Cooper&Scully

A Professional Corporation

2017 INSURANCE SYMPOSIUM
Use of Metadata in Litigation

Maryssa Simpson
Benton Williams

PANELISTS

Maryssa Simpson, Esq.

Benton Williams, Esq.

Cooper & Scully, P.C.

900 Jackson Street, Suite 100

Dallas, Texas 75201

maryssa.simpson@cooperscully.com

benton.williams@cooperscully.com

Tel. (214) 712-9500

WHAT IS METADATA?

Metadata is data that provides information about other data. In litigation, "metadata is evidence, typically stored electronically, that describes the characteristics, origins, usage, and validity of other electronic evidence."

- Source: CRAIG BALL, BEYOND DATA ABOUT DATA: THE LITIGATOR'S GUIDE TO METADATA 1 (2005).

WHAT IS METADATA?

The term refers to a vast array of different types of data, which the United States District Court for the District of Maryland has grouped into three categories in its *Suggested Protocol for Discovery of Electronically Stored Information.*

- Source: W. Lawrence Wescott II, *The Increasing Importance of Metadata in Electronic Discovery*, 14 RICH. J. L. & TECH. 10, 2-5 (2008) (citing United States District Court for the District of Maryland, *Suggested Protocol for Discovery of Electronically Stored Information*, at 25 (hereinafter *Suggested Protocol*).

CATEGORIES OF METADATA

1. <u>System Metadata:</u> data that is automatically generated from the computer and includes "author, date, and time of creation, and the date a document was modified."
2. <u>Substantive Metadata:</u> data reflecting substantive changes to a document made by a user, e.g., tracked changes.
3. <u>Embedded Metadata:</u> data entered into a document or file but not normally visible, e.g. formulas in cells in an Excel spreadsheet.

Q: WHERE IS METADATA?
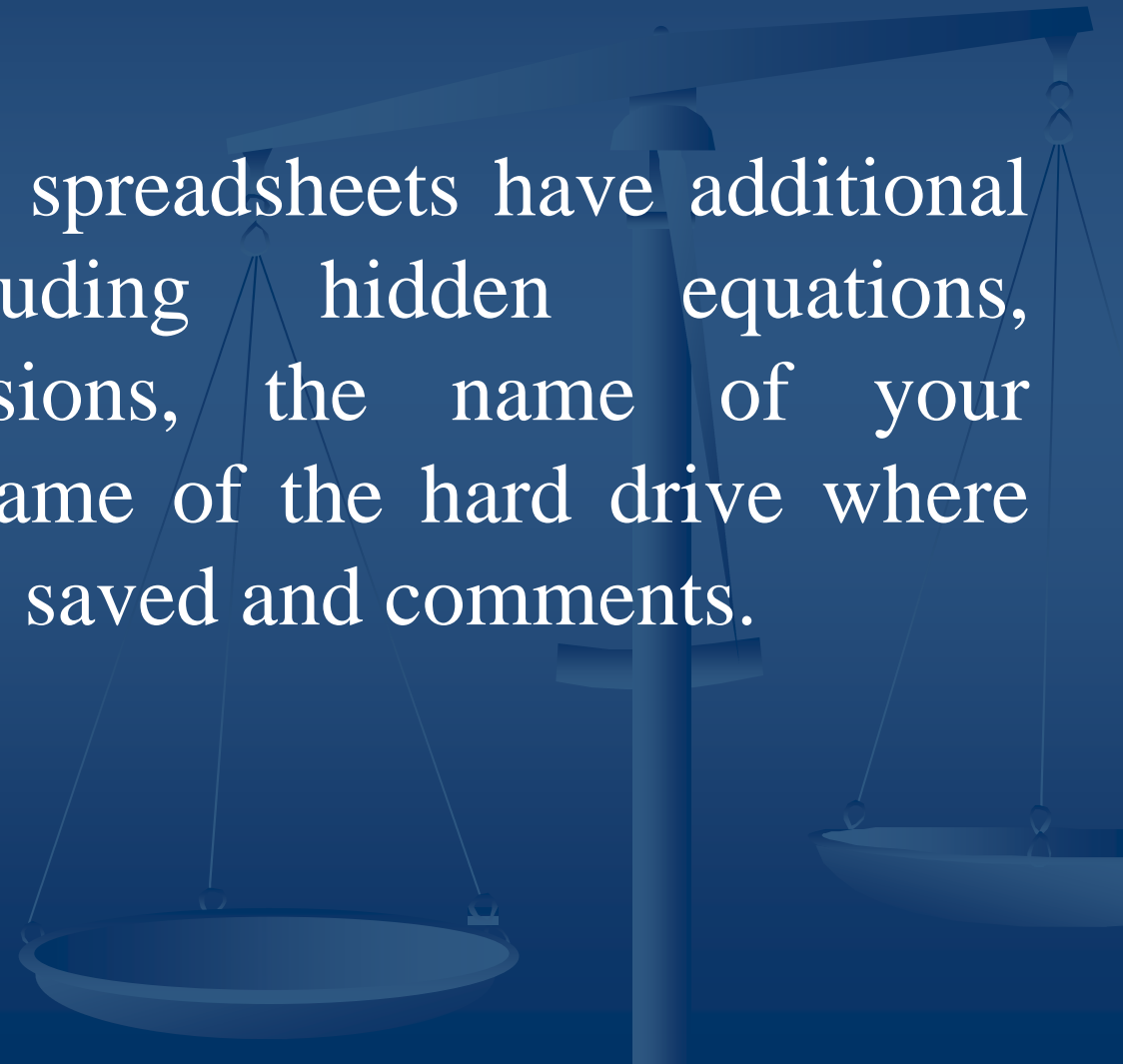
A: ALL ELECTRONIC FILES.

