Duty to Preserve

A Federal District Court's Inverted View of Litigation Holds

By Lawrence S. Ebner

A Louisiana district court turns the law on the duty to preserve documents on its head.

In April 2014, a Louisiana federal district court jury, after a bellwether trial in multidistrict litigation, returned a verdict against two prescription drug product liability defendants, subjecting them to a mind-boggling *$9 billion* in punitive damages, about 6,000 times the amount of their compensatory damages award. According to the plaintiffs, the defendant drug companies, Takeda Pharmaceuticals and Eli Lilly, failed to provide adequate label warnings about an alleged relationship between use of Actos—an FDA-regulated diabetes drug—and bladder cancer. The district court rejected the companies' contention that the federal Food, Drug, and Cosmetic Act (FDCA) preempted the plaintiffs' state law failure-to-warn claims even though the record indicated that the FDA was actively involved in regulating the warnings on Actos labeling, which at all relevant times contained information about a possible association with bladder cancer.

In addition, the district court instructed the jury that it could draw spoliation-related adverse inferences against Takeda because it supposedly violated a duty to preserve evidence relevant to bladder cancer litigation—a duty, according to the court, which Takeda triggered in 2002, nine years before it had knowledge of any Actos-related bladder cancer claims, when it issued a broadly worded "litigation hold" memorandum in response to a *liver failure* suit. *See In re Actos (Pioglitazone) Products Liability Litig.*, MDL No. 6:11-md-2299,

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The district court's highly prejudicial spoliation ruling turned the use of a litigation hold on its head. "Spoliation is 'the destruction or significant alteration of evidence… for another's use as evidence in pending or reasonably foreseeable litigation." *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 216 (S.D.N.Y. 2003) (*Zubulake IV*) (internal quotation marks omitted). Virtually all case law on the spoliation of evidence treats issuance of a litigation hold as an effective way for a company to satisfy a duty to preserve relevant documents *after* a particular type of litigation has been filed or can be reasonably anticipated. *See, e.g.*, *Yelton v. PHI, Inc.*, 279 F.R.D. 377, 387 (E.D. La. 2011) (explaining that a company is obligated to implement a litigation hold "*once the preservation duty has been triggered*") (emphasis added). The district court in the Actos litigation held, however, that Takeda's issuance of a litigation hold in 2002 in response to unrelated liver failure litigation—almost a decade before bladder cancer litigation reasonably could have been anticipated—created a duty to preserve any and all documents that, with the benefit of hindsight, now might be considered relevant to bladder cancer suits.

The drug companies appealed to the U.S. Court of Appeals for the Fifth Circuit. DRI—The Voice of the Defense Bar—was prepared to file an *amicus curiae* brief in the Fifth Circuit discussing the fundamental legal flaws in the district court's spoliation ruling, and more generally, the relationship between a company's duty to preserve documents, including electronic files, in anticipation of litigation and the use of litigation holds to fulfill that duty.

Shortly before briefing was scheduled to begin, the companies and the plaintiffs reached a proposed universal settlement expected to resolve the vast majority of Actos-related bladder cancer suits. Early in May 2015, the Fifth Circuit dismissed the appeal without prejudice for a period of six months to allow time for the settlement agreement to be finalized and approved.

The principal point that DRI planned to raise in its *amicus* brief—and the point of this article—is that contrary to the district court's spoliation ruling, a litigation hold satisfies, but does not create, a duty to preserve documents.

Duty to Preserve

Spoliation case law establishes that "the duty to preserve evidence arises when a party reasonably anticipates litigation." *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of America Securities, LLC*, 685 F. Supp. 2d 456, 466 (S.D.N.Y. 2010). *See also In re Delta/AirTran Baggage Fee Antitrust Litig.*, 770 F. Supp. 2d 1299, 1307 (N.D. Ga. 2011) ("[A] party's obligation to retain documents, including e-mails, is only triggered when litigation is reasonably anticipated."); *Point Blank Solutions, Inc. v. Toyobo America, Inc.*, No. 09-61166-CIV, 2011 WL 1456029, at *11 (S.D. Fla. Apr. 5, 2011) ("Concerning the *when* question, the duty to preserve evidence arises when a party *reasonably anticipates litigation*."). Highly regarded Sedona Conference commentary has characterized it this way: The "touchstone" of the duty to preserve "is 'reasonable anticipation'." *The Sedona Conference Commentary on Legal Holds: The Trigger & The Process*, 11 Sedona Conf. J. 265, 271 (2010). In its spoliation ruling, the district court agreed that "a duty to preserve litigation-related documents arises when litigation is filed *or* when a party reasonably anticipates litigation." *In re Actos (Pioglitazone) Products Liability Litig.*, 2014 WL 2921653, at *25.

The Sedona Conference guideline on "Preservation Obligations and Legal Holds" indicates that "[a] reasonable anticipation of litigation arises when an organization is on notice of a credible probability that it will become involved in litigation…." The Sedona Conf., *supra,* at 271. Further, "[t] his guideline suggests that a duty to preserve is triggered *only* when an organization concludes (or should have concluded), based on credible facts and circumstances, that litigation… is probable." *Id.* at 272. *See also Zubulake IV*, 220 F.R.D. at 216 ("The obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation.") (internal quotation marks omitted); *Consol. Aluminum Corp. v. Alcoa, Inc.*, 244 F.R.D. 335, 339 (M.D. La. 2006).

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Litigation Holds

Takeda argued that the first Actos-related bladder cancer suit was not filed until 2011 and that such litigation was not reasonably foreseeable in 2002 when the company issued its litigation hold in response to a liver failure suit. If bladder cancer litigation was not reasonably foreseeable in 2002, then a duty to preserve documents relevant to bladder cancer litigation could not have arisen in 2002.

