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Litigation Holds in Class Actions: Triggering Events, Scope of Hold, Termination, Forms

Avoiding Costly Missteps that Empower the Other Side

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Class Action Facts

- 2018 - class action spending rose to highest level since recession, reaching $2.46 billion.
- While number of companies facing class actions in 2018 dropped slightly to 54 percent, average number of matters per company increased from 6.3 in 2017 to 7.8 in 2018.
- Spending and matters are expected to increase again in 2019

Preservation

- When the duty to preserve is triggered, you want to protect relevant data in ways that are legally defensible.
- Typically issue a litigation hold notification.
  - Stop an operation's destruction of relevant data due to routine procedure of discarding files, including e-mails, voicemails, and other electronic data, in the ordinary course of business.
  - Require the preservation of, and prevent modifications to, all relevant hard-copy documents and electronic data within an employees' control.

Steps in the Litigation Hold Process

1. Trigger
   - "When" must a hold be initiated?
   - When a party "**reasonably anticipates litigation**."
2. Scope
   - "What" must be preserved and "who" is implicated?
   - "Evidence that a party knows or should know is **relevant**."
   - "**Key Players**" must be included, but IT and others should be notified as well.

Steps in Litigation Hold Process

3. Communication
   - "How" must the hold be relayed?
   - "Written notice of a litigation hold to key players **may be required**. Custodians should be periodically **reminded** and their compliance **monitored**."
4. Compliance
   - "How" often must the hold be refreshed?
   - The communication can't be "one and done." **Periodic** reminders must be sent out, particularly as the matter morphs over time.

Sources of Duty to Preserve/Trigger

- "The scope of a party's preservation obligation can be described as follows: Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents." *Zubulake v. Warburg*, 220 F.R.D. 212 (S.D.N.Y. 2003)("Zubulake IV").

Obvious Events that can Trigger Duty to Preserve

- Complaints
- Subpoenas
- Civil Investigative Demand
- Notice of an administrative proceeding
- Demand letter
- Inquiry from state government
- Receipt or issuance of a demand for arbitration
- Preservation letter or written notice from opposing counsel
- Discrimination charge from former or current employee

Not So Obvious Events that Can Trigger Duty to Preserve

- A potential claimant repeatedly seeking information about an incident
- Pre-litigation discussion with opposing party or counsel
- Party's actions communicating the possibility of a suit to third party, such as an insurer, accountant, or SEC
- Findings by a party in a pre-litigation investigation
- Occurrence of an event which the company knows frequently results in litigation
- Knowledge of litigation between other parties

Trigger of Preservation Duty for MDL Litigation/Class Actions

- Filing of one or two isolated product liability cases did not create a duty to implement widespread preservation measures at that time for future, possible MDL.

- 2008 FDA publication of "public health notification discussing rare, but serious complications experienced by nine manufacturers of surgical mesh products associated with the transvaginal placement of mesh products to treat pelvic organ prolapse and stress urinary incontinence," coupled with a "steadily increasing" number of personal injury lawsuits, should have alerted manufacturer to the need to preserve documents in 2009.

— *In re Ethicon*, 299 F.R.D. 502 (S.D. W.Va. Feb. 4, 2014)

Preservation Duty - Class Actions

- Civil plaintiffs alleged spoliation based on Delta's defendant's failure to immediately comply with a Civil Investigative Demand served by government. Court found this insufficient to put the defendant on notice of a "reasonably foreseeable" lawsuit by civil plaintiffs. Court found that Delta owed the plaintiffs no duty to preserve, and thus denied plaintiffs' motion for sanctions.
  - *In re Delta/Airtran Baggage Fee Antitrust Litig.*, 2011 WL 915322 (N.D. Ga. Feb. 22, 2011).

Scope

- What must be preserved?
  - Information useful to adversary
  - Relevant information
  - Information likely to be requested
  - Information reasonably calculated to lead to discovery of admissible evidence
  - Information under custody and control of party including potential evidence which may be in databases created by third-party vendors
  - Information inside/outside of United States

Identifying Custodians

- Identifying sources of discoverable information such as
  - "Key Players" identified in the litigation or investigation
  - Custodians of relevant information such as IT professionals, assistants and support staff
  - Managers of non-custodial ESI such as Records Information Management, IT Administrators (those responsible for automated janitorial functions like automated deletion of email)
  - Third Parties

Third Parties

- Companies have a duty to preserve documents in its **possession, custody or control** even where the documents are in the hands of third parties. Case law defining whether a corporation has possession, custody or control of documents is not very well developed and differs from jurisdiction to jurisdiction. United States District Judge Paul Grimm's *Victor Stanley* decision contains charts identifying the different standards for evaluating possession, custody and control in multiple jurisdictions.
  - *See Victor Stanley, Inc. v Creative Pipe, Inc.*, 269 F.R.D. 497, 540 (D. Md. 2010).