Metadata attaches to all electronic files, and it can be a great source of information providing the who, what, why, when, where and how information connected to a file. Different file formats have different metadata. Some metadata information is readily viewable by the user, and other metadata requires extraordinary methods to view, such as metadata retrieval software. Some metadata is embedded or encrypted.

METADATA : Microsoft Office

- Microsoft Office documents like Word and Excel contain a host of metadata. To view, open, click on "File" and then "Properties." Can also click "View" then "Markup."
- "General" tab: metadata including location of document, date of creation, last access date, and last modification date.
- "Summary" tab: metadata of title, subject, author, manager, company, category, keywords, and comments.
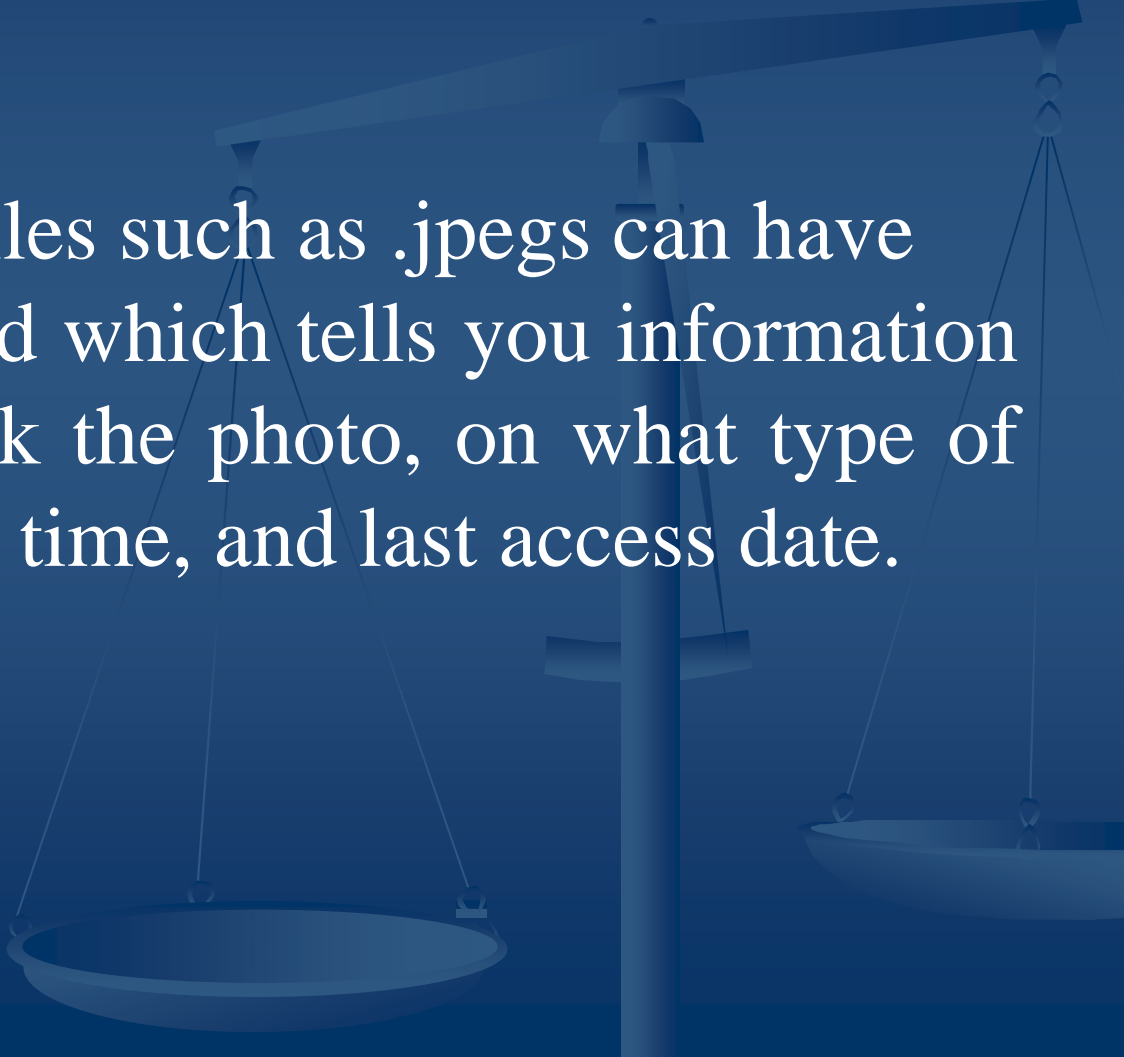
METADATA : Excel

