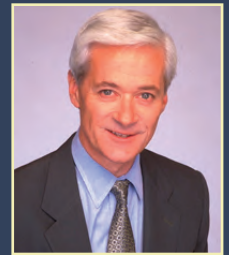


DUNN ON DAMAGES

THE ECONOMIC DAMAGES REPORT FOR LITIGATORS AND EXPERTS



ROBERT L. DUNN

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James R. Hitchner, CPA/ABV/CFF, ASA

Editor in Chief

Robert L. Dunn, J.D.

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KELLY J. TODD, CPA/ABV/CFF, CFE

Kelly J. Todd is a shareholder at Forensic/Strategic Solutions, PC, specializing in forensic accounting, fraud examination and litigation support. She has experience in financial and white-collar investigations as well as investigation and analysis of large electronic databases. Ms. Todd has conducted forensic examinations for governmental agencies, including the second largest school district in the United States, and publicly held and closely held businesses. Her experience in litigation support includes services for plaintiffs or defendants in civil proceedings.

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UNLOCKING THE POTENTIAL OF ELECTRONICALLY STORED INFORMATION IN DAMAGES CASES



KELLY J. TODD
CPA, ABV, CFF, CFE
Forensic Strategic
Solutions, PC
Birmingham, AL
kelly@
forensicstrategic.com



JEFFREY WINDHAM
JD, CFE
Forensic Strategic
Solutions, PC
Birmingham, AL
jeffrey@
forensicstrategic.com

The unsophisticated, unorganized small business is all too familiar - paper records yellowing from age, the vanilla box computer that only reads a five-inch floppy disk, and of course the green font tube monitor! However, think twice before you assume that an unsophisticated small business cannot possibly have any useful or accessible electronically stored information ("ESI"). Consider this question: does the business have any printed documents? Most of the time the answer is yes. If so, those documents were created by some form of technology that possessed potentially valuable ESI.

The quest for relevant forensic evidence in determining damages, especially lost profits, in a small business usually presents unique challenges in retrieving and utilizing ESI. In fact, many small business owners and managers, as well as their attorneys are unaware of the types of ESI available that just may be the key to their case. Persistence, creativity, and knowledge are necessary to unlock the potential of small business ESI.

Three primary challenges are often encountered with small business ESI. First, the information may be stored, entered, or utilized on archaic hardware and/or software. Second, the owner and employees may be unaware of the type and the extent of data that is present on their system. Moreover, they are often adamant that no useful ESI is available from their system because they have previously encountered extreme difficulty or even failed in trying to extract information. This leads the employees and the owner to conclude that relevant information is just not available. Third, and finally, small businesses generally have limited resources and their personnel usually do not have the expertise to

extract relevant useful data from an outdated system.

CASE STUDY

Consider the following true case example:¹ Green Fuel ("Green") was a small gasoline distributor who provided fuel to local gas stations. Green was owned by a gentleman in his late seventies. He did not use a computer and his office staff only included two office administrators, an accounting clerk, and a manager.

Green was a defendant in a state court case where numerous claims were made by Morris, a gas station owner, where Morris alleged that Green overcharged Morris for fuel delivered to Morris's two small-town gas stations during an eight year period. Morris claimed that Green failed to transact business pursuant to their contract, and as a result, Morris suffered economic damages of \$1 million dollars arising from overcharges and a failure to share profits as specified by their contract.

Under the contract between Green and Morris, Green's fuel price charges to Morris were based on the "rack price" for 87 octane fuel as published by the Oil Price Information Service, or OPIS. For its profit, Green was to receive \$.50 over the OPIS daily price and the load factor (delivery charge). The contract called for half of the \$.50 per gallon, or \$.25, to be retained as a credit to Morris as his "incentive share" of the profit. In the actual billing records, Green did not retain Morris' \$.25 profit per gallon; instead, Green simply charged Morris \$.25 less on every gallon which led Morris and his attorneys to conclude that Morris had been overcharged during the eight year period.