Must Litigation Hold Notice Be Written?

- Best practice is to send a written litigation hold notice.
- Failure to issue a litigation hold does not constitute gross negligence per se.
  - *Chin v. Port Authority of New York & New Jersey*, (2nd Cir. July 10, 2012)

Elements of a Written Litigation Hold Notice

- Clearly instruct individuals not to destroy records
- State the relevant time period
- Describe the substantive scope of what must be preserved
- Describe the potential types and sources of the material to be preserved
- Provide instructions for preservation and/or collection
  - State that all relevant data must be preserved in its original form, without modification
- Inform recipients of their legal obligations and the potential penalties for noncompliance
  - Preservation is mandatory
- Provide instructions for communicating about the Litigation Hold
- Acknowledgment
- Attorney-client privilege/work product protected
  - Information about the litigation is confidential

Preservation Strategies

- Preservation of records must actually be implemented after the litigation hold is issued
- Goal: a complete set of relevant documents
- Preservation in place
  - Low cost option but places heavy reliance on custodians
- Preservation by collection
  - Involves going to each custodian and collecting all potentially relevant data
    - More costly but avoids risks associated with custodian-driven preservation
  - Keyword search
    - Variation of the preservation by collection
    - Run queries across enterprise systems to preserve electronically
- Hybrid preservation
  - Preserve in place for all custodians and collect for key players and high-risk custodians
- Preserve in native format
  - Avoid modifying metadata by opening, printing, copying or forwarding files

Communicating, Document, Auditing

- Document actions taken during the legal hold process:
  - the forms and timing of legal holds notices; and
  - follow-up steps taken, by whom, when and why; and
  - reasons for not preserving/collecting certain data.
- Create an audit trail to keep track of completed and outstanding tasks and provide sufficient evidence to rebut allegations of spoliation, negligence or other discovery failures.
- Litigation Hold Call Log

Litigation Hold Compliance

- Acknowledgment reminders
  - Two reminder notices 7 days after issuance
  - Escalation notification
- Reissue notices
  - Issue every 6 months as long as litigation hold is in effect
  - Reminds the custodians of the ongoing obligation to preserve information
- Updated litigation hold notice should be issued as the matter morphs over time
  - Discover additional relevant information that needs to be put on hold
- Add newly hired employees or additional employees as scope broadens
- Departing custodians

Potential Differences with Class Actions

- May decide to use more formal and comprehensive preservation methods
- LH Notice more widely disseminated and need strategy for preserving large volume of custodians' main sources
- Proportionality concerns may be harder to articulate
  - *Pippins v. KPMG LLP*, 279 F.R.D. 245, 255 (S.D.N.Y. 2012)
- Use of E-Discovery Liasion

Thank You

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Litigation Holds – So What Could Go Wrong?

Consequences of Getting a Litigation Hold "Wrong."

February 5, 2020

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Consequences for Litigation Hold Failures

- The Basics To Keep In Mind –

THE BAD NEWS

- Failure to implement and manage a proper litigation hold can get you – or better said, your client – in a lot of trouble with a court, including significant sanctions.

THE GOOD NEWS

- Thanks to the 2015 amendments to the Federal Rules of Civil Procedure, things now are better than they were in terms of possible sanctions. But, sanctions have not disappeared.

There . . . Don't you feel comforted?

The Rules – Circa 2015

- Perhaps surprisingly, the Federal Rules do not set standards or guidelines for litigation holds or preservation requirements.
  - Indeed, guidelines for litigation preservation requirements are much more a function of state common law.
  - That said, in analyzing a particular litigation hold situation, federal courts often look to other federal courts' decisions for guidance.
- The 2006 and 2015 Amendments to the Federal Rules did, however, include references to documents preservation –
  - Rule 26(f)(2) and (3) speak about including discussions about document preservation in the parties' required initial discovery conference.

The Rules – Circa 2015 (continued)

- But, it is Rule 37(e) that truly addresses document preservation – specifically, what can occur if a party fails to preserve ESI. The full rule is worth repeating here:

  (e) Failure to Preserve Electronically Stored Information. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take **reasonable steps** to preserve it, and it **cannot be restored or replaced through additional discovery**, the court:

  - (1) upon finding **prejudice** to another party from loss of the information, may order measures **no greater than necessary** to cure the prejudice; or
  - (2) **only upon finding that the party acted with the intent** to deprive another party of the information's use in the litigation may:
    - (A) presume that the lost information was unfavorable to the party;
    - (B) instruct the jury that it may or must presume the information was unfavorable to the party; or
    - (C) dismiss the action or enter a default judgment.