Microsoft Excel spreadsheets have additional metadata including hidden equations, document revisions, the name of your computer, the name of the hard drive where the work book is saved and comments.

METADATA : Picture files

Certain picture files such as .jpegs can have metadata attached which tells you information such as who took the photo, on what type of camera, the date, time, and last access date.
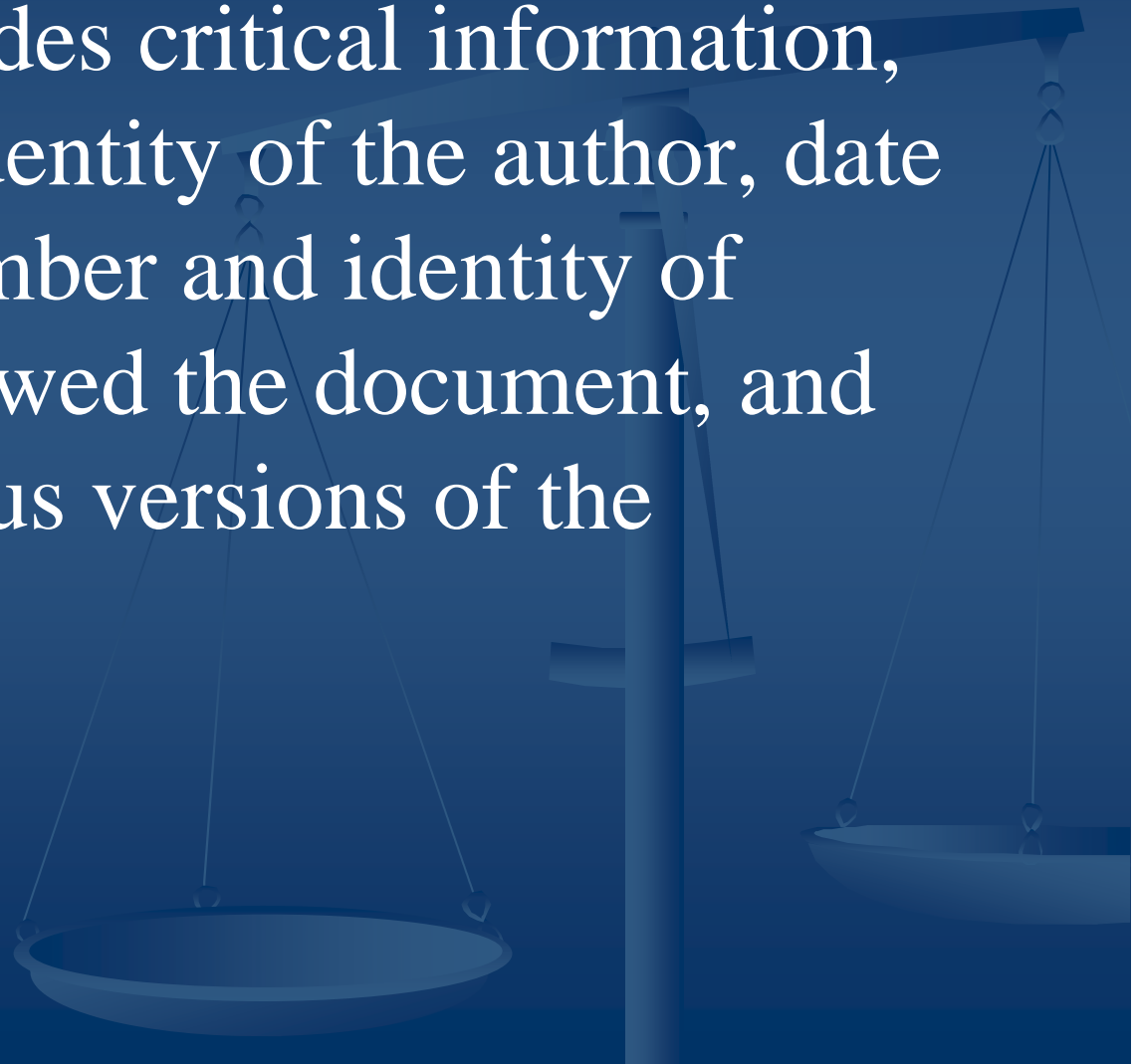
METADATA UNDER TEXAS LAW