DOCUMENT DISCOVERY

At first blush, both parties appeared to have woefully inadequate documentation of fuel deliveries and payments. The only documentation maintained by the gas station owner, Morris, was some sparse paper receipts and logs regarding fuel delivery. Moreover, Morris' stations used unsophisticated point-of-sale cash registers and did not utilize a computer system to maintain accounting records or other records of fuel deliveries. Morris said in his deposition testimony that he relied on Green to keep detailed records of fuel orders and deliveries which allowed Green to overcharge him.

Green's documentation of fuel deliveries was only slightly better than Morris', there were few useful paper records, and Green did not maintain the daily OPIS price records. Although Green used an antiquated DOS-based computer system to maintain limited accounting records, Green's management vehemently maintained that no electronic record existed of fuel delivery or receipt of payment.

Left with such sparse information to determine losses, the attorneys for both parties were highly doubtful that any meaningful analysis of the transactions could be conducted.

"GOLD IN THE DATA MINE"—THE ESI SOLUTION

The Green case epitomizes not only the challenges faced in extracting useful forensic evidence in small business lost profit cases, but also the need for persistence in seeking ESI. Review of the parties' sparse documents revealed Green's electronically produced invoices for fuel
Continued on next page

sales to Morris, which meant that Green more than likely did have ESI available despite its claims to the contrary. The challenge for the forensic examiners became not only convincing Green that the information existed, but also helping Green and its attorneys understand how it could be retrieved.

The ESI challenge is rarely accomplished through force or the use of highly technical jargon; rather, success will come through an understanding and observation of the key personnel's daily routines. This can be accomplished with an information-seeking interview with personnel that regularly use the computer system, such as the accounting clerk or administrator. Interview questions should seek understanding of the daily routine, including the functions regularly performed, and the tools used to accomplish those functions. Observation of the performance of key functions will also aid in gaining an understanding of the computer system and the software programs used.

In the case of Green, the interview required a few hours with its accounting clerk to observe her daily routine, including the data processing of fuel deliveries, creation of computer-generated invoices, and subsequent data processing of payment receipts. At the completion of the interview, a plan was developed to extract the data from Green's archaic system, which required a multi-step process including the use of more advanced technology. A detailed discussion of the process is beyond the scope of this article, but it is sufficient to say that Green's archaic system was able to provide electronic records of the gallons of fuel delivered to Morris, the date, and the amount charged – *for all eight years*.

With the ESI extracted from Green's database, Morris' economic loss claims were analyzed using two methods:

1. As specified under the contract ("the contract method")
2. As business was actually transacted ("actual performance method")

The analysis under the contract method revealed that not only was Morris not economically damaged, but that *Morris had actually underpaid Green* in excess of \$1 million. Under the actual perform-

ance method, Morris underpaid Green in excess of \$700,000.²

CONCLUSION

Morris' claims were dealt a lethal blow by the analysis of relevant ESI. Initially, Morris' claims seemed somewhat feasible due to the lack of data by Morris and Morris' "bet" that Green would never be able to organize and analyze the data to disprove his claims. Morris had no way to prove his claims with reasonable certainty, but by using electronic data analysis, Green was able to disprove Morris' claims (without question) and actually determine that Morris owed Green.

Morris dismissed his claims against Green only two weeks after the findings were revealed to his attorneys. Green, on the other hand, did not pursue amounts found to be due by Morris under the contract.

Absent the ability to acquire Green's ESI, a manual analysis of Green's records would have been cost prohibitive, and the likelihood of a large settlement for Morris would have been substantial. This case clearly demonstrates that persistence, creativity, and ability in obtaining small business ESI is worth millions.

¹ Actual names have been changed to protect confidentiality. Any similarity to an existing person or entity is purely coincidental.

² Some of the differences result from additional claims that have not been set forth in this article. Even with the other claims, it was clear from the analysis that Morris owed Green a substantial amount, as opposed to the other way around.