such notice is transmitted.

g. Entire Agreement

These Terms of Service are the entire and exclusive agreement between Syncplicity and you regarding the Site, Syncplicity Content, Services, Sync Files and User Files, and these Terms of Service supersede and replace any prior agreements between Syncplicity and you regarding the Site, Syncplicity Content, Services, Sync Files and User Files.

h. Questions

If you have any questions about these Terms of Service, please contact Syncplicity at legal@syncplicity.com.

XVI. Fees

Please see http://www.syncplicity.com/pricing.html for the rates at which the Services can be purchased and such terms are incorporated herein by reference. Syncplicity Users can purchase the Services in a variety of ways: (i) Syncplicity Users can pay a monthly service fee for the Services ("Service Fee") and (ii) Syncplicity Users can pay a one time fee for a one-year service plan ("One-Year Service Plan Fee").

XVII. Payment

- All Service Fees are billed in advance on a monthly basis starting from the date the Syncplicity User signed up for a paid account (e.g., the date you select to move from a free plan to a paid plan). If you sign up for the Service on the last day of any particular month (recognizing that not all months have the same number of days), your billing cycle start date will be the last day of each succeeding month.
- All fees are non-refundable and non-cancelable. No prorated refunds, credits or upgrade or downgrade related refunds will be provided under any circumstances. You agree to pay Syncplicity for all charges at the prices then in effect for use of the Services by you or other persons (including, without limitation, your agents, employees or contractors) using your Syncplicity account, and you hereby authorize Syncplicity to collect fees by charging the credit

card you provide to us as part of your Syncplicity account information or otherwise, either directly or indirectly, via a third party online payment service.

- The Services may include sales tax based on the bill-to address and the sales tax rate in effect at the time your transaction is completed. You will be responsible for, and will promptly pay, all taxes and duties of any kind (including but not limited to sales, use and withholding taxes) associated with your receipt or use of the Services.
- At least fourteen (14) days prior to the end of a Syncplicity User's one-year service plan, Syncplicity Users will be sent an email message indicating when their one-year service plan will end. Once a Syncplicity User's one-year service plan is over, the one-year service plan will automatically renew for additional one-year terms (each a "Renewal Term") at the One-Year Service Plan Fee rate posted on the Site on the date the Renewal Term begins, unless the Syncplicity User provides notice of cancellation, in accordance with the section below titled "Termination or Cancellation of the Services", prior to the end of the his or her one-year service plan.

XVIII. Upgrading/Downgrading

Syncplicity Users that wish to upgrade or downgrade their service plans can do so by emailing our billing department at billing@synplicity.com. You may request an upgrade or downgrade at any time subject to the following terms and conditions:

a. Upgrading

- Monthly Service Plans – Syncplicity Users pay a prorated increase in their Service Fee for the remaining time in the billing cycle in which the upgrade is initiated.
- One-Year Service Plans – Syncplicity Users pay a prorated increase in their One-Year Service Plan Fee for the remaining time in the annual billing cycle in which the upgrade is initiated.

b. Downgrading

Syncplicity is a prepaid service. With respect to downgrades for any type of Service plan, although the adjustment in Service may happen immediately, please note that any adjustments in fees do not take effect until the next billing cycle (monthly or annual) after the downgrade is initiated. There are no refunds or credits on any amounts prepaid. Downgrading your service plan may cause loss of features or functionality. Syncplicity will not be liable to you or any third party for any downgrading and Syncplicity will have no obligation to maintain any information stored in our data centers related to your account which may become inaccessible thereafter or to forward any information to you or any third party.

XIX. TERMINATION OR CANCELLATION OF THE SERVICES

Syncplicity accounts which are unused for more than 60 consecutive days are subject to termination. In addition, Syncplicity may notify authorities or take any actions it deems appropriate, without notice to you, including immediate termination of your account, if Syncplicity suspects or determines, in its own discretion, that you may have or there is a significant risk that you have (i) failed to comply with any provision of these Terms of Service or any policies or rules established by Syncplicity; or (ii) engaged in actions relating to or in the course of using the Site or Services that may be illegal or cause liability, harm, embarrassment, harassment, abuse or disruption for you, Syncplicity Users, Syncplicity, any

other third parties or the Site or Services.
Subject to the section titled “Fees and Billing”, you may terminate your Syncplicity account at any time and for any reason. Upon any termination by a Syncplicity User, the related account will no longer be accessible.
Any suspension, termination or cancellation will not affect your obligations to Syncplicity under these Terms of Service (including, without limitation, the rights granted by you to Syncplicity, indemnification and limitation of liability), which by their sense and context are intended to survive such suspension, termination or cancellation. After any termination, you understand and acknowledge that we will have no further obligation to provide the Site or Services and all licenses and other rights granted to you by these Terms of Service will immediately cease. Syncplicity will not be liable to you or any third party for termination of the Site or Services or termination of your use of either. UPON ANY TERMINATION OR SUSPENSION, ANY CONTENT, MATERIALS OR INFORMATION (INCLUDING SYNC FILES OR SYNCPLICITY CONTENT) WHICH IS RELATED TO YOUR ACCOUNT MAY NO LONGER BE ACCESSED BY YOU. Furthermore, Syncplicity will have no obligation to maintain any information stored in our data centers related to your account or to forward any information to you or any third party.

Appendix: Iron Mountain