- Under Texas law, metadata, like other data that exists in electronic or magnetic form, is **discoverable.**

  - Cases: *In re Weekley Homes, L.P.*, 295 S.W.3d 309 (Tex. 2009); *In re Honza*, 242 S.W.3d 578 (Tex. App.—Waco 2008, pet. denied).

Why It Matters

■ Metadata provides critical information, including the identity of the author, date of creation, number and identity of people who viewed the document, and whether previous versions of the document exist

CASE EXAMPLES
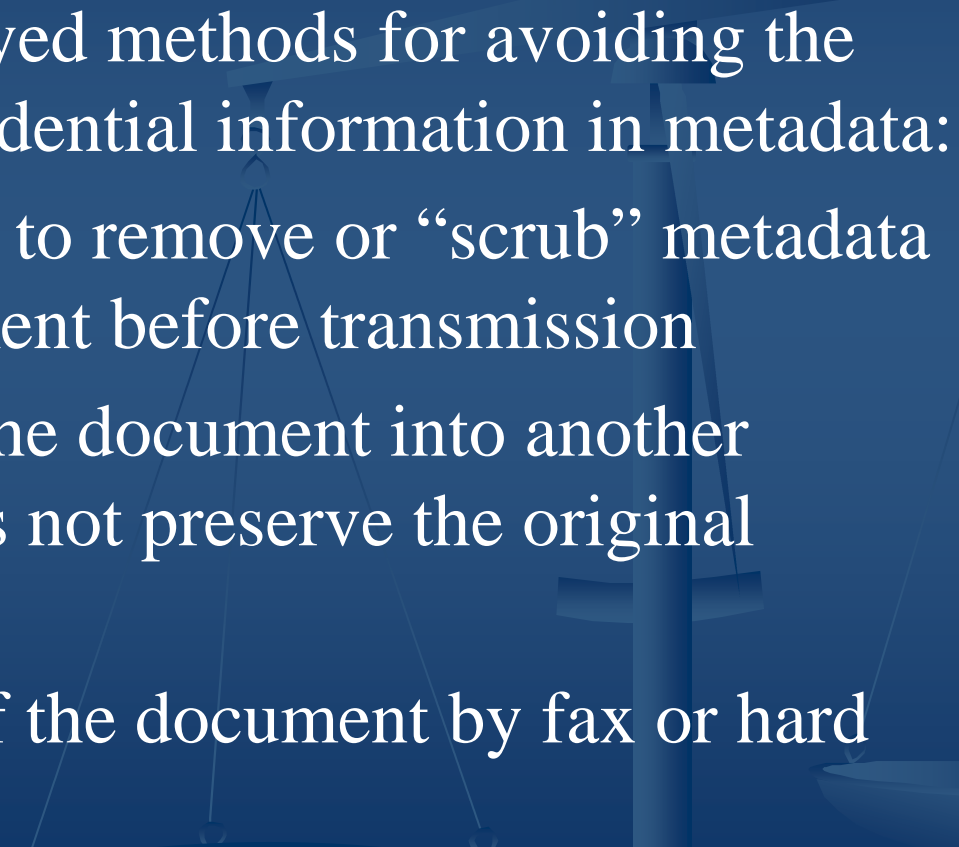
- LEASE RENEWALS
  - Was notice sent or not?
- INSURANCE CLAIMS—What date was the claim submitted?
  - During the policy period or after the policy expired?

