

## **GLA ARMA SEMINAR HYPOTHETICAL**

Delta Mart, a publicly traded large retail chain of children's toys, inaugurated a brand new store in February of 2000, a dreary winter day in Albany, New York. Phillip Pinto worked as a truck driver for Heavenly Toys, a wholesaler of Barbie Dolls. On February 15, 2000, Pinto arrived at a brand new Delta-Mart retail outlet in Albany, New York, with merchandise in tow. He parked his van on the delivery ramp behind the store and alerted Delta-Mart to his arrival. A Delta-Mart employee helped Pinto unload his Heavenly cargo. In the process, Pinto slipped on the snow-and-ice-coated ramp, fell, and injured himself.

Delta-Mart photographed the ramp that day and proceeded to conduct a full investigation of the incident. Before the month was out, on February 20<sup>th</sup>, a Delta-Mart employee prepared an internal report noting, inter alia, that Pinto yelled, as he was being placed in the ambulance, "You cheap bastards, I'm gonna sue you!" The employee e-mailed the report to his supervisor, who was out on medical leave, but scheduled to return within two months. Upon the supervisor's return from medical leave, his employee's e-mail had been deleted from Delta's system, because Delta-Mart has a 60-day e-mail destruction policy.

On April 24, 2002, Pinto made good on his word. Pinto sued Delta-Mart in New York's federal district court. Delta-Mart has denied that it committed any actionable negligence. Delta argues that the mishap occurred on the day of the Albany store's grand opening and, anticipating a huge turnout, it wanted the staff's attention focused exclusively on customer service. To that end, it asserts that Rich Eagerly, an invoice clerk, informed all vendors on February 14 that Delta-Mart would not accept deliveries the following day. Thus, Delta-Mart explains, it did not bother to clear the ramp from snow on February 15 because it believed that no deliveries would be forthcoming. In addition to this defense, Delta-Mart also suggests that Pinto assumed the risk of using the icy ramp and that his negligence caused (or at least contributed to) the occurrence of the accident.

Eagerly is willing to testify that he had put an electronic hold on the order previously placed with Heavenly Toys on February 14, 2000, thus bolstering Delta-Mart's claim that it had no reason to clear the delivery ramp on February 15. However, Delta-Mart cannot produce either the purchase order addressed to Heavenly Toys or the telephone records for February 14 (the date when Eagerly claims to have called), to corroborate Eagerly's otherwise self-serving assertion. According to Delta-Mart, Eagerly discarded these records in or around February 2002 (a few months before Pinto brought suit), pursuant to a standard record-retention policy. Eagerly states that he did not know about the accident at the time, and no one instructed him to preserve either the purchase order or the telephone records.

To make matters worse for Delta-Mart, the Federal Trade Commission has announced that it intends to look into the advertising practices of toy retailers. Delta-Mart, however, has not received direct notice of this investigation.