The Rules – Circa 2015

- As the Committee Notes to Rule 37 make clear, Rule 37(e)(2) was designed to limit the imposition of the most severe sanctions to *only* those cases where the loss of the ESI arose because of a party's *intent* to deprive the other party of the requested information.
- This limitation was added in 2015 specifically to reject courts that permitted the imposition of severe evidentiary sanctions based on a finding of negligent preservation.

> The new rule "rejects cases such as *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99 (2d Cir. 2002) that authorized the giving of adverse-inference instructions on a finding of negligence or gross negligence." (Advisory Committee Notes to 2015 Rule 37(e)(2).)

The Rules – Circa 2015 (continued)

- Has the new Rule 37(e) worked as intended?
  - Some would say "yes" – more draconian penalties have diminished, in particular in matters involving what would be regarded as negligent preservation errors.
  - Some would say "no" – that parties who engage in egregious preservation errors are now given a sanctions "pass", and bad or "stupid" behavior goes unpunished.

    See, e.g., United States v. Supervalu, Inc., 2019 U.S. Dist. LEXIS 198958 (D.C. Ill. Nov. 18, 2019) (email sent by district manager instructing that competitive pricing information discarded; court declined to impose sanctions).
  - I suggest that practitioners become familiar with the preservation/sanctions decisions in their particular jurisdictions. Some courts and judges are more forgiving than others . . .

Additional Authority . . .

In addition to the Federal Rule 37, at least some courts recognize that the authority to sanction also derives from a court's inherent authority.

See, e.g., Borum v. Brentwood Village, LLC, 332 F.R.D. 38, 43-44 (D.D.C. 2019)

> [C]ourts have the inherent power to impose sanctions for abusive litigation practices" when the Federal Rules of Civil Procedure alone do not provide them with "sufficient authority to protect the integrity of the judicial system." ***44** *Young v. Off. of U.S. Senate Sergeant at Arms*, 217 F.R.D. 61, 65 (D.D.C. 2003). "One such inherent power is the authority to impose sanctions for the ... spoliation of evidence." *CAT3, LLC v. Black Lineage, LLC*, 164 F. Supp. 3d 488, 497 (S.D.N.Y. 2016). Available sanctions include default judgment, fines, and awards of attorneys' fees and expenses, among others. *See Shepherd v. Am. Broad. Cos.*, 62 F.3d 1469, 1475 (D.C. Cir. 1995).

But see, Stevens and Sons, Inc. v. JeLd-Wen, Inc., 327 F.R.D. 96, 105 (E.D. Va. 2018) (explaining that court's inherent authority applies for non-ESI materials not covered by Rule 37(e)).

What Will Get Me In Trouble? Forgetting Or Ignoring . . .

- "When" to Preserve -- when a party reasonably foresees or anticipates that litigation is likely. Don't forget, the standard applies equally well **to plaintiffs** as they begin to contemplate filing suit and take steps in preparing a complaint.
  - *See, e.g., Leidig v. Buzzfeed, Inc.,* 2017 WL 6512353, at *8-12 (S.D.N.Y. Dec. 19, 2017).
- "What" to preserve from Whom" – don't forget about former employees, administrative assistants, legacy systems, ESI sent to personal computers, business-related text messages, including those sent from a personal cell phone, social media (if applicable), WhatsApp exchanges, telephone messages . . . . Etc.
  - But, also -- A party is not obligated to save "every shred of paper, every email or electronic document." *Ethicon Inc. Pelvic Repair Sys. Prob. Liab. Litig.,* 299 F.R.D. 502, 517 (S.D.W. Va. 2014).
  - Perfection is not the standard . . . Proportionality does matter.

What Will Get Me In Trouble? Forgetting Or Ignoring . . .

- "Where" People Really Preserve – regardless of a company's policy regarding retention, archiving, deleting, etc., people find the most amazing individual ways and places to preserve. Each custodian should be interviewed.
- IT Personnel's Expertise and Knowledge – the IT department will have more knowledge than anyone about the intricacies of a company's IT programs – past, present and future. They must be part of the discussion in designing and implementing a preservation protocol. Along these lines, please read *Epac Technologies, Inc. v. HarperCollings Publishing, Inc.* 2018 WL 1542040 (M.D. Tenn. Mar. 29, 2018).
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What Will Get Me In Trouble? Forgetting Or Ignoring . . .