HOW TO MANAGE METADATA IN LITIGATION

- Your counsel can:
    - Object to producing metadata
    - Seek a protective order
    - Come to an agreement limiting the metadata fields
- Another consideration is ensuring that proprietary or privileged information is not contained in the client's metadata. Counsel should consider the potential of privileged metadata in connection with the format counsel is willing to produce.

HOW TO MANAGE METADATA IN LITIGATION: Production

- Commonly employed methods for avoiding the disclosure of confidential information in metadata:
  - Use of software to remove or "scrub" metadata from the document before transmission
  - Conversion of the document into another format that does not preserve the original metadata
  - Transmission of the document by fax or hard copy.

The Ethics of Metadata:

- New York, Florida, Alabama, and the District of Columbia all have ethics opinions concluding that it is unethical to mine inadvertently produced metadata. N.Y. Comm. on Prof'l Ethics, Op. 749 (2001); Prof'l Ethics of the Fla. Bar, Op. 06-2 (2006); Ala. State Bar Office of the Gen. Counsel, Op. No. 2007-02 (2007); D.C. Bar, Op. 341.

- Maryland and the ABA have concluded the opposite. Md. State Bar Ass'n, Comm. on Ethics, Opinion 2007-092 (2006); ABA Formal Op. 06-442.

- In Texas, no requirement that recipient notify sender. EAO-665 (Tex. Eth. Com.), 2016 WL 8253930.

The Ethics of Metadata:

- In Texas, no requirement that recipient notify sender.