The district court held, however, that Takeda's duty to preserve documents relevant to bladder cancer litigation arose when the 2002 litigation hold was issued. Rather than focusing on whether Takeda could have reasonably anticipated *bladder*

cancer litigation in 2002—almost a decade before bladder cancer litigation was filed—the court seized upon the 2002 hold memorandum's general language, which did not explicitly refer to liver failure litigation. *See In re Actos (Pioglitazone)*, 2014 WL 2921653, at *26 ("The *2002* Litigation Hold is, by its own language, general in nature… *no mention of any specific malady is found in the language of the Hold*.") (emphasis in original). According to the court, because the 2002 hold was not "malady specific," it imposed upon Takeda a permanent, unqualified duty to preserve any and all documents and electronic data which discussed, mentioned or related to Actos in any way. *Id*.

Contrary to the district court's spoliation ruling, a litigation hold satisfies, but does not create, a duty to preserve documents.

Topsy-Turvy View of Litigation Holds

The district court's ruling on the duty to preserve documents conflicted with the virtually uniform case law on the subject. This is because the court viewed the 2002 hold memorandum that Takeda issued in response to a liver failure suit and subsequently "refreshed" as the *source* of an extraordinarily expansive, wholly untethered duty to preserve any and all documents that at some indeterminate point in the future may be relevant, in retrospect, to some plaintiff in some type of Actos-related product liability litigation—not as a means for satisfying a duty to preserve documents relevant to particular existing or reasonably anticipated litigation such as the 2002 liver failure-related litigation. *See Point Blank Solutions*, 2011 WL 1456029, at *24 (rejecting a "shifting duty" to preserve documents as "incompatible with the basic rule that a duty is owed to a specific party"). Ironically, because Takeda, in an effort to *avoid spoliation*, worded its liver failure-related hold memorandum broadly, the court concluded that spoliation occurred in the bladder cancer litigation, and as a result, issued a highly prejudicial, adverse jury instruction. *See* 2014 WL 2921653, at *1 n.5.

The district court fundamentally erred by putting the litigation-hold "cart" before the duty-to-preserve "horse." In her widely cited *Zubulake IV* opinion, Judge Shira Scheindlin explained that "*[o]nce* 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." 220 F.R.D. at 218 (emphasis added). *See also Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 439 (S.D.N.Y 2004) ("*Zubulake V*") ("*[W]hen* the duty to preserve attaches, counsel must put in place a litigation hold….") (emphasis added); Sedona Conf., *supra,* at 267 (discussing "use of a 'litigation hold' as a means to satisfy preservation obligations"). Along the same lines, Judge Scheindlin, in her 2010 *Pension Committee* opinion, indicated that "*when* the duty to preserve has attached," failure "to issue a written litigation hold" supports a finding of gross negligence in fulfilling discovery obligations. 685 F. Supp. 2d at 471 (emphasis added). The 2006 Advisory Committee notes to Federal Rule of Civil Procedure 37(f), "Failure to Provide Electronically Stored Information," now renumbered as Rule 37(e), make the same point: "*When a party is under a duty to preserve* information because of pending or reasonably anticipated litigation, intervention in the routine operation of an information system is one aspect of what is often called a 'litigation hold.'" Fed. R. Civ. P. 37(f) advisory committee's note (2006) (emphasis added). In other words, a duty to preserve precedes and is not created by issuance of a litigation hold.

Need to Oppose Any Similar Rulings

Aside from the district court's ruling in the Actos litigation, there is no case law or other legal authority suggesting that issuance of a litigation hold—no matter how broadly worded—creates a duty to preserve documents, which, only in retrospect, turn out to be relevant to unrelated litigation that was not reasonably anticipated at the time that the hold was issued. Indeed, at least one court has specifically rejected the Louisiana district court's approach, holding that a duty to preserve evidence was *not* triggered by issuance of a litigation hold when future litigation—even future litigation on the *same subject*—was not reasonably anticipated. *See In re Ethicon, Inc. Pelvic Repair Sys. Prod. Liab. Litig.*, 299 F.R.D. 502, 516 (S.D. W. Va. 2014).

As stated in *Zubulake IV*, "[i]t goes without saying that a party can only be sanctioned for destroying evidence if it had a duty to preserve it." *Zubulake IV*, 220 F.R.D. at 216. *See also Consol. Alum. Corp. v. Alcoa*, 244 F.R.D. at 339. The district court's erroneous ruling that good-faith issuance of a hold memorandum creates a virtually boundless, endless, and sanctionable duty to preserve documents that someday may be viewed by an unknown plaintiff or trial court as relevant to unforeseen litigation, renders corporate records retention policies almost meaningless. This is especially true for companies that are frequently, if not continually, litigation targets: "Must a corporation, upon recognizing the threat of litigation, preserve every shred of paper, every e-mail or electronic document, and every backup tape? The answer is clearly, 'no.' Such a rule would cripple large corporations… that are almost always involved in litigation." *Zubulake IV*, 220 F.R.D. at 217.

Conclusion

The Louisiana district court's premise that a broadly worded litigation hold memorandum creates a sanctionable duty to preserve any and all documents or electronic files relating to a product regardless of whether a particular type of litigation was reasonably anticipated was wrong. Such a mistaken view of litigation holds defeats their document-preservation purpose and interferes with fair resolution of claims by leaving civil litigation attorneys and their clients on the horns of a dilemma: Issue a broadly worded litigation hold and run the risk of a spoliation sanction and runaway jury award in unrelated and unanticipated future litigation, or issue a narrowly worded hold and run the risk of a spoliation claim, spoliation sanctions, and a runaway award in either the particular litigation or the same type of litigation that prompted the hold. Either way, this no-win situation for corporate defendants would seriously undermine the civil justice system. FD