- Issuing a late hold notice – where notices don't issue for months or even years after a triggering event, courts can get quite angry.
  - But – a hold notice is not mandatory. *See, e.g., Radiologix, Inc. v. Radiology and Nuclear Medicine, LLC,* 2019 WL 354972, at *10 (D. Kan. Jan. 1, 2019) (citing Sedona Conference; "where all potentially relevant information is already secured, a legal hold notice will not be necessary").
- Preparing an incomprehensible hold notice – don't write it for lawyers – write it for the people who are going to actually need to read it and implement it.
- Preserving from too few people – preservation is a burden but trying to limit that burden to too few people can come back to haunt the attorneys/clients.

What Will Get Me In Trouble? Forgetting Or Ignoring . . .

- Failing to follow-up – this can require a delicate balance.
  - There is a school of thought that takes the position that it is "advisable" to issue a litigation hold notice – and even refresher notices from time to time – but that because "monitoring" is so difficult, that it is better not to follow up.
  - On the other hand, as the Sedona Conference's 2019 edition of its commentary on legal holds notes: "Numerous decisions hold that counsel also owe an independent duty to monitor and supervise or participate in a party's efforts to comply with a duty to preserve." The Sedona Conference, *Commentary on Legal Holds, Second Edition: The Trigger & the Process,* 20 Sedona Conf. J. 341, 358 and n.33 (2019).

What Will Get Me In Trouble? Forgetting Or Ignoring . . .

- Forgetting to create a paper trail of what was done –
  - *See In re Actos (Pioglitazone Prods. Liab. Litig.),* 2014 U.S. Dist. LEXIS 13307, at *132-134 (M.D. La. Jan. 30, 2014).

July 2002 – broadly worded litigation hold issued

September 2003 – "refreshed" litigation hold issued

May 2006 – "refreshed" litigation hold issued

October 2007 – "refreshed" litigation hold issued

January 2008 – "refreshed" litigation hold issued

February 2011 – "refreshed" litigation hold issued

BUT – 46 custodial files could not be located, including from senior executives with direct knowledge of claims and highly relevant historical information. **UPSHOT – SANCTIONS FOR SPOILATION. From reading the decision it appears that the biggest problem was that there was no written record of what occurred over the course of the 12 years that litigation of one form or another was pending. Present in-house counsel could not provide an explanation as to what happened over the 12 years.**

What Will Get Me In Trouble? Forgetting Or Ignoring . . .

- Failing to alter preservation instructions as the case evolves
  - Decisions made at the start of a matter regarding who receives a preservation notice and what they should be instructed to preserve very well made need to change as the matter progresses.
  - To the extent that changes are made, make sure that a clear and thorough record is made of the changes so that if challenged, you can defend any change as "reasonable" or any earlier "lapse" as addressed once the lapse was recognized.

See In re Actos (Pioglitazone Prods. Liab. Litig.), 2014 U.S. Dist. LEXIS 13307, at *132-134 (M.D. La. Jan. 30, 2014).

Ending Preservation

- Too often overlooked are steps that should be taken once litigation is complete.
  - At some point, litigation ends . . . It could be within a matter of months or many, many years down the road. In either case, once litigation ends, so too should the preservation notice.
  - Once litigation ends, a notice should be sent to all employees who had received the initial notice(s) and the IT department should also be instructed to eliminate caches of preserved data that otherwise would have been available for deletion. Outside counsel – and its vendors – also should be instructed to destroy documents being held – especially those not produced.
  - Why? Because if not – a litigation library is being created for some future litigation.

Final Cautionary Tale

- ***Crossfit, Inc. v. Nat'l Strength & Conditioning Ass'n.,* 2019 U.S. Dist. LEXIS 209319 (C.D. Cal. Dec. 4, 2019) –**
- Defendant identified over 500 devises on which relevant ESI might be stored, but could only locate about half of them; defendant harvested over 11 million documents and produced over 280,000 documents as responsive; plaintiff sought terminating sanctions on the grounds that defendant had lost over 200 devises, had failed to produce 196 "responsive" documents, and had been dilatory and non-cooperative in discovery, including ignoring a variety of prior court discovery orders.
  - The court found that defendant had not taken reasonable steps to preserve based in significant part on the fact that a written litigation hold was not issued until 4 years after the litigation began and that whether a oral hold instruction had been given was questionable.
  - The court found that defendant had the requisite intent to destroy within the meaning of Rule 37 based on the fact that defendant resisted discovery for years and a court ordered forensic review determined that documents continued to be deleted during the pendency of the litigation.
  - **Terminating sanctions granted under Rule 37(e) and the court's inherent authority and monetary sanctions of about $4,000,000.**

Questions?

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