- "There is no specific provision in the Texas Disciplinary Rules requiring a lawyer to take or refrain from taking any particular action in such a situation. *See* Professional Ethics Committee Opinion 664 (October 2016) ("The Texas Disciplinary Rules of Professional Conduct do not prescribe a specific course of conduct a lawyer must follow upon the unauthorized or inadvertent receipt of another party's confidential information **outside the normal course of discovery.")."** Texas Ethics Opinion 665.
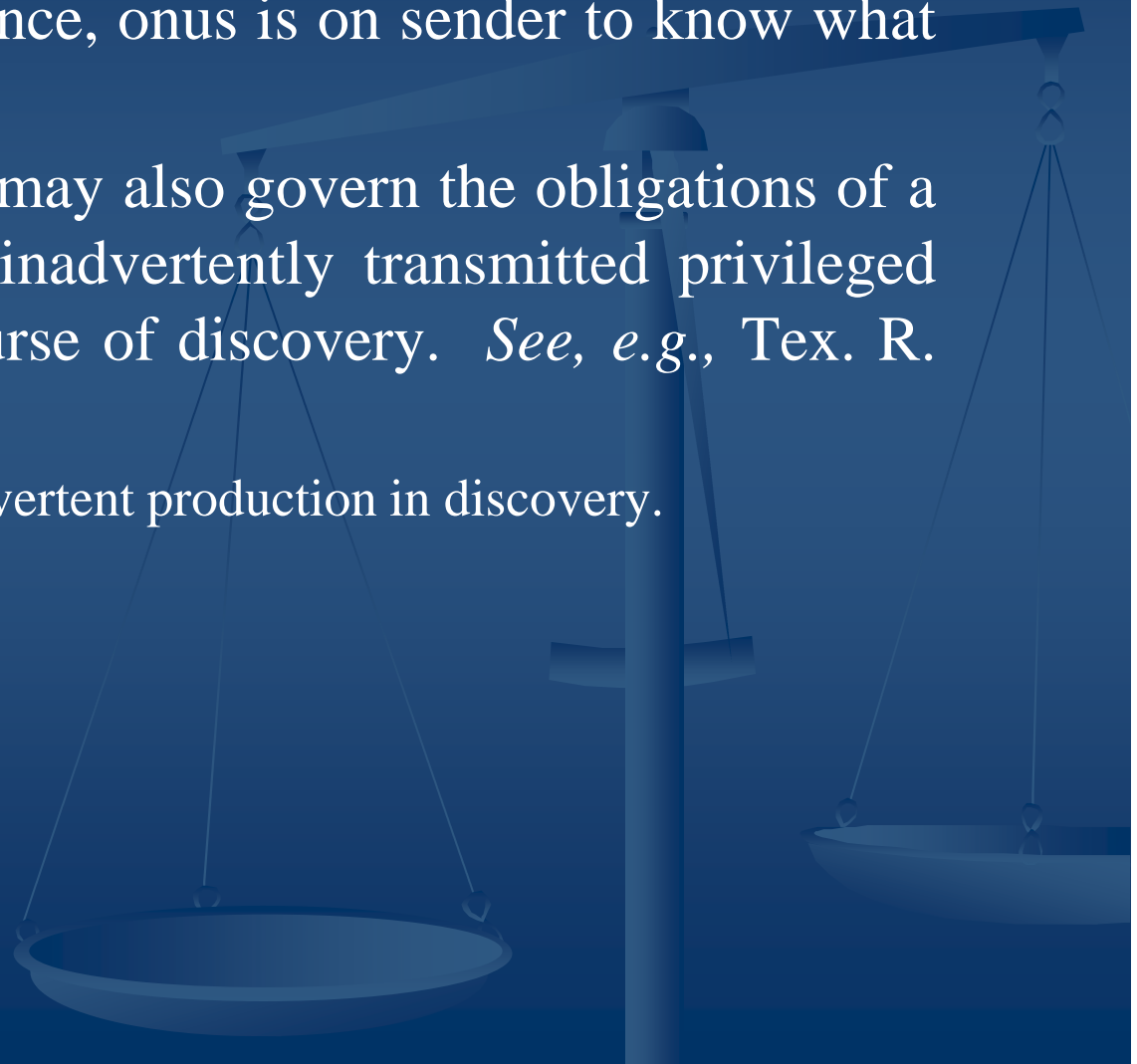
The Ethics of Metadata:

- However, the State Bar of Texas recently said Texas lawyers "must take reasonable steps" to protect metadata.
  - Texas Ethics Opinion 665, Dec. 2016.

- The committee said that a lawyer's duty to provide competent representation to clients requires them to understand that metadata — the embedded information describing the history, tracking or management of documents — exists and can be transmitted when electronic documents are exchanged between parties.
  - Ex.: draft settlement that has been edited by lawyers and clients, with previously considered terms still accessible in the metadata of a document, though that information isn't visible on the face of the document itself.

The Ethics of Metadata:

- Thus, per Texas guidance, onus is on sender to know what they are transmitting.

- However, Court rules may also govern the obligations of a lawyer who receives inadvertently transmitted privileged information in the course of discovery. *See, e.g.*, Tex. R. Civ. P. 193.3(d).

  - "Snap back" rule: inadvertent production in discovery.

SOURCES:

Articles:

- Falk, Sheryl A. and Donald H. Mahoney, III. "*Taking Advantage (or not) of Cyber-Blunders: The Ethics of Metadata Mining in Texas.* State Bar of Texas, 21st Annual Advanced Real Estate Drafting Course, 2010. http://www.texasbarcle.com/Materials/Events/9077/120052_01.pdf

Case List:

- *In re Weekley Homes, L.P.*, 295 S.W.3d 309 (Tex. 2009)

- *In re Honza*, 242 S.W.3d 578 (Tex. App.—Waco 2008, pet. denied).

Administrative Guidance:

- EAO-665 (Tex. Eth. Com.), 2016 WL 8253930.